



This is a digital copy of a book that was preserved for generations on library shelves before it was carefully scanned by Google as part of a project to make the world's books discoverable online.

It has survived long enough for the copyright to expire and the book to enter the public domain. A public domain book is one that was never subject to copyright or whose legal copyright term has expired. Whether a book is in the public domain may vary country to country. Public domain books are our gateways to the past, representing a wealth of history, culture and knowledge that's often difficult to discover.

Marks, notations and other marginalia present in the original volume will appear in this file - a reminder of this book's long journey from the publisher to a library and finally to you.

Usage guidelines

Google is proud to partner with libraries to digitize public domain materials and make them widely accessible. Public domain books belong to the public and we are merely their custodians. Nevertheless, this work is expensive, so in order to keep providing this resource, we have taken steps to prevent abuse by commercial parties, including placing technical restrictions on automated querying.

We also ask that you:

- + *Make non-commercial use of the files* We designed Google Book Search for use by individuals, and we request that you use these files for personal, non-commercial purposes.
- + *Refrain from automated querying* Do not send automated queries of any sort to Google's system: If you are conducting research on machine translation, optical character recognition or other areas where access to a large amount of text is helpful, please contact us. We encourage the use of public domain materials for these purposes and may be able to help.
- + *Maintain attribution* The Google "watermark" you see on each file is essential for informing people about this project and helping them find additional materials through Google Book Search. Please do not remove it.
- + *Keep it legal* Whatever your use, remember that you are responsible for ensuring that what you are doing is legal. Do not assume that just because we believe a book is in the public domain for users in the United States, that the work is also in the public domain for users in other countries. Whether a book is still in copyright varies from country to country, and we can't offer guidance on whether any specific use of any specific book is allowed. Please do not assume that a book's appearance in Google Book Search means it can be used in any manner anywhere in the world. Copyright infringement liability can be quite severe.

About Google Book Search

Google's mission is to organize the world's information and to make it universally accessible and useful. Google Book Search helps readers discover the world's books while helping authors and publishers reach new audiences. You can search through the full text of this book on the web at <http://books.google.com/>

LRR



HARVARD LAW SCHOOL
LIBRARY

NATIONAL REPORTER SYSTEM—STATE SERIES

THE PACIFIC REPORTER

VOLUME 184

PERMANENT EDITION

COMPRISING ALL THE DECISIONS OF THE
SUPREME COURTS OF CALIFORNIA, KANSAS, OREGON
WASHINGTON, COLORADO, MONTANA, ARIZONA
NEVADA, IDAHO, WYOMING, UTAH
NEW MEXICO, OKLAHOMA
AND OF THE COURTS OF APPEAL OF CALIFORNIA
AND CRIMINAL COURT OF APPEALS
OF OKLAHOMA

WITH KEY-NUMBER ANNOTATIONS

CONTAINING A TABLE OF PACIFIC CASES IN WHICH REHEARINGS
HAVE BEEN DENIED

NOVEMBER 10 — DECEMBER 15, 1919

ST. PAUL
WEST PUBLISHING CO.
1920

KF
135
P32

COPYRIGHT, 1919
BY
WEST PUBLISHING COMPANY

COPYRIGHT, 1920
BY
WEST PUBLISHING COMPANY
(184 PAGES)

JUDGES

OF THE COURTS REPORTED DURING THE PERIOD COVERED
BY THIS VOLUME

ARIZONA—Supreme Court.

D. L. CUNNINGHAM, CHIEF JUSTICE.

JUDGES.

HENRY D. ROSS.
ALBERT C. BAKER.

CALIFORNIA—Supreme Court.

FRANK M. ANGELLOTTI, CHIEF JUSTICE.

ASSOCIATE JUSTICES.

LUCIEN SHAW.
HENRY A. MELVIN.
WILLIAM P. LAWLOR.
CURTIS D. WILBUR.
THOMAS J. LENNON.
WARREN OLNEY, JR.

District Courts of Appeal.

FIRST DISTRICT.

Division 1.

WILLIAM H. WASTE, PRESIDING JUSTICE.
FRANK H. KERRIGAN.
JOHN E. RICHARDS.

Division 2.

WILLIAM H. LANGDON, PRESIDING JUSTICE.
FRANK S. BRITTAIN.
THOMAS E. HAVEN.¹
JOHN T. NOURSE.²

SECOND DISTRICT.

Division 1.

NATHANIEL P. CONREY, PRESIDING JUSTICE.
VICTOR E. SHAW.
WILLIAM P. JAMES.

Division 2.

FRANK G. FINLAYSON, PRESIDING JUDGE.
WILLIAM A. SLOANE.
WILLIAM H. THOMAS.

THIRD DISTRICT.

NORTON P. CHIPMAN, PRESIDING JUSTICE.
ELIJAH C. HART.
ALBERT G. BURNETT.

COLORADO—Supreme Court.

JAMES E. GARRIGUES, CHIEF JUSTICE.

ASSOCIATE JUSTICES.

TULLY SCOTT.
JAMES H. TELLER.
MORTON S. BAILEY.
GEORGE W. ALLEN.
HASLETT P. BURKE.
JOHN H. DENISON.

IDAHO—Supreme Court.

WILLIAM M. MORGAN, CHIEF JUSTICE.

JUSTICES.

JOHN C. RICE.
ALFRED BUDGE.

KANSAS—Supreme Court.

WILLIAM A. JOHNSTON, CHIEF JUSTICE.

JUSTICES.

ROUSSEAU A. BURCH.
HENRY F. MASON.
SILAS PORTER.
JUDSON S. WEST.
JOHN MARSHALL.
JOHN S. DAWSON.

MONTANA—Supreme Court.

THEO. BRANTLY, CHIEF JUSTICE.

ASSOCIATE JUSTICES.

WILLIAM L. HOLLOWAY.
CHARLES H. COOPER.
JOHN HURLY.³
GEORGE Y. PATTEN.⁴
JOHN A. MATTHEWS.⁵

NEVADA—Supreme Court.

BEN W. COLEMAN, CHIEF JUSTICE.

ASSOCIATE JUSTICES.

JOHN A. SANDERS.
EDWARD A. DUCKER.

NEW MEXICO—Supreme Court.

FRANK W. PARKER, CHIEF JUSTICE.

JUSTICES.

CLARENCE J. ROBERTS.
HERBERT F. RAYNOLDS.

OKLAHOMA—Supreme Court.

THOMAS H. OWEN, CHIEF JUSTICE.

ROBERT M. RAINEY, VICE CHIEF JUSTICE.

ASSOCIATE JUSTICES.

JOHN F. SHARP.⁶
MATTHEW J. KANE.
JOHN H. PITCHFORD.
JOHN T. JOHNSON.
NEAL E. MCNEILL.
JOHN B. HARRISON.
ROBERT W. HIGGINS.
FRANK M. BAILEY.⁷

Criminal Court of Appeals.

THOMAS H. DOYLE, PRESIDING JUDGE.

ASSOCIATE JUDGES.

JAS. R. ARMSTRONG.
SMITH C. MATSON.

¹ Resigned September 1, 1919.

² Appointed to succeed Thomas E. Haven.

³ Took seat September 1, 1919.

⁴ Resigned December 8, 1919.

⁵ Appointed November 24, 1919.

⁶ Resigned October 1, 1919.

⁷ Appointed October 1, 1919, to succeed John F. Sharp.

OREGON—Supreme Court.**THOMAS A. McBRIDE, Chief Justice.***Department 1.***HENRY L. BENSON, Presiding Judge.***Associate Judges.***LAWRENCE T. HARRIS.****GEORGE H. BURNETT.***Department 2.***HENRY J. BEAN, Presiding Judge.***Associate Judges.***CHARLES A. JOHNS.****ALFRED S. BENNETT.****UTAH—Supreme Court.****ELMER E. CORFMAN, Chief Justice.***Justices.***JOSEPH E. FRICK.****ALBERT J. WEBER.****VALENTINE GIDEON.****SAMUEL R. THURMAN.****WASHINGTON—Supreme Court.****OSCAR R. HOLCOMB, Chief Justice.***Department 1.**Associate Justices.***JOHN F. MAIN.****KENNETH MACKINTOSH.****JOHN R. MITCHELL.****WARREN W. TOLMAN.***Department 2.**Associate Justices.***MARK A. FULLERTON.****WALLACE MOUNT.****EMMETT N. PARKER.****J. B. BRIDGES.****WYOMING—Supreme Court.****CYRUS BEARD, Chief Justice.***Associate Justices.***CHARLES N. POTTER.****CHARLES E. BLYDENBURGH.**

CASES REPORTED

	Page		Page
A. B. Mays & Co., J. B. Klein Iron & Foundry Co. v. (Okl.)	577	Black, Durant v. (Okl.)	439
Adams v. Wagoner (Nev.)	814	Blackburn v. Marple (Cal. App.)	873
Adamson v. Moyes (Idaho)	849	Blackburn v. Marple (Cal. App.)	875
Adler, Anderson v. (Cal. App.)	42	Blackwood, Dickinson v. (Okl.)	582
Advance-Rumely Thresher Co. v. Nelson (Kan.)	982	Blahnik v. Small Farms Imp. Co. (Cal.)	661
Akers, Miera v. (N. M.)	817	Bland v. Bland (Okl.)	781
Albers Bros. Milling Co., City of Oakland v. (Cal. App.)	865	Blassingame & Woodward, St. Louis & S. F. R. Co. v. (Okl.)	574
Allen, Ernst v. (Utah)	827	Blocker, St. Louis & S. F. R. Co. v. (Okl.)	584
Allen v. Langford (Utah)	827	Board of Com'rs of Muskogee County, Muskogee Times-Democrat v. (Okl.)	591
Allen v. Spokane (Wash.)	812	Board of Education of Davis County School Dist. v. Smith (Utah)	160
Allen v. State (Okl. Cr. App.)	793	Board of Education of Granite School Dist. v. Stillman (Utah)	159
American Imp. Co. v. Lillenthal (Cal. App.)	692	Board of Education of Pasadena City School Dist., West v. (Cal. App.)	877
American Smelting & Refining Co., Rate v. (Mont.)	478	Bokel, Dunham v. (Kan.)	636
American Trust & Banking Co., Lowe v. (Cal. App.)	508	Booth v. Midvale City (Utah)	799
American Trust & Banking Co. v. Union Sec. Co. (Cal. App.)	508	Bowen, City and County of Denver v. (Colo.)	357
Anderson v. Adler (Cal. App.)	42	Boyle, Miller v. (Cal. App.)	421
Anderson v. Aronsohn (Cal.)	12	Boyle, Reid v. (Cal. App.)	423
Anderson v. Columbia Contract Co. (Or.)	240	Bradford v. Armijo (N. M.)	708
Andersonian Inv. Co. v. Wade (Wash.)	327	Braley, Smith v. (Okl.)	586
Arizona-Hercules Copper Co. v. Crenshaw (Ariz.)	996	Brandon v. Globe Inv. Co. (Wash.)	325
Armijo, Bradford v. (N. M.)	708	Branstetter, Barr v. (Cal. App.)	409
Armstrong v. Phillips (Okl.)	109	Bridge, Murphy v. (Cal. App.)	497
Arnold, Curtis v. (Cal. App.)	510	Brod, Jirku v. (Cal. App.)	413
Aronsohn, Anderson v. (Cal.)	12	Brooks, Krueger v. (Or.)	285
Askew, State v. (Idaho)	473	Brown v. Barth (Colo.)	300
Aspinwall v. Aspinwall (Nev.)	810	Brown, Drumright v. (Okl.)	110
Atchison, T. & S. F. R. Co. v. Colorado Alfalfa Mill & Power Co. (Colo.)	373	Brown, Glover v. (Idaho)	649
Austgen, Strauss v. (Colo.)	299	Brown v. Rives (Cal. App.)	82
Autry v. State (Okl. Cr. App.)	786	Brown v. State (Okl. Cr. App.)	912
Azbill, Hays v. (Okl.)	945	Bryant, Freeman v. (Okl.)	76
		Buell v. Oil Well Supply Co. (Okl.)	572
Baca, Flores v. (N. M.)	532	Bullock v. Yakima Valley Transp. Co. (Wash.)	641
Bachmann v. Hurrst (Wyo.)	709	Bundy v. State (Okl. Cr. App.)	795
Badertscher v. Independent Ice Co. (Utah)	181	Burke v. Norton (Cal. App.)	45
Barby v. Straub (Kan.)	716	Burrows v. Petroleum Development Co. (Cal.)	5
Baglin v. Earl-Eagle Mining Co. (Utah)	190	Bush v. Bush (Utah)	823
Bailey v. Bank of Meeker (Okl.)	761		
Baker, Pine v. (Okl.)	445	Canafax v. Bank of Commerce (Okl.)	1014
Baldrige v. Smith (Okl.)	153	Carden v. Humble (Okl.)	104
Bandy, Lusk v. (Okl.)	144	Cardenas v. Valdez (Colo.)	370
Bank of Commerce, Canafax v. (Okl.)	1014	Cardwell, Kohlhausen v. (Or.)	261
Bank of Meeker, Bailey v. (Okl.)	761	Carl v. McDougall (Cal. App.)	885
Barber v. Superior Court of California in and for San Diego County (Cal. App.)	952	Carter, Mendenhall v. (Okl. Cr. App.)	789
Barlow, San Joaquin Light & Power Co. v. (Cal. App.)	899	Cary v. Long (Cal.)	857
Barndt, Bishop v. (Cal. App.)	901	Cason v. Mutual Life Ins. Co. of New York (Colo.)	296
Barr v. Branstetter (Cal. App.)	409	Castle, Torrison v. (Mont.)	788
Barrick v. Porter (Mont.)	217	Castner v. People (Colo.)	387
Barth, Brown v. (Colo.)	300	Cater, Covington v. (Okl.)	112
Bass v. Atoka (Okl.)	573	Centennial Coal Co., Hendrie & Bolthoff Mfg. & Supply Co. v. (Colo.)	860
Bates v. Ransome-Crummey Co. (Cal. App.)	39	Central State Bank, Interurban Const. Co. v. (Okl.)	905
Bayside Land Co. v. Phillips (Cal. App.)	951	Chandler v. Industrial Commission of Utah (Utah)	1020
Beck v. Ransome-Crummey Co. (Cal. App.)	431	Chaplin v. Chaplin (Kan.)	984
Beck, Rogers Bros. Co. v. (Cal. App.)	515	Charles B. Marvin Inv. Co., Hansue v. (Colo.)	289
Beck, Rogers Bros. Co. v., two cases (Cal. App.)	516	Chase v. Peters (Cal. App.)	869
Benn v. Trobert (Okl.)	181	Chase, Winningham v. (Okl.)	126
Bentley v. Zelma Oil Co. (Okl.)	181	Chelan County, Quigg Const. Co. v. (Wash.)	331
Benvenuto v. Superior Court in and for Santa Barbara County (Cal.)	672	Chicago, R. I. & P. R. Co., Wyman v. (Okl.)	758
Bijou Irr. Co. v. Lower Latham Ditch Co. (Colo.)	292	Ching Wing v. Southern Pac. Co. (Cal.)	949
Bijou Irr. Dist. v. Weldon Valley Ditch Co. (Colo.)	382	Chris Irving Plumbing & Heating Co., Southern Surety Co. v. (Colo.)	856
Bishop v. Barndt (Cal. App.)	901		
Bishop v. Mace (N. M.)	215		
Black, City of Madera v. (Cal.)	397		

	Page		Page
Chumos v. Chumos (Kan.).....	736	Durant v. Black (Okl.).....	439
Citizens' Nat. Bank v. State (Okl.).....	63	Dyer, Spotton v. (Cal. App.).....	23
City and County of Denver v. Bowen (Colo.).....	357	Eades v. Los Angeles Ry. Corporation (Cal. App.).....	884
City and County of Denver v. Mountain States Telephone & Telegraph Co. (Colo.).....	604	Earl-Eagle Mining Co., Baglin v. (Utah).....	190
City of Atoka, Bass v. (Okl.).....	573	Earp v. State (Ariz.).....	942
City of Billings, Kansier v. (Mont.).....	630	E. B. & A. L. Stone Co., Newell v. (Cal.).....	659
City of Colorado Springs, Denver & R. G. R. Co. v. (Colo.).....	373	Eckert, Smith Stage Co. v. (Ariz.).....	1001
City of Eugene, Gamma Alpha Bldg. Ass'n v. (Or.).....	973	Ehrhart v. Mahony (Cal. App.).....	1010
City of Madera v. Black (Cal.).....	397	E. I. Du Pont de Nemours Powder Co. v. Pederson (Wash.).....	316
City of Oakland v. Albers Bros. Milling Co. (Cal. App.).....	868	Ellis v. Mid-Continent Oil & Gas Co. (Okl.).....	573
City of Portland, Killingsworth v. (Or.).....	248	Emerson Hardwood Co., Kuntz v. (Or.).....	253
City of Spokane, Allen v. (Wash.).....	312	Enid Cemetery Ass'n, Spalding v. (Okl.).....	579
City of Topeka v. Ritchie (Kan.).....	728	Ernst v. Allen (Utah).....	827
City of Trinidad v. Trinidad Waterworks Co. (Colo.).....	368	Ernst v. State (Okl. Cr. App.).....	793
Clark v. Lund (Utah).....	821	Farmers' Nat. Bank v. Renfro (Or.).....	564
Clements, Johnson v. (Wash.).....	318	Farmers' State Bank, Ferguson v. (Colo.).....	870
Clowers v. State (Okl. Cr. App.).....	790	Farmers' & Fruit-Growers' Bank v. Davis (Or.).....	275
Cole, Nezik v. (Cal. App.).....	523	Favorite v. Superior Court of Riverside County (Cal.).....	15
Collins v. Oklahoma State Hospital (Okl.).....	946	Ferguson v. Farmers' State Bank (Colo.).....	370
Colorado Alfalfa Mill & Power Co., Atchison, T. & S. F. R. Co. v. (Colo.).....	373	Fidelity & Casualty Co. of New York v. Llewellyn Iron Works (Cal. App.).....	402
Colorado Life Ins. Co., Lucero v. (Colo.).....	379	Fields v. Kincaid (Colo.).....	832
Columbia Contract Co., Anderson v. (Or.).....	240	Findley v. Lindsay (Cal. App.).....	883
Commercial Security Co. v. Modesto Drug Co. (Cal. App.).....	984	First Presbyterian Church of Norman, Walcher v. (Okl.).....	106
Commonwealth Bonding & Casualty Ins. Co. v. Pacific Electric R. Co. (Cal. App.).....	29	Flickenger v. Industrial Accident Commission (Cal.).....	851
Condit v. Merritt Printing & Stationery Co. (Colo.).....	381	Flores v. Baca (N. M.).....	532
Connor & Groger v. Forest Mills of British Columbia (Wash.).....	319	Flournoy, Jameson v. (Okl.).....	910
Continental Casualty Co. v. Pillsbury (Cal.).....	658	Forch, Kloepper v. (Idaho).....	477
Cook, Vinson v. (Okl.).....	97	Forest Mills of British Columbia, Connor & Groger v. (Wash.).....	319
Coughlin, Hutchinson Co. v. (Cal. App.).....	435	Forney's Estate, In re (Nev.).....	206
Cousins, Western Silo Co. v. (Okl.).....	92	Foster, State v. (Okl.).....	910
Covington v. Cater (Okl.).....	112	Frank A. Hubbell Co., Stroup v. (N. M.).....	976
Crane Co., Independent Meat Co. of Jerome v. (Ariz.).....	992	Fraser, State v. (Or.).....	848
Creek v. State (Okl. Cr. App.).....	917	Frear v. State (Okl.).....	771
Crenshaw, Arizona-Hercules Copper Co. v. (Ariz.).....	996	Freeman v. Bryant (Okl.).....	76
Cullen v. Park Club Land Co. (Colo.).....	803	Freeman, Taylor v. (Okl.).....	761
Curraether's Mercantile Co., Smith v. (Okl.).....	102	Frikker v. Morrison (Colo.).....	371
Curtis v. Arnold (Cal. App.).....	510	Fuller, Title Loan & Investment Co. v. (Kan.).....	727
Curtis v. Harris (Okl.).....	574	Fulmer, Prichard v. (N. M.).....	529
Curtis, Horne v. (Kan.).....	719		
Daniels v. Granite Bi-Metallic Consol. Mining Co. (Mont.).....	836	Gamma Alpha Bldg. Ass'n v. Eugene (Or.).....	973
Davis, Farmers' & Fruit-Growers' Bank v. (Or.).....	275	Ganong, State v. (Or.).....	233
Davis, State v. (Utah).....	161	Garring v. Stephens (Wash.).....	314
De Baca v. Perea (N. M.).....	482	Garvin v. Western Cooperage Co. (Or.).....	555
De Bock v. De Bock (Cal. App.).....	890	Gates, Munnah v. (Okl.).....	127
Dennison v. Jossi (Or.).....	269	General Electric Co., Schulze v. (Wash.).....	342
Denver & R. G. R. Co. v. Colorado Springs (Colo.).....	373	Geren & Hamond v. Lawson (N. M.).....	216
Dibble, Morgan v. (Cal. App.).....	704	Giannini, Whitcomb v. (Cal. App.).....	887
Dickinson v. Blackwood (Okl.).....	582	Gibson, Guthrie v. (Colo.).....	969
Dillwood v. Riecks (Cal. App.).....	35	Gigoux v. Moore (Kan.).....	637
District Court, State v., three cases (Mont.).....	788	Gill v. Goldfield Consol. Mines Co. (Nev.).....	309
District Court of Seventh Judicial Dist. in and for Dawson County, State v. (Mont.).....	218	Globe Inv. Co., Brandon v. (Wash.).....	325
District Court of Sixth Judicial Dist. Humboldt County, State v. (Nev.).....	1023	Glover v. Brown (Idaho).....	649
Dixon v. Miller (Nev.).....	926	Goldfield Consol. Mines Co., Gill v. (Nev.).....	309
Dobbins v. State (Okl. Cr. App.).....	789	Goodrich v. Starratt (Wash.).....	220
Drake v. Tucker (Cal. App.).....	502	Gowey v. Seattle Lighting Co. (Wash.).....	339
Drumright v. Brown (Okl.).....	110	Granite Bi-Metallic Consol. Mining Co., Daniels v. (Mont.).....	836
Duncan, Hart-Parr Co. v. (Okl.).....	108	Grant, MacDermot v. (Cal.).....	396
Dunham v. Bokel (Kan.).....	636	Great Northern R. Co., Williams v. (Mont.).....	789
Dupes v. Dupes (Cal. App.).....	425	Great Northern R. Co., Williams v. (Wash.).....	340
Du Pont de Nemours Powder Co. v. Pederson (Wash.).....	316	Greek Catholic Church of St. Michaels v. Roizdestvensky (Colo.).....	295
		Green v. South San Francisco R. & Power Co. (Cal.).....	669
		Greene v. Moore (Cal. App.).....	506
		Griffith, Smith v. (Kan.).....	725
		Griffith, State v. (Mont.).....	219
		Grove, Hart v. (Okl.).....	572
		Guber, Ex parte (Kan.).....	850

	Page		Page
Guber v. Mathias (Kan.).....	850	Johnson, Welch v. (Or.).....	280
Gunter v. State (Okl. Cr. App.).....	797	Joslyn v. People (Colo.).....	375
Guthrie v. Gibson (Colo.).....	989	Jossi, Dennison v. (Or.).....	269
Hallberg v. Harriet (Or.).....	549	Judson Mfg. Co. v. Industrial Accident Commission (Cal.).....	1
Hambey v. Wood (Cal.).....	9	Kansier v. Billings (Mont.).....	630
Hamilton's Estate, In re (Wash.).....	337	Kaufman v. Hastings (Or.).....	265
Hannas, Hegel v. (Cal. App.).....	808	Kay Copper Co., Ross v. (Ariz.).....	978
Hansen's Estate, In re (Utah).....	197	Keehn, Harris v. (N. M.).....	527
Hanshue v. Charles B. Marvin Inv. Co. (Colo.).....	289	Kemp v. New Mexico Annual Conference of M. E. Church, South (N. M.).....	484
Harper v. Tipple (Ariz.).....	1006	Kemp Lumber Co. v. New Mexico Annual Conference of M. E. Church, South (N. M.).....	484
Harriet, Hallberg v. (Or.).....	549	Kennedy, State v. (Kan.).....	734
Harrington v. United Verde Copper Co. (Ariz.).....	980	Keyes v. Nims (Cal. App.).....	695
Harris, Curtis v. (Okl.).....	574	Killingsworth v. Portland (Or.).....	248
Harris v. Keehn (N. M.).....	527	Kimmel, Miller v. (Okl.).....	762
Harris, Rogers v. (Okl.).....	459	Kincaid, Fields v. (Colo.).....	832
Hart v. Grove (Okl.).....	572	Kincheloe v. State (Okl. Cr. App.).....	602
Hart-Parr Co. v. Duncan (Okl.).....	108	King v. Wright (Cal. App.).....	517
Hartley's Estate, In re (Cal.).....	950	King Collie Co. v. Richards (Okl.).....	130
Haskell Nat. Bank v. Stewart (Okl.).....	463	King's Guardianship, In re (Cal. App.)..	964
Hastings, Kaufman v. (Or.).....	265	Kirk v. Madgreita (Idaho).....	225
Hawkins, State v. (N. M.).....	977	Kirk v. Montana Transfer Co. (Mont.)...	987
Hays v. Azbill (Okl.).....	945	Klein Iron & Foundry Co. v. A. B. Mays & Co. (Okl.).....	577
Hegel v. Hannas (Cal. App.).....	898	Kloepfer v. Forch (Idaho).....	477
Heisinger, McClendon v. (Cal. App.).....	52	Koch v. Wright (Colo.).....	363
Heitmiller v. Prall (Wash.).....	334	Kohlhagen v. Cardwell (Or.).....	261
Hendrie & Bolthoff Mfg. & Supply Co. v. Centennial Coal Co. (Colo.).....	360	Krueger v. Brooks (Or.).....	285
Higgins, People v. (Colo.).....	365	Kuntz v. Emerson Hardwood Co. (Or.)..	253
Highland Park Inv. Co. v. List (Cal. App.)	48	Kurent, State v. (Kan.).....	721
Hoch, Pierrard v. (Or.).....	494	Kusumi, Pallis v. (Wash.).....	789
Hoffman, North Laramie Land Co. v. (Wyo.).....	226	Ladd & Tilton Bank v. Mitchell (Or.)....	282
Hoffman, Smith v. (Mont.).....	842	Langford, Allen v. (Utah).....	827
Hoggan v. Price River Irr. Co. (Utah)....	536	Larson, Hurst v. (Or.).....	258
Holsapple, Rogers Bros. Co. v. (Cal. App.).....	516	Lawley, McNulty v. (Cal. App.).....	50
Holsapple, Rogers Bros. Co. v. (Cal. App.).....	517	Lawson, Geren & Hamond v. (N. M.).....	216
Honore v. Lemm (Cal.).....	664	Lawson, McKinley v. (N. M.).....	316
Horne v. Curtis (Kan.).....	719	Lehman v. Maryott & Spencer Logging Co. (Wash.).....	323
Howard, Miller v. (Okl.).....	773	Lemm, Honore v. (Cal.).....	664
Howell, State v. (Wash.).....	333	Lemp v. Lemp (Idaho).....	222
Hoyt, Osborn v. (Cal.).....	854	Lemp v. Lemp (Idaho).....	224
Hubbell Co., Stroup v. (N. M.).....	976	Lilienthal, American Imp. Co. v. (Cal. App.).....	692
Hughes v. Silva (Cal. App.).....	415	Lilley, State v. (Okl.).....	946
Humble, Carden v. (Okl.).....	104	Lindsay, Findley v. (Cal. App.).....	883
Hurst v. Larson (Or.).....	258	List, Highland Park Inv. Co. v. (Cal. App.).....	48
Hurt, Bachmann v. (Wyo.).....	709	Ijubich v. Western Cooperage Co. (Or.)..	551
Huser, State v. (Okl.).....	113	Llewellyn Iron Works, Fidelity & Casualty Co. of New York v. (Cal. App.).....	402
Hutchinson Co. v. Coughlin (Cal. App.)...	435	Locomotive Exch. v. Rucker Bros. (Wash.)	848
Independent Ice Co., Badertscher v. (Utah).....	181	London Guarantee & Accident Co. v. Indus- trial Accident Commission (Cal.).....	864
Independent Meat Co. of Jerome v. Crane Co. (Ariz.).....	992	Long, Cary v. (Cal.).....	857
Industrial Accident Commission, Flickenger v. (Cal.).....	851	Loomer, State v. (Kan.).....	723
Industrial Accident Commission, Judson Mfg. Co. v. (Cal.).....	1	Los Angeles County, Swall v. (Cal. App.)..	406
Industrial Accident Commission, London Guarantee & Accident Co. v. (Cal.).....	864	Los Angeles Ry. Corporation, Eades v. (Cal. App.).....	884
Industrial Accident Commission, Starr Piano Co. v. (Cal.).....	860	Love v. Mt. Oddie United Mines Co. (Nev.)	921
Industrial Commission of Colorado, Young- quist v. (Colo.).....	381	Lowe v. American Trust & Banking Co. (Cal. App.).....	508
Industrial Commission of Utah, Chandler v. (Utah).....	1020	Lower Latham Ditch Co., Bijou Irr. Co. v. (Colo.).....	292
Interurban Const. Co. v. Central State Bank (Okl.).....	905	Lucero v. Colorado Life Ins. Co. (Colo.)..	379
Irving Plumbing & Heating Co., Southern Surety Co. v. (Colo.).....	356	Luna v. Montoya (N. M.).....	533
Jacobsen, Lynch v. (Utah).....	929	Lund, Clark v. (Utah).....	821
Jameson v. Flournoy (Okl.).....	910	Lusk v. Bandy (Okl.).....	144
J. B. Klein Iron & Foundry Co. v. A. B. Mays & Co. (Okl.).....	577	Lynch v. Jacobsen (Utah).....	929
Jenson, State v. (Utah).....	179	McClendon v. Heisinger (Cal. App.).....	52
Jirku v. Brod (Cal. App.).....	413	McCray v. Miller (Okl.).....	781
Johnson v. Clements (Wash.).....	318	MacDermot v. Grant (Cal.).....	896
Johnson v. Nelson (Cal. App.).....	501	McDougall, Carl v. (Cal. App.).....	885
Johnson v. Razey (Cal.).....	657	Mace, Bishop v. (N. M.).....	215
		McIntosh, Tormey v. (Cal. App.).....	1012
		McKay's Estate, In re (Nev.).....	305
		McKenzie v. Nichelini (Cal. App.).....	871
		McKinley v. Lawson (N. M.).....	218

	Page		Page
McKissick v. McKissick (Or.).....	272	Nelson, Advance-Rumely Thresher Co. v. (Kan.)	982
McLay, State v. (Idaho).....	470	Nelson, Johnson v. (Cal. App.).....	501
McNulty v. Lawley (Cal. App.).....	50	New Almaden Co., Michalek v. (Cal. App.).....	50
MueSwain v. Wright (Cal. App.).....	517	Newell v. E. B. & A. L. Stone Co. (Cal.).....	659
Macy, People v. (Cal. App.).....	1008	New Mexico Annual Conference of M. E. Church, South, Kemp v. (N. M.).....	484
Madureira, Kirk v. (Idaho).....	225	New Mexico Annual Conference of M. E. Church, South, Kemp Lumber Co. v. (N. M.).....	484
Mahony, Ehrhurt v. (Cal. App.).....	1010	New York Plate Glass Ins. Co. v. Martines (Utah).....	819
Majors v. Superior Court of California in and for Alameda County (Cal.).....	18	Nczik v. Cole (Cal. App.).....	523
Manville, Shanklin v. (Kan.).....	983	Nichelini, McKenzie v. (Cal. App.).....	871
Marple, Blackburn v. (Cal. App.).....	873	Nims, Keyes v. (Cal. App.).....	695
Marple, Blackburn v. (Cal. App.).....	875	North Laramie Land Co. v. Hoffman (Wyo.).....	226
Marsh Mines Consolidated, Tatum v. (Wash.).....	628	Norton, Burke v. (Cal. App.).....	45
Marshall's Estate, In re (Cal. App.).....	43	Oil Well Supply Co., Buell v. (Okl.).....	572
Martien, State v. (Mont.).....	788	Oklahoma City v. Stewart (Okl.).....	779
Martines, New York Plate Glass Co. v. (Utah).....	819	Oklahoma State Hospital, Collins v. (Okl.).....	946
Marvin Inv. Co., Hanshue v. (Colo.).....	289	Oklahoma Union R. Co., Tulsa St. R. Co. v. (Okl.).....	71
Maryott & Spencer Logging Co., Lehman v. (Wash.).....	323	Olsson's Estate, In re (Cal. App.).....	22
Mathews v. Savings Union Bank & Trust Co. (Cal. App.).....	418	Orbison, Park v. (Cal. App.).....	428
Mathews v. State (Okl. Cr. App.).....	408	Oregon Home Builders v. Montgomery Inv. Co. (Or.).....	487
Mathewson, Ward v. (Cal.).....	867	Osborn v. Hoyt (Cal.).....	854
Mathewson's Estate, In re (Cal.).....	867	Pacific Electric R. Co., Commonwealth Bonding & Casualty Ins. Co. v. (Cal. App.).....	29
Mathias, Guber v. (Kan.).....	850	Pacific Mfg. Co. v. Rasmussen (Cal. App.).....	54
Mays & Co., J. B. Klein Iron & Foundry Co. v. (Okl.).....	577	Page v. Mintzer (Cal. App.).....	690
Mendenhall v. Carter (Okl. Cr. App.).....	789	Pallis v. Kusumi (Wash.).....	789
Merritt Printing & Stationery Co., Condit v. (Colo.).....	381	Park v. Orbison (Cal. App.).....	428
Michalek v. New Almaden Co. (Cal. App.).....	56	Park Club Land Co., Cullen v. (Colo.).....	303
Mid-Continent Oil & Gas Co., Ellis v. (Okl.).....	573	Pedersen v. Moore (Idaho).....	475
Midvale City, Booth v. (Utah).....	799	Pederson, E. I. Du Pont de Nemours Powder Co. v. (Wash.).....	316
Miera v. Akers (N. M.).....	817	Peninsula Lumber Co. v. Royal Indemnity Co. (Or.).....	562
Milam v. Milam (Okl.).....	442	People, Castner v. (Colo.).....	387
Miller v. Boyle (Cal. App.).....	421	People v. Higgins (Colo.).....	365
Miller, Dixon v. (Nev.).....	926	People, Joslyn v. (Colo.).....	375
Miller v. Howard (Okl.).....	773	People v. Macy (Cal. App.).....	1008
Miller v. Kimmel (Okl.).....	762	People v. Morley (Colo.).....	386
Miller, McCray v. (Okl.).....	781	People v. Neetens (Cal. App.).....	27
Miller, State v. (Wash.).....	352	People v. Razo (Cal. App.).....	881
Mintzer, Page v. (Cal. App.).....	690	People v. Sartori (Cal. App.).....	879
Missouri, K. & T. R. Co. v. Wolf (Okl.).....	765	People, Smith v. (Colo.).....	372
Missouri, K. & T. R. Co. v. Zuber (Okl.).....	452	People v. Tom Woo (Cal.).....	389
Mitchell, Ladd & Tilton Bank v. (Or.).....	282	People v. Wagner (Cal. App.).....	876
Modesto Drug Co., Commercial Security Co. v. (Cal. App.).....	964	People v. Williams (Cal. App.).....	498
Montana Transfer Co., Kirk v. (Mont.).....	987	Perea, De Baca v. (N. M.).....	482
Montgomery, Morrison v. (Kan.).....	985	Peters, Chase v. (Cal. App.).....	869
Montgomery Inv. Co., Oregon Home Builders v. (Or.).....	487	Petroleum Development Co., Burrows v. (Cal.).....	5
Montoya, Luna v. (N. M.).....	533	Phillips, Armstrong v. (Okl.).....	109
Moore, Gigoux v. (Kan.).....	637	Phillips, Bayside Land Co. v. (Cal. App.).....	951
Moore, Greene v. (Cal. App.).....	506	Piatt v. Piatt (Idaho).....	470
Moore, Pedersen v. (Idaho).....	475	Pierotti, Ex parte (Nev.).....	209
Moore v. Thompson (Kan.).....	980	Pierrard v. Hoch (Or.).....	494
Morgan v. Dibble (Cal. App.).....	704	Pillsbury, Continental Casualty Co. v. (Cal.).....	658
Morley, People v. (Colo.).....	386	Pine v. Baker (Okl.).....	445
Morosco, Standing v. (Cal. App.).....	954	Porter, Barrick v. (Mont.).....	217
Morrison, Frikker v. (Colo.).....	371	Porter, Stull v. (Or.).....	260
Morrison v. Lafayette (Colo.).....	301	Prall, Heitmiller v. (Wash.).....	334
Morrison v. Montgomery (Kan.).....	985	Pratt v. Pratt (Cal. App.).....	956
Morrison v. Robinson (N. M.).....	214	Price River Irr. Co., Hoggan v. (Utah).....	536
Mott v. Wright (Cal. App.).....	517	Prichard v. Fulmer (N. M.).....	529
Mountain States Telephone & Telegraph Co., City and County of Denver v. (Colo.).....	604	Pryor v. Western Paving Co. (Okl.).....	88
Mt. Oddie United Mines Co., Love v. (Nev.).....	921	Puget Sound Bridge & Dredging Co., Weifenbach v. (Wash.).....	321
Moyes, Adamson v. (Idaho).....	849	Purdum v. Shock (Okl.).....	125
Mundell v. Wells (Cal.).....	666	Quigg Const. Co. v. Chelan County (Wash.).....	331
Munnah v. Gates (Okl.).....	127	Ransome-Crummey Co., Bates v. (Cal. App.).....	39
Murphy v. Bridge (Cal. App.).....	497	Ransome-Crummey Co., Beck v. (Cal. App.).....	431
Muskegee Times-Democrat v. Board of Com'rs of Muskegee County (Okl.).....	501		
Mutual Life Ins. Co. of New York, Cason v. (Colo.).....	296		
Nealan v. Ring (Or.).....	275		
Neetens, People v. (Cal. App.).....	27		
Nehls v. William Stock Farming Co. (Nev.).....	212		

CASES REPORTED

(184 P.)

xi

	Page		Page
Rasmussen, Pacific Mfg. Co. v. (Cal. App.)	54	Smith, Southern Surety Co. v. (Okl.)	905
Rate v. American Smelting & Refining Co. (Mont.)	478	Smith Stage Co. v. Eckert (Ariz.)	1001
Razey, Johnson v. (Cal.)	657	Southern Pac. Co., Ching Wing v. (Cal.)	949
Razo, People v. (Cal. App.)	881	Southern Pac. Co. v. Richardson, three cases (Cal.)	8
Reid v. Boyle (Cal. App.)	423	Southern Surety Co. v. Chris Irving Plumbing & Heating Co. (Colo.)	856
Renfro, Farmers' Nat. Bank v. (Or.)	564	Southern Surety Co. v. Smith (Okl.)	905
Rhoades v. State (Okl. Cr. App.)	913	South San Francisco R. & Power Co., Green v. (Cal.)	669
Rich, Wrought Iron Range Co. v. (Idaho)	627	Spalding v. Enid Cemetery Ass'n (Okl.)	579
Richards, King Collie Co. v. (Okl.)	130	Sphier, Western Loan & Building Co. v. (Or.)	496
Richards, Uncle Sam Oil Co. v. (Okl.)	575	Spotton v. Dyer (Cal. App.)	23
Richardson, Southern Pac. Co. v., three cases (Cal.)	8	Standing v. Morosco (Cal. App.)	954
Riddle, Stewart v. (Okl.)	443	Starrett, Goodrich v. (Wash.)	220
Riecks, Dillwood v. (Cal. App.)	35	Starr Piano Co. v. Industrial Accident Commission (Cal.)	860
Ring, Nealan v. (Or.)	275	State, Allen v. (Okl. Cr. App.)	793
Ritchie, City of Topeka v. (Kan.)	728	State v. Askew (Idaho)	473
Rives, Brown v. (Cal. App.)	82	State, Autry v. (Okl. Cr. App.)	786
Road Construction, Okmulgee County, In re (Okl.)	445	State, Brown v. (Okl. Cr. App.)	912
Robinson, Morrison v. (N. M.)	214	State, Bundy v. (Okl. Cr. App.)	795
Roe v. Schweitzer (Utah)	938	State, Citizens' Nat. Bank v. (Okl.)	63
Rogers v. Harris (Okl.)	459	State, Clowers v. (Okl. Cr. App.)	790
Rogers Bros. Co. v. Beck (Cal. App.)	515	State, Creek v. (Okl. Cr. App.)	917
Rogers Bros. Co. v. Beck, two cases (Cal. App.)	516	State v. Davis (Utah)	161
Rogers Bros. Co. v. Holsapple (Cal. App.)	516	State v. District Court, three cases (Mont.)	788
Rogers Bros. Co. v. Holsapple (Cal. App.)	517	State v. District Court of Seventh Judicial Dist. in and for Dawson County (Mont.)	218
Rogers-l'empoleon Lumber Co. v. Welch (Mont.)	838	State v. District Court of Sixth Judicial Dist., Humboldt County (Nev.)	1023
Roisdestvensky, Greek Catholic Church of St. Michaels v. (Colo.)	295	State, Dobbins v. (Okl. Cr. App.)	789
Rosenthal v. Silveira (Cal. App.)	58	State, Earp v. (Ariz.)	942
Roas v. Kay Copper Co. (Ariz.)	978	State, Ernst v. (Okl. Cr. App.)	793
Royal Indemnity Co., Peninsula Lumber Co. v. (Or.)	562	State v. Frasier (Or.)	848
Rucker Bros., Locomotive Exch. v. (Wash.)	848	State v. Foster (Okl.)	910
St. Louis & S. F. R. Co. v. Blassingame & Woodward (Okl.)	574	State, Frear v. (Okl.)	771
St. Louis & S. F. R. Co. v. Blocker (Okl.)	584	State v. Ganong (Or.)	233
St. Louis & S. F. R. Co. v. State (Okl.)	442	State v. Griffith (Mont.)	219
San Joaquin Light & Power Co. v. Barlow (Cal. App.)	899	State, Gunter v. (Okl. Cr. App.)	797
Sartori, People v. (Cal. App.)	879	State v. Hawkins (N. M.)	977
Savage, State v. (Or.)	567	State v. Howell (Wash.)	333
Savings Union Bank & Trust Co., Mathews v. (Cal. App.)	418	State v. Huser (Okl.)	113
Scheller v. Tacoma Ry. & Power Co. (Wash.)	844	State v. Jensen (Utah)	179
Schofield v. School Dist. No. 113, Labette County (Kan.)	480	State v. Kennedy (Kan.)	734
School Dist. No. 113, Labette County, Schofield v. (Kan.)	480	State, Kincheloe v. (Okl. Cr. App.)	602
Schulze v. General Electric Co. (Wash.)	342	State v. Kurent (Kan.)	721
Schweitzer, Roe v. (Utah)	938	State v. Lilley (Okl.)	946
Scott v. Times-Mirror Co. (Cal.)	672	State v. Loomer (Kan.)	723
Sears, Wintler Abstract & Loan Co. v. (Wash.)	309	State v. McLoy (Idaho)	470
Seattle Lighting Co., Gowey v. (Wash.)	339	State v. Martien (Mont.)	788
Shaffer, Watson v. (Okl.)	1016	State, Mathews v. (Okl. Cr. App.)	468
Shanklin v. Manville (Kan.)	983	State v. Miller (Wash.)	852
Shepard v. Utah Light & Traction Co. (Utah)	542	State, Rhoades v. (Okl. Cr. App.)	913
Shepard, Weigand v. (Kan.)	722	State, St. Louis & S. F. R. Co. v. (Okl.)	442
Shetler v. Stroud (Colo.)	294	State v. Savage (Or.)	567
Shock, Purdom v. (Okl.)	125	State v. Sullivan (Okl. Cr. App.)	921
Silva, Hughes v. (Cal. App.)	415	State v. Superior Court for Whitman County (Wash.)	848
Silveira, Rosenthal v. (Cal. App.)	58	State, Thompson v. (Okl. Cr. App.)	487
Simpson v. Smith (Cal. App.)	507	State, Tingley v. (Okl. Cr. App.)	599
Slater's Estate, In re (Utah)	1017	State v. True (Wyo.)	229
Small Farms Imp. Co., Blahnik v. (Cal.)	661	State v. Webb (Kan.)	715
Smith, Baldrige v. (Okl.)	153	State v. Welch (Okl. Cr. App.)	786
Smith, Board of Education of Davis County School Dist. v. (Utah)	160	State, Wells v. (Okl. Cr. App.)	465
Smith v. Braley (Okl.)	586	State v. Wilson (N. M.)	531
Smith v. Curreather's Mercantile Co. (Okl.)	102	State, Wilson v. (Okl. Cr. App.)	603
Smith v. Griffith (Kan.)	725	State, Wright v. (Okl. Cr. App.)	158
Smith v. Hoffman (Mont.)	842	Stephens, Garring v. (Wash.)	814
Smith v. People (Colo.)	872	Stewart, Haskell Nat. Bank v. (Okl.)	463
Smith, Simpson v. (Cal. App.)	507	Stewart, Oklahoma City v. (Okl.)	779
Smith v. Smith (Okl.)	82	Stewart v. Riddle (Okl.)	443
		Stillman, Board of Education of Granite School Dist. v. (Utah)	159
		Stock Farming Co., Nehls v. (Nev.)	212
		Stone Co., Newell v. (Cal.)	659
		Straub, Bagby v. (Kan.)	716
		Strauss v. Austgen (Colo.)	299
		Stroud, Shetler v. (Colo.)	294
		Stroup v. Frank A. Hubbell Co. (N. M.)	976
		Stull v. Porter (Or.)	260

	Page		Page
Sullivan, State v. (Okl. Cr. App.).....	921	Wagner, People v. (Cal. App.).....	876
Superior Court for Whitman County, State v. (Wash.).....	848	Wagoner, Adams v. (Nev.).....	814
Superior Court in and for Santa Barbara County, Benvenuto v. (Cal.).....	672	Walcher v. First Presbyterian Church of Norman (Okl.).....	106
Superior Court of California in and for Alameda County, Majors v. (Cal.).....	18	Ward v. Mathewson (Cal.).....	867
Superior Court of California in and for City and County of San Francisco, Todd v. (Cal.).....	684	Watson v. Shaffer (Okl.).....	1016
Superior Court of California in and for San Diego County, Barber v. (Cal. App.).....	952	Webb, State v. (Kan.).....	715
Superior Court of Riverside County, Favorite v. (Cal.).....	15	Weiffenbach v. Puget Sound Bridge & Dredging Co. (Wash.).....	321
Swall v. Los Angeles County (Cal. App.)..	406	Weigand v. Shepard (Kan.).....	722
Tacoma Ry. & Power Co., Scheller v. (Wash.).....	344	Welch v. Johnson (Or.).....	280
Tatum v. Marsh Mines Consolidated (Wash.).....	628	Welch, Rogers-Templeton Lumber Co. v. (Mont.).....	838
Taylor v. Freeman (Okl.).....	761	Welch, State v. (Okl. Cr. App.).....	786
Thompson, Moore v. (Kan.).....	980	Weldon Valley Ditch Co., Bijou Irr. Dist. v. (Colo.).....	882
Thompson v. State (Okl. Cr. App.).....	487	Wells, Mundell v. (Cal.).....	666
Times-Mirror Co., Scott v. (Cal.).....	672	Wells v. State (Okl. Cr. App.).....	465
Tingley v. State (Okl. Cr. App.).....	599	Wells' Estate, In re (Mont.).....	788
Tipple, Harper v. (Ariz.).....	1006	West v. Board of Education of Pasadena City School Dist. (Cal. App.).....	877
Title Loan & Investment Co. v. Fuller (Kan.).....	727	Western Cooperage Co., Garvin v. (Or.)...	555
Todd v. Superior Court of California in and for City and County of San Francisco (Cal.).....	684	Western Cooperage Co., Ljubich v. (Or.)...	551
Tom Woo, People v. (Cal.).....	389	Western Loan & Building Co. v. Sphier (Or.).....	496
Tormey v. McIntosh (Cal. App.).....	1012	Western Paving Co., Pryor v. (Okl.).....	88
Torrison v. Castle (Mont.).....	788	Western Silo Co. v. Cousins (Okl.).....	92
Town of Lafayette, Morrison v. (Colo.)..	301	Whitcomb v. Giannini (Cal. App.).....	887
Tracy v. Tracy (Okl.).....	81	William Stock Farming Co., Nehls v. (Nev.).....	212
Trinidad Waterworks Co., City of Trinidad v. (Colo.).....	368	Williams v. Great Northern R. Co. (Mont.)	789
Trobert, Benn v. (Okl.).....	595	Williams v. Great Northern R. Co. (Wash.)	840
True, State v. (Wyo.).....	229	Williams, People v. (Cal. App.).....	498
Tucker, Drake v. (Cal. App.).....	502	Wilson, State v. (N. M.).....	531
Tulsa St. R. Co. v. Oklahoma Union R. Co. (Okl.).....	71	Wilson v. State (Okl. Cr. App.).....	603
Uncle Sam Oil Co. v. Richards (Okl.).....	575	Wimberly, Wright v. (Or.).....	740
Union Sec. Co., American Trust & Banking Co. v. (Cal. App.).....	508	Winningham v. Chase (Okl.).....	126
United Verde Copper Co., Harrington v. (Ariz.).....	980	Wintler Abstract & Loan Co. v. Sears (Wash.).....	309
Utah-Apex Mining Co., Valiotis v. (Utah)..	802	Wolf, Missouri, K. & T. R. Co. v. (Okl.)...	765
Utah Light & Traction Co., Shepard v. (Utah).....	542	Wood, Hamby v. (Cal.).....	9
Valdez, Cardenas v. (Colo.).....	370	Wright, King v. (Cal. App.).....	517
Valiotis v. Utah-Apex Mining Co. (Utah)	802	Wright, Koch v. (Colo.).....	363
Vanek v. Vanek (Kan.).....	731	Wright, MacSwain v. (Cal. App.).....	517
Vinson v. Cook (Okl.).....	97	Wright, Mott v. (Cal. App.).....	517
Wade, Andersonian Inv. Co. v. (Wash.)....	327	Wright v. State (Okl. Cr. App.).....	158
		Wright v. Wimberly (Or.).....	740
		Wrought Iron Range Co. v. Rich (Idaho)..	627
		Wyman v. Chicago, R. I. & P. R. Co. (Okl.).....	758
		Yakima Valley Transp. Co., Bullock v. (Wash.).....	641
		Youngquist v. Industrial Commission of Colorado (Colo.).....	831
		Zelma Oil Co., Bentley v. (Okl.).....	131
		Zuber, Missouri, K. & T. R. Co. v. (Okl.)..	452

REHEARINGS DENIED

[Cases in which rehearings have been denied, without the rendition of a written opinion, since the publication of the original opinions in previous volumes of this Reporter.]

KANSAS.

Bremer v. Warner, 182 P. 411.
Silver Lake State Bank v. George, 181 P. 574.

MONTANA.

Babcock v. Gregg, 178 P. 294.
Equitable Life Assur. Co. v. Hart, 173 P. 1062.
O'Keefe, In re, 175 P. 593.
State v. Van Laningham, 173 P. 795.
Wheeler v. McIntyre, 175 P. 892.

OKLAHOMA.

Bell v. Dobyns, 158 P. 1103.
184 P.

Chicago, R. I. & P. R. Co. v. Craig, 157 P. 87.
Crickett v. Hardin, 159 P. 275.
Farrar v. State, 177 P. 990.
Lush v. Ten Eyck, 157 P. 924.
Madill Oil & Cotton Co. v. Davidson, 157 P. 354.
Modern Order of Prætorians v. Kennedy, 157 P. 926.
Rector v. Wildrick, 158 P. 610.
Tague v. State, 174 P. 1106.
Ward v. Missouri, K. & O. R. Co., 157 P. 775.
West v. Board of Com'rs, 158 P. 354.
Whitehead v. Galloway, 153 P. 1101.
Zahn v. Obert, 159 P. 298.

(xiii)†

THE PACIFIC REPORTER

VOLUME 184

(121 Cal. 300)

**JUDSON MFG. CO. et al. v. INDUSTRIAL
ACCIDENT COMMISSION et al.**
(S. F. 9039.)

(Supreme Court of California. Sept. 26, 1919.
Rehearing Denied Oct. 23, 1919.)

**1. MASTER AND SERVANT ⇐375(2) — WORK-
MEN PERFORMING "SERVICE" ON ARRIVAL AT
PLACE OF WORK.**

An employé, who has arrived at his employer's premises and is thereon for purpose of immediately commencing his actual work, is performing "service" incidental to his employment, within Workmen's Compensation Act, relative to right of compensation for his injury then occurring.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Service.]

**2. MASTER AND SERVANT ⇐375(2)—INJURY
TO WORKMEN CROSSING TRACKS IN PLANT
"ARISING OUT OF AND IN COURSE OF EMPLOY-
MENT."**

Accident to employé on his way to work, by being struck by another's train, in use of a necessary mode of ingress, across railroad tracks, provided and required by the employer, and as between employer and employé constituting part of the employer's plant, arose out of and occurred in the course of his employment, within Workmen's Compensation Act.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Course of Employment.]

Shaw and Melvin, JJ., dissenting.

In Bank.

Prosperina Gallia was awarded compensation by the Industrial Accident Board for death of Felice Gallia, and the Judson Manufacturing Company, employer, and the California Casualty Indemnity Exchange, insurer, apply for certiorari. Award affirmed.

Rehearing denied; SHAW and MELVIN, JJ., dissenting. ANGELLOTTI, C. J., votes for rehearing.

Redman & Alexander, of San Francisco, for petitioners.

Michele Cimbalo, of San Francisco, for respondent Gallia.

Christopher M. Bradley, of San Francisco (A. E. Graupner and Warren H. Pillsbury, both of San Francisco, of counsel), for other respondents.

LENNON, J. Certiorari to review the action of the Industrial Accident Commission in awarding compensation for the death of one Felice Gallia, who, on April 1, 1918, was struck and killed by an engine operated by the Southern Pacific Company while he was pursuing his way to work along a path crossing the latter's tracks.

Gallia was a laborer in the employ of the Judson Manufacturing Company; his duties consisting in attending an open-hearth furnace. The furnace and factory of the company are situated on the east shore of San Francisco Bay. The premises are bounded on the west by the bay shore and on the east by the right of way on which the Southern Pacific Company maintains numerous tracks for its through and local trains. A path crossing this right of way, and leading from the end of a public street at its eastern extremity directly to the gate of the factory yard at its western extremity, was the sole means of ingress and egress for the employes of the Judson Manufacturing Company to and from its factory and furnace. It was, moreover, the means of access required and authorized by the company. This path was not a public highway. The crossing was, in fact, dominant as to user in the employer, servient to its purposes, and intimately associated with its plant as a part of its necessary establishment. The company had, indeed, even claimed a lawful easement over the crossing for the purposes of the plant. At the time of his injury and death, which occurred about five minutes before the beginning of his shift, Gallia was proceeding from his residence to the factory, and had reached a point on the path in question about 20 feet east of the factory gate.

The Industrial Accident Commission found that Gallia's death resulted from an injury arising out of his employment and received while he was performing a service growing out of, incidental to, and in the course of that employment. Petitioner insists that the facts do not support the finding.

[1, 2] The right to compensation is by no means restricted to those cases where the injury occurs while the employé is actually presently manipulating the tools of his calling. It would be unnecessary to the decision

of this case to attempt to formulate a precise and comprehensive definition of the term "service," as used in the statute now under consideration. It seems to us, however, that when an employé has arrived at the premises of his employer, and is thereon for the purpose of immediately commencing his actual work, he is performing service incidental to his employment. The facts stated above show that as between the employer and his employé the path across the Southern Pacific Company's right of way was in fact a part of the employer's plant, and that at the time of his death Gallia was there solely in the line of his duty as an employé. It would be a harsh and indefensible rule that would withhold compensation from an employé engaged in traversing a dangerous pathway in his employer's building on his way to his own particular place of work therein, on the ground that he had not yet entered upon the real work of his employment. We can perceive no difference in principle between such a case and the case at bar.

There have been a great number of cases in other jurisdictions in which the question here involved has been discussed—namely, as to the point at which a person who has been injured while away from his actual place of work leaves his employment. The line is a very fine one. *Mole v. Wadworth*, 6 B. W. C. C. 129; *Richards v. Morris*, [1915] 1 K. B. 221; *Gane v. Norton Hill Co.*, 2 B. W. C. C. 42; *Moore v. Manchester Liners*, 3 B. W. C. C. 527; *In re Sundine*, 218 Mass. 1, 105 N. E. 433, L. R. A. 1916A, 318—in which compensation was awarded. *De Constantin v. Pub. Serv. Com.*, 75 W. Va. 32, 83 S. E. 88, L. R. A. 1916A, 329; *Nelson R. Constr. Co. v. Ind. Com. of Ill.*, 286 Ill. 632, 122 N. E. 113; *Ocean Accident, etc., Co. v. Ind. Acc. Comm.*, 173 Cal. 313, 159 Pac. 1041, L. R. A. 1917B, 336—in which compensation was denied.

In the case last cited we find a statement to the effect that all those accidental injuries which occur while the employé is going to or returning from his work are excluded from the benefits of the act. This sweeping dictum was not necessary to the decision of the case. The accident there considered occurred, it is true, while the deceased was attempting to reach his place of employment; but the mode of ingress which he undertook to use was not one provided and required by his employer, it was in no sense a part of the premises where his work was to be performed, and, finally, it was not in fact a mode of ingress to his work at all. As remarked by Lord Loreburn in *Walters v. Staveley Co.*, 4 B. W. C. C. 305:

"In applying this act one has to look to the words of the act itself. * * * Other cases are only useful as illustrations of the way in which these words are applied, and nothing, I think, is more fruitless than to attempt to argue by analogy from one set of facts to another set of facts."

This very danger is illustrated by the citation of that case in support of the dictum in the *Ocean Accident, etc., Co. Case*. It appears from a careful reading of the opinions of their lordships that their decision in the *Walters Case* was rested solely upon the ground that the contract of employment there involved did not contemplate the use of the pathway where the injury occurred as a necessary incident to gaining access to the place of employment. The facts, in other words, failed to show that as between the company and its employé the path was in fact a part of the company's plant. *Gilmour v. Dorman Co.*, 4 B. W. C. C. 279, also cited in the *Ocean Accident, etc., Co. Case*, is similarly distinguishable from the case at bar. On the other hand, it appears from *Moore v. Manchester Liners*, supra, and from other cases cited by the court in the *Ocean Accident, etc., Co. Case*, as well as from the additional cases which we have cited, supra, that an injury due to the necessary means of access to the employer's premises, required by the employer and contemplated in the employment, is compensable.

We are of the opinion that the facts here disclosed warranted the finding that the accident by which Gallia met his death arose out of and occurred in the course of his employment. It follows that the applicant is entitled to compensation.

The award is affirmed.

We concur: ANGELLOTTI, C. J.; WILBUR, J.; LAWLOR, J.; OLNEY, J.

SHAW, J. I dissent. The Constitution authorizes the Legislature to create a liability for compensation to be made to an employé, by the community at large through the medium of the employer, for an injury to such employé incurred in the course of his employment. Const. art. 20, § 21, as adopted in 1911; *Western I. Co. v. Pillsbury*, 170 Cal. 694, 707, 151 Pac. 398. To this the Legislature has added the condition that the injury must be one that was sustained by accident arising out of the employment. *Workmen's Compensation Law 1913* (St. 1913, p. 283) § 12(a); *Act 1917* (St. 1917, p. 834) § 6(a). Gallia was employed to work in the factory of the plaintiff. The only entrance to the factory was a gate on the easterly side. From this gate a pathway extended easterly across the adjacent tracks of the Southern Pacific Railroad Company into the end of a public street. This path was commonly used for access to the factory by all persons desiring to enter, and there was no other way or means of access. In going from his home to the factory Gallia was crossing the tracks aforesaid upon this path, and while so doing he was struck by a Southern Pacific engine and killed.

His contract of employment did not provide that he was to be considered in service

while going to the factory from his home, nor did it require him to perform any service while crossing said tracks along said path. It did not specify the route he was to travel in going to and from the factory. At the time he was struck he was not engaged in any work or service for the plaintiff; he had not yet reached the place of employment or the factory, but was still on his way thereto. The engine belonged to the Southern Pacific Company, and was in no way connected with the business of the plaintiff or the work Gallia was to do.

The accident had no more to do with his employment than would an accident which occurred any place on the public street by which he reached the path. His act in going there may have been a thing done "in the course of his employment," according to a few rather strained constructions of that phrase in some of the decisions; but that meaning is against the weight of authority. *Bradbury's Workmen's Compensation Law* (3d Ed.) p. 468. But I know of no case which holds that an injury from an accident so occurring is one "arising out of" the employment. It could be said to do so only upon the theory that the employment created the necessity of going to the place of employment and that this necessity was the cause or occasion of his being in the place of danger. But exactly the same thing could be said if he had been injured anywhere in the street along his usual and proper route from his home to the factory. And so it might be said that almost anything that occurs to the employé while absent from the place of work arises directly or in natural sequence out of his having been, or being required to be, at the place of employment. But the authorities are unanimous that the phrase does not have this comprehensive meaning. I can see no substantial distinction between this case and our decision in *Ocean, etc., Co. v. Industrial Accident Commission*, 173 Cal. 313, 159 Pac. 1041, L. R. A. 1917B, 336, and the many similar cases cited therein, and in *Bradbury's Workmen's Compensation Law*, above cited, to the effect that the employer is not liable for an injury to the employé during his journey to or from his place of work.

I concur: MELVIN, J.

(181 Cal. 280)

SOUTHERN P. CO. v. RICHARDSON, State
Treasurer (three cases). (S. F. 8912-8914.)

(Supreme Court of California. Sept. 24, 1919.)

1. TAXATION ⇨148—RAILROAD NOT LIABLE
TO TAX ON RECEIPTS FROM SEPARATE FERRY
PLANT.

The gross receipts of a railroad company from operation of a ferry, entirely separate and

distinct from its railroad business and unconnected therewith, were not taxable by the state board of equalization at 5¼ per cent., under Const. art. 13, § 14.

2. TAXATION ⇨144 — RAILROAD PROPERTY
USED EXCLUSIVELY IN ITS OPERATION ONLY
SUBJECT TO TAX.

Const. art. 13, § 14, subd. (a), providing that all railroad companies shall annually pay a tax on their franchises, roadways, rolling stock, "and other property or any part thereof, used exclusively in the operation of their business in the state," refers by the phrase "all railroad companies" and "other property or any part thereof," etc., only to the kinds of business which are declared to be so taxable in the opening paragraph of section 14, and includes only property used exclusively in the operation of such business.

In Bank.

Appeal from Superior Court, City and County of San Francisco; George A. Sturtevant, Judge.

Three actions by the Southern Pacific Company against Friend W. Richardson, Treasurer of the State of California. From judgments for plaintiff, defendant appeals. Affirmed.

U. S. Webb, Atty. Gen., and Raymond Benjamin and Frank L. Guereña, Deputy Attys. Gen., for appellant.

Henley C. Booth, of San Francisco, for respondent.

SHAW, J. In each of these cases the defendant appeals from a judgment in favor of the plaintiff. Each case is an action to recover taxes paid to the state under protest for a single fiscal year ending on June 30th. Case No. 8912 was for \$21,415.28, paid for the year ending in 1916; case No. 8913, for \$23,507.98, paid for the year ending in 1917; and case No. 8914, for \$25,920.31, paid for the year ending in 1918.

These taxes were levied by the state board of equalization, under the assumed authority of section 14, article 13, of the Constitution. The sole question for determination is whether or not the state board was correct in the position that the plaintiff was liable, under this section, for the taxes upon the gross receipts from operation of the particular property upon which these several amounts were assessed. The Southern Pacific Company, as is well known, operates an extensive system of railways within the state. As adjuncts thereto, at its Oakland and Alameda rail terminals it operates a number of ferryboats, connecting with its railway lines, to carry its freight and passengers between said terminals and the city of San Francisco, in order to complete the carriage from its different lines of railway to that city.

In addition to these railroad lines and connecting ferry lines, it operates a system of

ferryboats between San Francisco and Oakland, known as the "Creek Route." These boats carry passengers and freight from a slip on the San Francisco side to a point in the estuary between Oakland and Alameda near the foot of Broadway in the city of Oakland. They do not connect with any railroad line of the plaintiff, nor with any other railroad line. So far as its business is concerned, it could as conveniently be operated by any other company, since it has no connection whatever with the railroad system operated by the plaintiff. An account of the receipts from this business is kept separate and distinct from the receipts from railroad lines and other ferryboats above mentioned belonging to the plaintiff. They are paid into the general treasury of the plaintiff, and are used by it for any purpose it sees fit. Under the direction of the state board, the plaintiff reported thereto for the year ending 1916 that its gross receipts from the operation of the said Creek Route during said fiscal year amounted to \$407,909.82. Said report also included other sums as the gross receipts from the railroad lines and other ferryboats above mentioned. The state board computed the sum of 5½ per cent. upon said sum as the amount of taxes to be assessed against said plaintiff on account of the gross receipts from said Creek Route, which sum the plaintiff thereupon paid under protest. A similar process took place with respect to the other cases.

The decision of the case depends upon the interpretation to be given to the language of section 14, above referred to. The contention on behalf of the state is that it authorizes an assessment of the fixed percentage upon the gross receipts from operation of the plaintiff company upon every kind of business which it carries on, whether a railroad business or of some other character not necessary for its railroad business, nor connected therewith. The plaintiff, on the other hand, insists that the section authorizes such tax only upon its railroad property, and the necessary or convenient adjuncts thereto. In order to clearly exhibit the question, we quote the parts of the section which relate thereto, as follows:

"Sec. 14. Taxes levied, assessed and collected as hereinafter provided upon railroads, including street railways, whether operated in one or more counties; sleeping car, dining car, drawing room car and palace car companies, refrigerator, oil, stock, fruit, and other car-loaning and other car companies operating upon railroads in this state; companies doing express business on any railroad, steamboat, vessel or stage line in this state; telegraph companies; telephone companies; companies engaged in the transmission or sale of gas or electricity; insurance companies; banks, banking associations, savings and loan societies, and trust companies; and taxes upon all franchises of every kind and nature, shall be entirely and exclusively for state purposes, and shall be

levied, assessed and collected in the manner hereinafter provided. The word 'companies' as used in this section shall include persons, partnerships, joint stock associations, companies, and corporations.

"(a) All railroad companies, including street railways, whether operated in one or more counties; all sleeping car, dining car, drawing room car, and palace car companies; all refrigerator, oil, stock, fruit and other car-loaning and other car companies, operating upon the railroads in this state; all companies doing express business on any railroad, steamboat, vessel or stage line in this state; all telegraph and telephone companies; and all companies engaged in the transmission or sale of gas or electricity shall annually pay to the state a tax upon their franchises, roadways, roadbeds, rails, rolling stock, poles, wires, pipes, canals, conduits, rights of way, and other property, or any part thereof used exclusively in the operation of their business in this state computed as follows: Said tax shall be equal to the percentages hereinafter fixed upon the gross receipts from operation of such companies, and each thereof within this state."

[1] The theory advanced on behalf of the state is, in effect, that if any railroad company or person, operating a railroad within this state, should engage in the business of operating another and separate public utility within the state, not of a character taxable exclusively or at all for state purposes under section 14, and not necessary, or convenient for the operation of its or his railroad, nor in any manner connected therewith as an adjunct thereto, the gross receipts from the operation of such separate public utility must be included with the gross receipts from the operation of the railroad system and connections, and the fixed percentage computed upon the whole sum. If this is correct, it would necessarily follow that the property used exclusively in operating such separate public utility would be exempt from local taxation for municipal or county purposes. The interpretation contended for would enlarge section 14 by bringing such separate public service business within its scope, in all such cases, although it is not of a class mentioned therein. It would do more. Section 1 of article 13 of the Constitution provides that all property in the state shall be taxed in proportion to its value, except as otherwise provided in the article. The property of the separate public utility would not be within the exception and it would, under section 1, be subject to local taxation for municipal and county purposes; whereas, under the interpretation claimed for the state, it would be excluded therefrom. This would not only be putting into section 14 a provision not contained in it, and inserting in section 1 an exception not there contained, but it would also be establishing a peculiar and unreasonable discrimination with respect to public utilities or kinds of business of a class not declared to be taxable for state purposes.

To make the proposition clear, if further exposition is necessary, we may take the very case here presented. Ferries are not mentioned in section 14; therefore the property used in the operation of a ferry is not taxable exclusively or at all for state purposes under that section, but is subject to local taxation in proportion to value, under section 1. It will be conceded that all ferries not operated by a railroad company which is also operating a railroad are thus subject to local taxation. Local taxation of all such ferries is authorized by section 3843 of the Political Code, and if they connect more than one county, the stationary property shall be taxed in the county in which it is situated and the intangible property and water craft assessed in equal proportions in the respective counties. But under this claim the mere fact that the Creek Route ferry happens to be operated by the Southern Pacific Company, which is also operating a railroad within the state, would cause the property of this particular ferry to be excluded from taxation for local purposes in the city and county of San Francisco, the county of Alameda and the city of Oakland, and make it taxable exclusively for state purposes under section 14, while all other ferries operating between said counties not owned by a railroad company or operating in connection with a railroad would be taxed only for local purposes. Also, it would follow that, if the Creek Route ferry should hereafter become the property of some other corporation which was not operating a railroad, its property would again become subject to local taxation. Such uncertain and unusual results were clearly not within the contemplation of the framers of section 14 of article 13 of the Constitution.

[2] The appellant argues that since subdivision (a) of section 14, which declares the duty to pay the taxes provided for in the opening paragraph, begins with the phrase, "all railroad companies," and, in describing the kinds of property to be so taxed, closes with the phrase, "and other property, or any part thereof used exclusively in the operation of their business in this state," it must follow that persons or corporations carrying on any business of a kind mentioned in the opening paragraph must be taxed in the same manner, and for state purposes exclusively, upon property which they may have and use exclusively in the operation of a separate public utility business in this state which otherwise would not be so taxable. If the meaning of the phrase "their business in this state" is to be enlarged so as to include any business other than the kinds made taxable by the first paragraph of the section, it could as well be said to include any kind of business carried on by such person or company, such, for example, as a farm, or a dry goods store. This would be absurd and

the appellant does not so contend. The argument is not sound. The entire context implies the contrary. The only reasonable interpretation is that the phrase refers only to the kinds of business which are declared to be so taxable in the opening paragraph and includes only the property which is used exclusively in the operation of such business. It was so held, in effect, by this court in *Lake Tahoe, etc., Co. v. Roberts*, 168 Cal. 551, 143 Pac. 786, Ann. Cas. 1916E, 1196. We do not mean to suggest that ferryboats and the necessary adjuncts used only to connect separate parts of the railroad line, such as those at Port Costa, or those used only to connect its rail lines with its terminals at San Francisco, are not to be taxed for state purposes only as provided in section 14.

It is ordered that the judgment in each of the above-entitled cases be affirmed.

We concur: ANGELLOTTI, C. J.; OLNEY, J.; MELVIN, J.; WILBUR, J.; LAWLOR, J.; LENNON, J.

(181 Cal. 253)

BURROWS et al. v. PETROLEUM DEVELOPMENT CO. (L. A. 4254.)

(Supreme Court of California. Sept. 24, 1919.
Rehearing Denied Oct. 23, 1919.)

1. CONTRACTS ⇐169 — TO BE CONSTRUED WITH RESPECT TO SITUATION OF PARTIES.

A contract should be construed with respect to the situation in which the parties were at the time it was made.

2. CONTRACTS ⇐213(1) — CONSTRUCTION OF AGREEMENT TO DRILL OIL WELL DILIGENTLY.

Contract whereby defendant oil development company agreed to drill diligently during the life of plaintiff's options on the land involved *held not* to require defendant to reach 2,500 feet depth within the period of the options, even if oil were not found, but merely to drill diligently during the life of the options until 2,500 feet depth was reached, or oil in specified quantities found.

3. CONTRACTS ⇐170(2) — CONSTRUCTION BY PARTIES OF OIL WELL DRILLING AGREEMENT.

Defendant oil development company, obligated to drill diligently only during the life of plaintiff's options, or until a depth of 2,500 feet was reached, *held not* to have construed its contract otherwise by continuing to drill after the period of the options had expired; action referable to its desire to realize on its own investment.

4. CONTRACTS ⇐241 — CONTRACT TO DRILL OIL WELL DURING OPTIONS ALTERED BY TAKING UP OF OPTIONS.

Obligation of defendant oil development company under its contract with plaintiff to

drill diligently on land covered by plaintiff's options during the period of the options, or until a depth of 2,500 feet was reached, or oil in specified quantities found, *held* not changed by defendant's action in taking up the options.

In Bank.

Appeal from Superior Court, Kern County; Milton T. Farmer, Judge.

Action by F. R. Burrows and others against the Petroleum Development Company, a corporation. From judgment for plaintiffs, defendant appeals. Reversed.

E. W. Camp, U. T. Clotfelter, M. W. Reed, and Robert Brennan, all of Los Angeles, for appellant.

John T. Thornton, of San Francisco (F. W. Henshaw and Henshaw, Black & Goldberg, all of San Francisco, of counsel), for respondents.

OLNEY, J. This is an appeal by the defendant from a judgment against it for \$40,000 as damages for a breach of contract. The contract was one between the plaintiff Burrows and the defendant, and the other two plaintiffs are interested only as assignees of Burrows of partial interests under the contract. For simplicity in discussion, we shall treat the action as one by Burrows as sole plaintiff. The facts are:

In May, 1909, Burrows held five options for the purchase of adjoining tracts of land in the vicinity of the Kern county oil field. The land had not been explored for oil. Each of the options specified the amount to be paid as purchase price and the time within which it had to be paid. One of the options, which we may call option A, contained no provision for drilling; but each of the others provided as a condition of its continuance during the term specified that the option holder should immediately begin and diligently prosecute the drilling of a well on the land covered by option A.

Shortly after acquiring these options, Burrows assigned them to the defendant under the contract involved here. That contract provided, in effect, that the defendant should immediately begin and diligently prosecute the drilling of a well on the land covered by option A to a depth of at least 2,500 feet, unless oil in certain specified quantities should be sooner found. The alleged breach of contract for which damages are here claimed is the failure of the defendant to drill a well to this depth of 2,500 feet. If oil were not found within this depth in the quantity specified, the contract provided that the defendant had the right to terminate the agreement. On the other hand, if oil were found, the defendant was obligated to exercise the option and purchase the lands, in which case it was to convey certain specified portions thereof equal to three-eighths of the acreage to the plaintiff. The contract also provided that

the well should be sunk at a point on the land included in option A to be designated by the plaintiff, but that neither the well nor the governmental subdivision on which it was located should be conveyed to the plaintiff.

Following the making of the contract the defendant began the drilling of a well at a point designated by the plaintiff and proceeded diligently with it. When the well had reached the depth of nearly, but not quite, 2,500 feet, a showing of oil was found, but not in the quantity specified by the contract as relieving the defendant of its obligation to continue drilling, or as imposing on it the obligation to take up the options. The time, however, of option A, which had been extended, was about to expire. It was the key option, as the well was on the land covered by it, and the other options were conditional on drilling a well on that land. The plaintiff and defendant, acting through the plaintiff, attempted to secure a further extension of option A, but were refused. Thereupon, although, as we have said, the defendant was under no obligation to do so, it took up the options and conveyed to the plaintiff the portion of the land which he was to receive.

The defendant continued with the work on the well, but the greatest depth reached was either 2,465 or 2,485 feet, or 35 or 15 feet, as the case may be, short of the specified distance. At this point, through some mishap, which it is not claimed was not reasonably incident to such operations, the well was spoiled. The defendant thereupon promptly started another well, and proceeded with its drilling until a depth of 800 feet or thereabouts was reached, when this well also was spoiled. The defendant then refused to drill again, and this refusal is the alleged breach of contract relied on. There is no allegation or claim that up to this time the defendant had not been proceeding diligently with the drilling as required by the contract. The time when the second well was spoiled, and the defendant ceased drilling, was something over a year and a half after the expiration of the prescribed time of option A as last extended.

The only allegation of damage in the complaint is that the cost of drilling a 2,500-foot well at the point fixed by the contract—such point being on the defendant's, not the plaintiff's, land—would be \$40,000. The only proof of damage at the trial was proof of this cost, and this cost is the amount allowed the plaintiff by the judgment of the trial court.

Two questions arise upon the foregoing facts. The first is: Did the refusal of the defendant to go on with drilling after the failure of the second well, and at a time subsequent to the expiration of the period of the options, constitute a breach of its contract? The second is: Assuming a breach, is the cost of such well, as distinguished from its

value to the plaintiff—that is, its beneficial effect upon the value of his land, he having no direct interest in the well—the correct measure of damages?

[1, 2] In order to determine whether or not there has been a breach of the contract, it is necessary to determine just what the obligation was which it is claimed was broken. The contract should, of course, be construed with respect to the situation in which the parties were at the time it was made. That situation was that the plaintiff held options merely on the land to be drilled, and that these options would expire at the end of a fixed and rather short period. Under these circumstances the contract transferred the options from the plaintiff to the defendant upon the conditions that the latter was to drill on the land, and, if oil were found in paying quantity, such quantity being specified, it was to take up the options, and that, if the options were taken up, a certain portion of the land was to be conveyed to the plaintiff. The portions of the contract with reference to the defendant's obligations to drill and to take up the options, which are the portions particularly material here, are as follows, epitomizing them in part:

"First. That the company [the defendant] on or before 22d of May, 1909 (the contract is dated May 8, 1909), shall commence the work of" drilling a well at a designated point, "and will thereafter prosecute the drilling of such well diligently to a depth of at least 2,500 feet unless crude petroleum" in certain specified amounts should be developed sooner. "Accidents, breakage of machinery, and other casualties incident to the drilling of such well shall be excepted in determining whether such well is being or was drilled diligently.

"Second. That if crude petroleum shall be developed in said well in the quantities above stated, the company shall exercise all or any (and every?) of said options and purchase all or any of said lands in accordance with their terms from the givers of said options if the latter or any of them can convey a title thereto free and clear of incumbrances."

In agreeing upon the foregoing provisions, the parties must have had in mind that the right to drill would expire with the expiration of the options, and that the only way they had as of right to extend this time was to take the options up. Nevertheless, the only provision in the contract requiring their taking up is the one quoted that they shall be taken up if oil in certain quantities is found, in which case the defendant is no longer obliged to continue drilling. It is apparent, therefore, that the parties contemplated both that drilling should cease upon the expiration of the options if they were not taken up, and also that the defendant was under no obligation to take them up unless oil in paying quantities were found before that time.

Nor is there anything in the contract requir-

ing the defendant to reach a depth of 2,500 feet *within the period of the options*, even if oil were not found. Its obligation is to drill diligently, and the provision relative to reaching a depth of 2,500 feet is merely that the defendant can stop when this depth is reached, even if oil be not found. It is a limitation on the obligation, not an imposing of an affirmative and most drastic burden. There is a very great difference between agreeing to drill diligently during a limited and fairly short time until a depth of 2,500 feet is reached and agreeing absolutely to reach such depth within that time. There is nothing whatever in the contract to support the view that the defendant insured a well 2,500 feet deep within the period of the options, unless oil were found sooner, diligence or no diligence; but, on the contrary, the express language of the obligation is only that the defendant shall "prosecute the drilling of such well diligently."

The necessary construction of the contract, the thing which the parties must of necessity have had in mind, was, therefore, that the defendant's obligation to drill diligently would cease with the expiration of the options, unless sooner terminated by reaching a depth of 2,500 feet or finding oil, and that there was no obligation resting on it to reach that depth within that time, provided only that it drilled diligently. This conclusion can be tested by assuming in this case that the defendant did not take up the options, as it was not required to do, and had gone on, without reaching a depth of 2,500 feet or finding oil, drilling diligently until the options expired and it could no longer drill. Could it be claimed under these circumstances that the defendant had not fulfilled its contract to the letter? It is certain that it could not.

We have devoted this much time to what seems to us a very apparent proposition, namely, that the defendant's obligation to drill was only to drill with diligence during the period of the options, because we believe it is the essential point in the case. The defendant did drill diligently during the entire period of the options, and in fact for more than a year and a half after, and no claim is made here that it did not. The claim is that long afterwards it refused to continue further.

But, it may be said, the options did not expire, the defendant took them up, and its right to continue drilling for the benefit of itself and the plaintiff was therefore not lost. But the question here is not one as to the right to continue, but as to the obligation to continue; and that obligation must be determined, as it must have been understood at the time the contract was made. At that time the parties must clearly have understood that the defendant's obligation would expire with the period of the options. It would be indeed

a remarkable construction to put upon the contract to say that it meant that if the defendant, voluntarily and without any obligation so to do, should take up the options for the joint benefit of itself and the plaintiff at an expense of \$33,500, it would do so only under penalty of being obligated to continue indefinitely, no matter what the time and expense might be, to drill until either a well 2,500 feet deep was obtained or oil was found. Yet this action, unwittingly in all probability, is nothing more than an attempt to impose just that penalty. The defendant was under no obligation to take up the options. All it had to do at the time it took them up was to go on diligently with the well, as it was doing and did, and let the options expire, and it would be free and clear of any reasonable possibility of claim. It would be wholly unreasonable to hold that by taking them up it assumed any obligation different or more extensive than the contract originally provided for, particularly one so different and so much more burdensome as the absolute obligation here insisted on. The taking up of the options worked no detriment to the plaintiff, and could work none, but quite the contrary. It could only work a benefit to him, and did so. Its sole effect has been that the plaintiff has acquired without cost to him several hundred acres of land, which he would otherwise not have received, and has had the benefit, if there be any, of continued exploration by the defendant for a very considerable period longer than it was contemplated by the contract such exploration without discovery would continue. Such a change of position, wholly beneficial to the plaintiff, cannot reasonably be made a ground for imposing on the defendant an obligation which most certainly it did not otherwise assume.

It may be said, also, that if the options had been extended, instead of being taken up, the defendant's obligation to drill would have continued during the time of such extension, and the effect of taking them up was to secure such extension. The key option, option A, was in fact extended twice, and it was only on the approach of the expiration of the second extension that the land was purchased. It is probably true that by these extensions, obtained at its instance, or at the joint instance of itself and the plaintiff, the defendant's obligation to drill was likewise extended, and that the same would have been true, if further extensions had been similarly obtained. But the defendant's obligation in the case of extensions merely of the options would still remain essentially the same. It would be still an obligation to drill diligently during a certain time, and as such might fairly come within both the scope of the contract and the original contemplation of the parties. But to give the same effect to a taking up of the options, is, as we have said, to impose a

wholly different obligation. The time element is removed, and the defendant's obligation is no longer one merely to drill diligently, but is one to insure a well 2,500 feet deep, unless oil be found at a less depth, from which no amount of diligence will excuse it. So different an obligation cannot be said to come within the scope of the contract or the original contemplation of the parties.

[3] It may be said, also, that the defendant, by continuing to drill after the period of the options had expired, itself put a construction on the contract that it was obligated so to continue. This can be truly said only if the natural inference from the fact of its continuing is that it did so because it believed itself obligated. It is only in case the defendant's action in continuing to drill can be reasonably explained only on the supposition that it believed itself bound to do so that it can be said that its action evidences a belief on its part that it was so bound. But this is not the fact. There is another and most apparent explanation. The defendant was then the owner of several hundred acres of possible oil lands. It had invested in them some \$33,500 as their purchase price, plus the cost up to that time of the well it was drilling. This cost was in the neighborhood of \$25,000 more. Under these circumstances, the most natural thing for the defendant to do was to continue its exploration, whether it was obligated so to do or not, in order to develop the property it had acquired and to realize on the investment it had made. Its action in continuing exploration is fully explainable on this ground, and does not give rise to any inference that the defendant continued because it believed itself bound to continue. Bound or not bound, the natural thing for it to do was to continue.

Finally, it is argued that the terms of the several deeds by the defendant to the plaintiff made as each of the options was taken up and conveying to the plaintiff the portion of the land he was to have, indicate that the obligation of the defendant to drill was to continue. The language relied on varies slightly as between the different deeds, but the variations are immaterial. Taking the language in one as typical, it consists in a recital that the deed is made by the defendant "in fulfillment of a part of its obligations" to the plaintiff under the contract here involved. The answer to this argument is that the recital is strictly accurate under any theory of the case. Each deed—conveying only a part of the land the plaintiff was to have—was by itself of necessity in part fulfillment only of the defendant's obligation, no matter what view may be taken of the contract.

[4] Summing the discussion up, it seems to us that the fair construction of the contract—in fact, the only possible reasonable con-

struction—is that the defendant's obligation under the contract at the time the parties made it was to drill diligently through the period of the options, unless within that period a depth of 2,500 feet was reached or oil in the paying quantities specified by the contract found. It also seems to us clear that this obligation was not changed by the taking up the options, and in particular it was not transformed into the very different obligation of guaranteeing either a well 2,500 feet deep or the finding of oil. Such being the obligation of the defendant, its refusal to continue drilling long after the expiration of the period during which it was required to drill was not a breach of its contract.

It follows that plaintiff has no cause of action on the pleadings and proof presented. This conclusion renders unnecessary a consideration of the question as to the measure of damages.

Judgment reversed.

We concur: ANGELLOTTI, C. J.; SHAW, J.; MELVIN, J.; LAWLOR, J.

WILBUR, J. (concurring). I concur in the judgment for the reasons stated in the main opinion, and for the further reason that if we assume, as the respondent contends, that the agreement required the appellant to sink the well to a depth of 2,500 feet, the damages for breach of such an agreement, under the circumstances stated, are too speculative to justify a recovery of substantial damages. In this case the well was sunk within 15 feet of the required depth, oil was struck, and property values were correspondingly enhanced, and upon the strength of that showing the appellant exercised the options and conveyed to the respondent all the land it was required to convey in the event that the well had been completed or oil struck in paying quantities. If the well had been sunk 15 feet deeper, it would either have enhanced or depreciated the value of the surrounding property, and the question of whether it would enhance or decrease such value is purely speculative. *Escondido Oil Co. v. Glaser*, 144 Cal. 494, 77 Pac. 1040; *McComber v. Kellerman*, 162 Cal. 749, 124 Pac. 431; *Taylor v. N. P. C. R. R. Co.*, 56 Cal. 317.

I concur: LENNON, J.

(181 Cal. 236)

HAMBEY v. WOOD et al. (S. F. 8299.)
(Supreme Court of California. Sept. 24, 1919.)

1. LANDLORD AND TENANT §63(1, 2)—RIGHT OF TENANT TO SET UP ACQUIRED TITLE AS DEFENSE TO SPECIFIC PERFORMANCE AGAINST LANDLORD.

Though tenant at will by written agreement between him and purchaser of property termi-

nated tenancy at will and became purchaser's tenant for a term certain, he was not precluded from acquiring title from the original owner, nor in the purchaser's action for specific performance is he precluded from setting up any title he may have so acquired; the purchaser not seeking to recover for the use and occupation under the lease, but having put the title in issue.

2. VENDOR AND PURCHASER §228(4)—NOTICE OF PRIOR CONTRACT VOIDABLE UNDER STATUTE OF FRAUDS DOES NOT AFFECT TITLE OF VENDEE.

That a purchaser of land took it with notice of a prior contract of sale, voidable under the statute of frauds, does not affect his title unless the case comes within some exception recognized by equity.

3. FRAUDS, STATUTE OF §119(1)—EQUITY WILL RELIEVE AGAINST IT WHERE IT WOULD PLACE PARTY RESISTING IN INEQUITABLE POSITION.

Equity is bound by the statute of frauds, and general relief against it is given only where to allow it to be set up would be to secure to the party relying on it the fruits of actual fraud, or where it would place the party resisting it in an inequitable position; it appearing further there is evidence as good as a writing between the parties.

4. FRAUDS, STATUTE OF §129(12)—POSSESSION BY TENANT ON ORAL SALE OF LAND INSUFFICIENT.

Possession of land by buyer under oral contract effected by the technical possession of a tenant, who for long before the creation of his tenancy under the buyer had been occupying the land as tenant at will of the seller, held not the character of possession which would take the oral contract of sale out of the statute of frauds, not rendering the buyer liable to an action for trespass, and not evidencing clearly the new ownership.

Shaw, J., dissenting in part.

In Bank.

Appeal from Superior Court, Monterey County; J. A. Bardin, Judge.

Action by Richard Hambey against Webster Wood and others. From judgment for defendants, plaintiff appeals. Affirmed.

C. F. Lacey, of Salinas, for appellant.

Alex Webster, of Paso Robles, and Chas. B. Rosendale, of Salinas (Cullinan & Hickey, of San Francisco, of counsel), for respondents.

LENNON, J. The facts upon which this appeal is based are stated as follows in the opinion prepared by Mr. Justice Beasley, sitting pro tempore as a member of the District Court of Appeal for the First Appellate District:

"This action was brought to obtain a decree of specific performance of an oral contract for the conveyance of real property. The record consists of the judgment roll alone. From the

findings it appears that on March 12, 1916, plaintiff entered into an oral agreement with defendant Wise for the purchase of the property in question for the sum of \$1,000, and that said defendant authorized and directed the plaintiff to take possession of the property, which was distant about one hundred miles from the place where the agreement was made. Prior to, and at the time of the making of this agreement, the property was in the possession of one Webster Wood, who is also a defendant in the action. Wood occupied the land from the fall of 1913 to the fall of 1915 as a tenant of defendant Wise, the owner. Wise had refused to make a further lease of the premises to Wood, but entered into an oral agreement with him, by the terms of which it was stipulated that Wood might buy the land for the sum of \$1,400, and pay for it later out of the proceeds of the sale of a crop of grain that he then had on hand, and in the meantime he might retain possession of the land. Wood sold the grain, but did not avail himself of the option of purchase up to the time of plaintiff's agreement. He entered into the possession of the land, however, and began the cultivation thereof, and in the fall of 1915, or in the spring of 1916, but prior to March 12, 1916, when the agreement here involved was entered into, he seeded about fifty acres to barley, which was growing upon the lands at the time plaintiff and defendant Wise entered into their oral agreement of sale, and plaintiff was familiar with this fact. Five days after this oral agreement, and on March 17, 1916, the plaintiff told defendant Wood that he had purchased the real property, and that he had a deed thereto which was of record. The statement, in so far as it related to the deed, was false. The same day plaintiff and defendant Wood entered into a written agreement by the terms of which defendant Wood leased from plaintiff the land in question, together with 820 acres of other land all in one body, from March 17, 1916, to November 1, 1916. Thereafter, on March 25, 1916, while negotiating with Wise relative to the purchase of said land, defendant Wood received notice of all the terms of the agreement between plaintiff and Wise. Upon learning that the agreement of sale was an oral one, and that it had not been concluded, Wood induced Wise to convey him the property for a consideration of \$1,400, the deed conveying the same being immediately recorded by Wood. Thereafter plaintiff tendered Wise the sum of \$1,000, his purchase price, and upon Wise's refusing to convey, this action was brought."

It further appears, as found by the trial court:

"That the defendant Wood, during the period from March 17, 1916, until the conveyance of said real property by defendant Wise, to defendant Wood, continued to remain in possession of said premises as follows: By continuing to exercise dominion over said premises and to have growing thereon the crop of grain referred to, but during said time did not make any physical entry upon or into said premises."

"In its conclusion of law the trial court holds that the plaintiff never took actual possession of the premises agreed to be conveyed, and that there was no part performance of the agreement sufficient to take the agreement out of the

statute of frauds or to enable plaintiff to specifically enforce the same. This conclusion is based upon the finding 'that the plaintiff did not go physically upon the said described real property, and did not take any possession thereof other than by the execution of said lease to the defendant Wood.'"

[1] Even if it be conceded that on March 17, 1916, Wood was a tenant at will holding under Wise, and that, by the written agreement entered into on that date between Wood and Hambey, Wood terminated the tenancy at will and became the tenant of Hambey for a term certain, nevertheless Wood was not precluded from acquiring title to the property from Wise, nor is he precluded from setting up in this action any title he may have so acquired, inasmuch as Hambey is not seeking to recover for the use and occupation of the land under the lease, but has put the title itself in issue. *Jochen v. Tibbells*, 50 Mich. 33, 14 N. W. 690; *McKie v. Anderson*, 78 Tex. 207, 14 S. W. 576. It follows that Hambey is entitled to compel a conveyance from Wood only in event the latter acquired title under circumstances rendering it unconscionable for him to keep the land. In other words, the single question presented upon this appeal is whether or not Wood purchased the land in good faith, it not being denied that he paid value.

[2] It is well settled that the fact that a purchaser of land took it with notice of a prior contract of sale, avoidable under the statute of frauds, does not affect his title thereto, unless the case falls within some exception which equity recognizes. 39 Cyc. 1772, and cases cited. It is necessary, therefore, for us to determine whether or not the facts of the case disclose any circumstance serving to lift Hambey's oral contract of purchase out of the statute of frauds on or before the date of the conveyance to Wood.

[3] Hambey contends that his possession of the land was such a part performance of the contract as to take it out of the operation of the statute. As pointed out by Lord Blackburn in *Maddison v. Alderson*, L. R. 8 A. C. 467, the cases allowing possession given and received to suffice to take a contract for the sale of an interest in land out of the statute of frauds have, in effect, construed the statute relative to agreements for the sale of land as if it contained the words "or unless possession of the land shall be given and received." This construction of the statute has been adopted in California. *Calanchini v. Branstetter*, 84 Cal. 249, 24 Pac. 149; *Moulton v. Harris*, 94 Cal. 421, 29 Pac. 706. It only remains to consider whether or not the nature of Hambey's possession was such as to satisfy the requirement of the statute. In considering this question, it is not to be forgotten that equity is after all bound by the statute of frauds, and that in general relief is given against the statute only in two classes of cases, first, where to allow the stat-

ute to be set up would be to secure to the party relying upon it the fruits of actual fraud, and, second, where to allow the statute to be set up would place the party resisting it in an inequitable position, it appearing further that there is evidence just as good as a writing of the agreement between the parties. *Fry on Specific Performance* (5th Ed.) §§ 584, 585. In the absence of actual fraud, the question here presented is whether or not Hambey's possession of the land at any time before the conveyance to Wood was such as to place him in an inequitable position if precluded from proving his oral contract and whether or not it was also such as to furnish evidence just as good as a writing of the agreement between himself and Wise. The inequitable situation which is contemplated by the cases holding that the vendee's possession will suffice to take a contract for the sale of land out of the statute of frauds is the vendee's liability to an action for trespass if he is not allowed to prove his oral contract. The evidence just as good as a writing contemplated by those cases is the visibility and notoriety of an actual possession manifesting clearly and unequivocally a new and distinctive ownership. *Charplot v. Sigerson*, 25 Mo. 63; *Ackerman v. Fisher*, 57 Pa. 460; *Arguello v. Edinger*, 10 Cal. 150; *Fulton v. Jansen*, 99 Cal. 587, 34 Pac. 331. This court, in *Davis v. Judson*, 159 Cal. 121, 132, 113 Pac. 147, 152, expressly holding that a nominal or merely technical possession was not sufficient, laid down the rule that—

The "possession which must be taken in order to meet the equitable requirement of part performance, and warrant specific performance of the contract, is actual possession by the vendee. The ground upon which possession, as constituting part performance and authorizing specific performance, is supported, is that the vendee would be exposed to liability as a trespasser, if he could not invoke the protection of the contract. The uniform rule, however, is that such possession must be an actual possession by the vendee; there must exist the physical fact of possession in him; a possession visible, notorious, and exclusive, such as manifests definitely and clearly that the vendee is claiming and asserting a distinctive ownership of the property, which is inconsistent with the right of possession or ownership in any other person. Less than this could not constitute a vendee a trespasser, and hence this actual possession must, under the authorities, exist to constitute such part performance as warrants the equitable interposition of a court to decree specific performance."

Even more directly to the point in the present case is the rule stated in *Browne* on the Statute of Frauds (5th Ed.) § 473:

"To allow a mere technical possession, not open to the observation of the neighborhood, and capable of being proved only by select and confidential witnesses, to be sufficient for obtaining a decree to enforce the contract, would manifestly afford an opportunity for and an

encouragement to dishonest testimony. Thus, where the vendor, having at the time a tenant in possession, makes a verbal sale of the premises, it has been held that, the tenant remaining in possession, and merely attorney to the purchaser, there was no such open and notorious change of possession as would justify a court of equity in enforcing a contract, and that, at any rate, the attornment must be formal, public, and explicit."

In support of the text the author cites *Brawdy v. Brawdy*, 7 Pa. 157, and *Johnston v. Clancy*, 4 Blackf. (Ind.) 94, 28 Am. Dec. 45.

[4] Hambey never entered into physical possession of the land. Moreover, conceding that between March 17 and March 25, 1916, Wood's possession was the possession of Hambey, the fact remains that during that time Wood did not make any physical entry upon the premises. Hambey's possession, if it may be called such, was technical possession by a tenant who for a long period of time prior to the creation of the tenancy had been occupying the land as the tenant of the vendor. It is clear that this possession had not the essential character of the possession which will suffice to take an oral contract for the sale of land out of the statute of frauds. Neither by himself nor by his tenant did Hambey enter into a possession such as would render him liable to an action for trespass. No inequitable situation would therefore have been created by refusing to allow him to set up the contract of purchase. Neither by himself nor by his tenant did he enter into a visible and notorious possession manifesting clearly and unequivocally a new and distinctive ownership. There was therefore a total absence of any act referable to the contract such as, when coupled with the inequitable situation, gives a court of equity jurisdiction to enforce an oral contract for the sale of an interest in land. The facts of the case, accordingly, disclose no circumstance serving to lift Hambey's oral contract of purchase out of the statute of frauds on or before the date of the conveyance to Wood. It follows that Wood, having purchased the land in good faith and for value, does not hold title as an involuntary trustee for Hambey.

The judgment is affirmed.

We concur: ANGELLOTTI, C. J.; OLNEY, J.; MELVIN, J.; WILBUR, J.; LAWLOR, J.

SHAW, J. I concur in the judgment, but I do not fully agree with all the reasons advanced by Justice LENNON. The rule is that the possession of land by the vendee, under an oral contract, in order to constitute part performance and render the contract enforceable, must be such as would make him liable for trespass, if he could not justify his possession except by the void oral contract of sale. This rule was adopted in equity when

the common-law forms of action for trespass were in use. Under the common law, one who entered on land through his tenant to whom he had let the land for a term was liable, after recovery in ejectment by the true owner, to an action of trespass for mesne profits, and the fact that he had not personally entered on the land would not excuse him. Nor would it excuse him in an action of trespass for breaking and entering, if he had leased the land and authorized his tenant to enter thereunder. Therefore the fact that one was in possession by his tenant would make him liable for trespass and would sufficiently answer that part of the equity rule in actions for specific performance. In this case both Hambey and Wood would have been liable to Wise for mesne profits if the sale to Hambey and Wood's possession under the lease could not have protected them.

It is clear also that this should be the rule. There are many cases as of property built for rental purposes, where the only possession ever taken or contemplated by the parties to a sale is a possession accomplished by the attornment of the tenant in possession to the new owner. It has never been supposed that possession of such property, when so taken, could not constitute a sufficient part performance. In so far as the main opinion is inconsistent with the above I do not agree with it.

(181 Cal. 294)

ANDERSON v. ARONSOHN et al.
(S. F. 8581.)

(Supreme Court of California. Sept. 26, 1919.
Rehearing Denied Oct. 23, 1919.)

1. ACKNOWLEDGMENT ¶22 — PERSONAL KNOWLEDGE AS TO IDENTITY OF PERSONS MAKING ACKNOWLEDGMENTS NECESSARY.

Notary held not legally justified in stating in certificates of acknowledgment that persons who appeared before him to acknowledge the instruments were known to him, as required by Civ. Code, § 1185, unless the identity of the individual making the acknowledgment is established by the oath of a credible witness.

2. ACKNOWLEDGMENT ¶48—STATEMENT BY NOTARY IN CERTIFICATE GUARANTY OF GENUINENESS OF INSTRUMENT.

A notary's act, in stating in certificates of acknowledgment that the persons who appeared before him were known to him, made the certificates guaranties of the genuineness of the instruments acknowledged, in view of Civ. Code, § 1185.

3. ACKNOWLEDGMENT ¶22 — WHAT CONSTITUTES PERSONAL KNOWLEDGE OF NOTARY AS TO IDENTITY OF PERSON.

Personal knowledge by a notary of the person making an acknowledgment, such as will justify the notary in stating in the certificate that the person is known to him, involves some-

thing more than an introduction by another person and casual meetings following it, and must be based on circumstances surrounding the person, tending to show he is what he purports to be.

4. ACKNOWLEDGMENT ¶22—INTRODUCTION UNDER OATH NOT PERSONAL KNOWLEDGE OF PERSON MAKING ACKNOWLEDGMENT.

Merely because a person is introduced to a notary under oath as the one who is to make an acknowledgment, the notary is not legally in possession of such personal knowledge of the person as justifies his making certificate to the acknowledgment.

5. ACKNOWLEDGMENT ¶48—NOTARY REQUIRING OATH AS TO IDENTITY RELIEVED FROM LIABILITY IF DECEIVED.

If a notary takes all due precautions in taking an acknowledgment, and fully complies with Civ. Code, § 1185, in the absence of personal knowledge of the person, by requiring the oath of a credible witness, he will not be held liable if he is deceived in the identity of the person.

6. ACKNOWLEDGMENT ¶48—NEGLIGENCE OF NOTARY IN TAKING ACKNOWLEDGMENT AS PROXIMATE CAUSE OF LOSS.

The negligence of a notary in taking an acknowledgment cannot be considered the proximate cause of loss sustained by a lender through the procurement by such lender's agent of loans to false parties, whose acknowledgments were taken by the notary.

In Bank.

Appeal from Superior Court, City and County of San Francisco; E. P. Shortall, Judge.

Action by Steven Anderson against Martin Aronsohn and others. From a judgment for defendants, plaintiff appeals. Reversed, and cause remanded for a new trial.

Carl W. Mueller, of San Francisco, for appellant.

Marshall B. Woodworth, of San Francisco, for respondents.

McCutchen, Olney & Willard, of San Francisco, amici curiæ.

LENNON, J. This is an appeal from a judgment in favor of the defendants in an action against a notary public and his sureties on his official bond to recover for damages alleged to have resulted from the negligence of the notary.

It appears from the findings that a few days prior to April 19, 1916, one Ambrose, a real estate agent and loan broker, through whom plaintiff had previously loaned money, called upon the plaintiff to secure a loan of \$900 upon certain real estate in the city and county of San Francisco owned by Louetta A. Pilliken, for whom Ambrose purported to act. The plaintiff having decided to make the loan, a note and deed of trust were given to Ambrose for execution by Mrs. Pilliken and her husband. Ambrose returned the

document, signed and acknowledged in proper form before the defendant Aronsohn, a notary public, and, upon presentation of an order purporting to be signed by the Pillikens, Ambrose received the amount of the loan in currency. At no time during the transaction did plaintiff deal with any one save Ambrose. In May of the same year, through a similar transaction, plaintiff advanced to Ambrose the sum of \$700 upon property owned by one Mary French. Plaintiff subsequently discovered that the owners of the properties in question, the Pillikens and Mary French, had never signed the notes or deeds of trust, or received the money, and that confederates of Ambrose had impersonated these parties before the defendant notary. The certificates of acknowledgment of both deeds of trust were each to the effect that the subscribing parties were "known" to the notary to be the persons whose names are subscribed to the instruments. The question presented upon this appeal is whether or not Aronsohn was legally justified in stating in the certificate of acknowledgment that the persons who appeared before him to acknowledge the instruments were known to him.

It appears that on September 8, 1915, the persons who represented themselves to be the Pillikens were introduced to Aronsohn by Ambrose on the occasion of their assignment of an interest in a mining claim. Aronsohn acknowledged the instrument, and certified to the identity of the parties under the oath of Ambrose, who was personally known to him. He made a record of this transaction in his books. We shall here quote the evidence concerning the further acquaintance of Aronsohn with these parties.

"Q. Now, did you after this transaction have occasion to meet these two Pillikens again? A. Yea. Q. Frequently or otherwise? A. Yes, five or six times. Q. And where? A. Met them the following day at the Fair, 1915, Native Sons of the Golden West Day, Admission Day, also at cafeteria, on streets, also was at my office. Q. When were they at your office? A. Shortly before April 19, 1916. Q. For what purpose? A. Mr. P. called at my office and asked me where he can get a loan on a note, and I suggested him to wait until Morris Plan Bank open business, as they were advertising loans at 6 per cent.," etc.

It also appears that on March 2, 1915, the person who represented herself to be Mary French was introduced to Aronsohn by his former teacher, Henry Frank. He took an acknowledgment of the signature of this woman, Frank acting as identifying witness. Aronsohn also made a record of this transaction in his books. The following is the evidence of his further acquaintance with this Mary French:

"Q. When did you again see Mrs. Mary French, if at all, previous to May 6, 1916? A. December 2, 1915. Q. What was the occasion of your meeting Mary French on December 2,

1915? A. She was at my office with Mr. Ambrose, who requested me to acknowledge a document.

"The Court: Did Mr. Ambrose request you to acknowledge a document, or Mrs. French request you to acknowledge a document? A. Mrs. French."

[1, 2] Basing its conclusion upon these facts, the trial court has decided that Aronsohn was legally justified in stating in the certificates of acknowledgment that the persons who appeared before him to acknowledge the instruments in question were known to him. With this conclusion we are unable to agree. The statutes prescribing the duty of a notary in ascertaining the identity of an acknowledger are not uniform. In some states the notary must either "know" or have "satisfactory evidence" that the person making the acknowledgment is the individual described in the instrument. Under such a statute some courts have held that it is sufficient if the officer's conscience is satisfied. *Wood v. Bach*, 54 Barb. 134, overruling *Jones v. Bach*, 48 Barb. 568. Other courts have held the notary to the care and diligence of a reasonably prudent man. *Barnard v. Schuler*, 100 Minn. 289, 110 N. W. 966. The California statute, however, provides that, unless the person making the acknowledgment is known to the officer to be the individual described in and who executed the instrument, his identity must be established by the oath of a credible witness. Civ. Code, § 1185. As stated by this court in *Joost v. Craig*, 131 Cal. 504, 509, 63 Pac. 840, 842 (82 Am. St. Rep. 374):

"This makes the certificate upon personal knowledge a guaranty of the genuineness of the instrument. * * *"

[3] The question presented for our decision relates to the degree of acquaintance which will authorize the notary to certify that he has personal knowledge. The acquaintance of Aronsohn with the confederates of Ambrose subsequent to the time of their introduction to him was not such as to furnish any rational basis for personal knowledge of their identity. Such knowledge, in our opinion, involves such an acquaintance, derived from association with the individuals in relation to other people, as establishes their identity with at least reasonable certainty. Such an acquaintance cannot in its very nature depend upon the mere word of one or two or three individuals, but must be based upon a chain of circumstances surrounding the persons in question, all of which tend to show that they are what they purport to be. That there is nothing to arouse suspicion is not enough. Something affirmative in the nature of evidence of identity must appear during the course of the acquaintanceship, which would not normally appear if the persons were other than they purport to be, before it can be said that their identity has become a matter of

personal knowledge; that is to say, personal knowledge involves something more than the casual meetings which followed Aronsohn's original introduction to the confederates of Ambrose.

[4] The question then remains whether or not Aronsohn can be said to have acquired such personal knowledge of the parties upon their introduction under oath as to justify the making of the certificate. Such an introduction is not enough. *Hatton v. Holmes*, 97 Cal. 208, 212, 81 Pac. 1131; *Joost v. Craig*, supra. As stated by the court in *Homan v. Wayer*, 9 Cal. App. 123, 126, 98 Pac. 80, 81:

"A certificate of personal knowledge is not justified by swearing the person who executed the instrument or *any other person*." (The italics are ours.)

The reasons for this view are admirably expressed in *State v. Meyer*, 2 Mo. App. 413, 420. Without perhaps indorsing all that was stated in the opinion, this court quoted with approval from that decision in *Joost v. Craig*, supra. Speaking for the St. Louis Court of Appeals, Mr. Presiding Justice Gantt said:

"It is not easy to give a definition of what will constitute 'personal knowledge.' Every one knows that two intimate friends, who have known each other from childhood to mature age, living in the same neighborhood all that time, may, in the fullest and most unreserved sense, be said to have such 'personal knowledge' of each other. But, if a stranger be introduced by a respectable person into any company, it is generally safe to assume that he is what he professes to be, although the person making the assumption has nothing for it but his reliance on the habits of accuracy of the introducer, who, in his turn, may be relying on similar habits in some one else, on whose information he has made the last introduction. It is obvious that, when an officer taking an acknowledgment and making a certificate assumes any such fact, he does it at his own risk. The law warns him, when he has not 'personal knowledge' of his own, to resort to certain observances which the law supposes to be sufficient in practice to prevent imposition. The very lowest of these observances is proof by two witnesses who possess such personal knowledge of the identity of the cognizor with the grantor; for the statute says, cautiously, 'at least two credible witnesses.' Hence we see that, in a case of any doubt, it is not only permissible, but imperative, that the number of witnesses should be increased; that not only their number, but their credit, must be looked to by the officer; that, as their testimony is to be taken, they must be sworn; and that, to secure them for future reference, their names and places of residence must be stated in the certificate. An officer taking all these precautions may, of course, be still deceived, and so be led to make a certificate that is calculated to mislead. But such a certificate is infinitely less likely to deceive or mislead than a declaration that the party making the acknowledgment is well known to the officer making the certificate. It puts all persons upon inquiry, and furnishes a clew for conducting it, and it complies with the law. If, after all, the party making the acknowledgment proves to be an impostor, the officer would,

we think, if acting in good faith, stand excused. But we are of the opinion that the noncompliance with the formalities enjoined by the statute, and the assumption of any fact which afterwards proves to be no fact at all, will subject the officer to all the risks attendant on the negligent performances of official duty. It may be very courteous to waive all such formalities; it may be disagreeable to speak plainly, and tell a party that one is not willing to assume that he is not falsely personating another; but no one is at liberty to practice courtesy or gain popularity, to indulge his own indolence, or avoid unpleasant things at the expense of others. If these others sustain loss by his laxity, it is impossible to listen to assurances from him that he meant well, and really did not know better, where it was his plain duty to probe the matter to the bottom, and not to certify at all until he knew what he was talking about. It is perfectly idle for him to protest that he did not know or suspect that his certificate was false. *That* may be granted; but it is nothing to the purpose. His business was to know *that it was true*."

[5] Respondents place great reliance on the statement in *Joost v. Craig*, supra, that—

"A notary may take all due precautions, and fully comply with the statute and still be deceived. In such case he would not be held liable; but if he has not fully complied with the statute, the rule announced above [in *State v. Meyer*, supra] is not a whit too stringent."

In view of the context in which this statement is found, and in view of the context in the *Meyer* Case from which it was paraphrased, it affords the respondents slight comfort. The meaning of the court is clear. It is that if the notary takes all due precautions and fully complies with the statute *by requiring the oath of a credible witness*, he may still be deceived, and in that event, he will not be held liable, but that, if he has not complied with the statute by requiring such an oath, but has, on the contrary, certified that he has personal knowledge of the identity of a person whom he knows merely through the introduction of another, it is not a whit too stringent to hold that he does so at his own risk.

[6] The respondent contends that Ambrose was the agent of Anderson for the purpose of transacting the loans. Were this in fact the case, the negligence of Aronsohn could not, of course, be considered the proximate cause of the loss sustained by Anderson. *Overacre v. Blake*, 82 Cal. 77, 22 Pac. 979. But the trial court did not find, and the evidence does not show, that Ambrose did act in the matter as the agent of Anderson.

The judgment is reversed, and the cause remanded for trial anew.

We concur: ANGELLOTTI, C. J.; WILBUR, J.; SHAW, J.; LAWLOR, J.; MELVIN, J.

Mr. Justice OLNEY, deeming himself disqualified, does not participate in the foregoing decision.

(181 Cal. 251)

**FAVORITE et al. v. SUPERIOR COURT
OF RIVERSIDE COUNTY et al.**
(L. A. 6096.)

(Supreme Court of California. Sept. 24, 1919.)

**1. PLEADING ⇨214(1) — DEMURRER ADMITS
FACTS ALLEGED.**

Where a cause was submitted on demurrer to a petition for a writ of prohibition against the superior court and judge thereof, the facts alleged are admitted.

**2. PROHIBITION ⇨20—PETITION TO RESTRAIN
JUDGE FROM ACTING BECAUSE DISQUALIFIED
INSUFFICIENT.**

A petition for a writ of prohibition, restraining the judge of the superior court from making any order in a cause in which a corporation was a party other than to transfer the same, held insufficient to show that any direct liability of the judge as a former stockholder of the corporation existed at the time the application for change of place of trial was made.

**3. COURTS ⇨207(5)—DISTRICT COURT OF AP-
PEAL CAN RESTRAIN JUDGE FROM ACTING IN
EQUITY SUIT.**

Under Const. art. 6, § 4, a District Court of Appeal has jurisdiction of an application for a writ of prohibition to restrain a judge of the superior court from making any order in an equity suit, other than to transfer the same, although appeals in equity causes are taken direct to the Supreme Court.

**4. VENUE ⇨49(1) — ON DISQUALIFICATION,
ERROR TO REFUSE CHANGE OF VENUE AND
CALL IN ANOTHER JUDGE.**

If a judge of the superior court was disqualified to hear a case in which a corporation was a party, because his wife was a stockholder, it was improper for the judge to deny a motion to change place of trial, and then call in another judge to hear the case, but he should have directed a change as provided by Code Civ. Proc. § 398; there being but one judge of the superior court of the county.

**5. CORPORATIONS ⇨506—STOCKHOLDER NOT
A PARTY TO ACTION AGAINST CORPORATION.**

A stockholder of a corporation is not a party to an action in which the corporation itself is a party.

**6. JUDGES ⇨43—DISQUALIFICATION BECAUSE
OF OWNERSHIP OF STOCK BY WIFE OF JUDGE.**

That the wife of a judge of the superior court owned stock in a corporation which was a party to the suit does not, under Code Civ. Proc. § 170, subds. 1, 2, declaring that no judge shall sit in any proceeding to which he is a party or is interested, or when he is related to any party, or to an officer of a corporation which is a party, disqualify him.

**7. JUDGES ⇨43—DISQUALIFICATION BY IN-
TEREST AFTER SALE OF CORPORATE STOCK.**

Where it appeared on application for writ to prohibit judge of superior court from trying a cause against a corporation, that the judge had disposed of his stock in the corporation a considerable period before application was made,

without more, it cannot be presumed that he was interested, so as to be disqualified, even though the liability of a stockholder for the debts of a corporation is, under Const. art. 12, § 3, direct, etc.

In Bank.

Application by O. J. M. Favorite and another for a writ of prohibition, to be directed against the Superior Court of Riverside County and Honorable Hugh H. Craig, Judge thereof. Writ denied.

Geo. B. Bush and D. B. Chapin, both of Riverside, for petitioners.

Adair & Winder, of Riverside, for defendants.

SHAW, J. This is an application for a writ of prohibition to prevent the superior court of Riverside county from proceeding in a cause pending in said court wherein the said petitioners are plaintiffs and the Security Investment Company and others are defendants. This proceeding for prohibition was begun in the District Court of Appeal for the Second District and after decision there was transferred to this court for rehearing. The original petition was filed on December 16, 1918. An amended petition was filed on December 19, 1918.

Hon. Hugh H. Craig is the regularly elected judge of the superior court of Riverside county, before whom the cause originally came on for disposition. On December 9, 1918, the petitioners here, without notice to the other party, presented to Judge Craig, ex parte, a paper purporting to set forth a motion to change the place of trial in the action. The sole ground for the motion was stated therein as follows: "On account of the disqualification of yourself to try the same." The fact which caused the disqualification referred to was not stated. Petitioners did not then file said paper, or any papers in the case, but stated to the judge that they would renew the motion on the following day. On December 10, 1918, the petitioners filed an application to change the place of trial of said cause on the sole ground that the wife of the judge was a stockholder in the said corporation, and that Judge Craig was for that reason disqualified to try the cause or make any order therein, other than to change the place of trial, as prescribed by section 398 of the Code of Civil Procedure. The attorneys for the defendants appeared to this motion, and the hearing was postponed to December 12, 1918, on which day the parties appeared, the motion was argued by the respective attorneys, and was denied by the court. It was made to appear that the wife of Judge Craig had disposed of her stock in the corporation on December 10, 1918. On the same day Judge Craig requested Hon. J. W. Curtis, judge of the superior court of San Bernardino county, to sit for him on the following day for the

purpose of disposing of the said cause. On December 13, 1918, Judge Curtis presided in the said court, and the said cause was called for further proceedings. Thereupon the petitioners objected to any further proceedings therein, and moved the court to change the place of trial thereof, upon the ground that the wife of Judge Craig was a stockholder in the defendant corporation during the pendency of the action at all times prior to December 10, 1918; that on December 9, 1918, the petitioners had made the application above mentioned to Judge Craig; that they had filed a motion for change of place of trial on December 10, 1918, as above stated; that the matter was heard on December 12, 1918, at which time it had been denied by Judge Craig. This application was heard by Judge Curtis, then presiding in the court, and, after argument, was denied. Thereupon, as before stated, this proceeding in prohibition was instituted against said superior court, and also against Hugh H. Craig, as presiding judge thereof. The object of the proceeding is to restrain the said court from making any order in the said cause, except an order changing the place of trial to the nearest or most accessible superior court, the judge of which is not disqualified from trying the same.

[1] The cause was submitted on a demurrer to the petition. The facts alleged are therefore admitted to exist. But other facts, though pertinent to the prayer of the petition, cannot be considered.

[2] Upon the argument here, it was stated that Judge Craig had been the owner of stock in the corporation defendant prior to June 13, 1917, and it was urged that he was and continued thereafter to be disqualified by reason of such fact, so long as his direct liability as a stockholder continued to exist. On this point we need only say that neither in the petition nor in the notice of motion is it alleged that he ever owned any stock in said corporation. The mere recital of the fact that Judge Craig had stated "that he had disposed of all his stock in said corporation to his wife" is not an allegation of the fact of ownership. It cannot be regarded as such allegation, and particularly in view of the fact that it is not assigned, either in the petition or in any motion addressed to the superior court, as ground for the application to change the place of trial. Nor can statements made by counsel in argument, or statements in an affidavit filed in behalf of the respondent, cure the lack of a material allegation in the petition. This court, therefore, cannot consider the effect of such ownership, if, as a matter of fact, Judge Craig ever did own such stock. The decision of the case must depend wholly on the effect of the alleged and admitted fact that his wife was the owner thereof at the time the application was made to the court, when Judge Craig was presiding therein, to change the place of trial.

[3] There is no merit in the motion of respondent to quash the writ of prohibition issued by the district court. The motion was based on the claim that the case before the superior court was an action in equity—a case in which appellate jurisdiction is, by the Constitution, lodged in the first instance in the Supreme Court alone (Const. art. 6, § 4), from which fact, it is argued, an original proceeding in prohibition to prevent action by the superior court in such a case is cognizable only in the Supreme Court. This assumption is not correct. The same section of the Constitution gives equal and concurrent jurisdiction to the District Courts of Appeal and to the Supreme Court to issue writs of prohibition in all proper cases. So far as jurisdiction to do so is concerned, the questions of appellate jurisdiction and of the nature of the action in which the act sought to be prohibited is threatened are entirely immaterial. As a matter of policy and practice, both this court and the District Courts of Appeal respectively, have at times refused to take jurisdiction of an original proceeding, where the case involved was in the superior court and was originally appealable to the other court. *Collins v. Superior Court*, 147 Cal. 264, 81 Pac. 509; *Estate of Turner* (App.) 177 Pac. 854. But this practice was not adopted because of any want of original jurisdiction in such cases in either court. This was expressly stated in the *Collins* Case.

[4] If the fact that the wife of Judge Craig owned stock in the corporation on December 10, 1918, when the application was filed and presented to him as judge of the superior court, is sufficient to disqualify him from sitting or acting as judge in that action, there is no doubt, under our decisions, that it was his duty, upon the fact being established, to grant the application and make an order transferring the case as provided in section 398 of the Code of Civil Procedure. *Livermore v. Brundage*, 64 Cal. 299, 30 Pac. 848; *Krumdick v. Crump*, 98 Cal. 119, 32 Pac. 800. There was but one judge of the superior court of Riverside county, and hence the rule stated in *Oakland v. Oakland, etc., Co.*, 118 Cal. 249, 50 Pac. 268, that an action could be retained and tried by another judge of the same court, does not apply. If his disqualification depends upon a fact not within the knowledge of the judge, as might be the case, power to determine from the evidence whether or not the fact existed would be implied from the necessity of the case, but, when established, the mandate of section 398 would certainly apply and be imperative, as was held in said cases, leaving him no discretion in the matter. It is true, as was said in *Paige v. Carroll*, 61 Cal. 215, that if, before the motion was made, the disqualified judge had called in another judge, not disqualified, to sit for him in the cause, the judge so called in could properly deny the motion to change the place of trial. But in this case

Judge Craig did not call in Judge Curtis to sit in the cause until after he had denied the motion, and therefore, as said in *Upton v. Upton*, 94 Cal. 28, 29 Pac. 411, it was "his duty to grant it," instead of denying the motion and thereafter calling in the judge. See, also, *Barnhart v. Fulkerth*, 59 Cal. 130; *Finn v. Spagnoli*, 67 Cal. 330, 7 Pac. 746. The first question presented on the merits, therefore, is whether or not the ownership of the stock by his wife at the time the motion was regularly presented to him operated to disqualify him from trying the case.

[5.6] The claim that the fact that the wife is a stockholder disqualifies the husband from trying the case as judge rests upon the following language of section 170 of the Code of Civil Procedure:

"No justice, judge, or justice of the peace shall sit or act as such in any action or proceeding: (1) To which he is a party or in which he is interested; (2) when he is related to either party, or to an officer of a corporation which is a party, or to an attorney, counsel, or agent of either party, by consanguinity, or affinity, within the third degree, computed according to the rules of law."

A provision follows for the waiver by the parties of such disqualification under subdivision 2. It is not material here. The argument is that the wife, as holder of corporate stock, is the owner of an interest in the corporation; that the corporation represents her in such action, and acts for her protection and benefit, and consequently that she is a "party" to the action, within the meaning and scope of the first clause of subdivision 2. That a stockholder is not technically a party cannot be doubted.

"Where a corporation sues or is sued in its corporate name, the action is by or against the corporation itself as a legal entity, and its members are not in any legal sense parties to the action." 1 Clark & Marshall, Corp. p. 15.

It is only where the corporation defendant refuses to defend the action, or, having begun a defense, it is made to appear that it will not prosecute the defense in good faith, that a stockholder may, upon a proper application showing the facts, be allowed to become a party and defend on behalf of the corporation. He must show that he cannot induce those in control of the corporation to do that which is right in the matter. *Waymire v. San Francisco, etc., Ry. Co.*, 112 Cal. 650, 44 Pac. 1086; 2 Clark & Marshall, Corp. p. 1690. Hence the use of the word "party" in the clause relied on does not signify that the ownership of stock by a person related to the judge within the prohibited degree disqualifies the judge from trying a case against the corporation.

The succeeding clause clearly indicates that the Legislature intended that it should not have that effect, for that clause states the fact which the Legislature must be pre-

sumed to have considered necessary to disqualify the judge where a corporation is a party. It limits the disqualification to cases where the relative is an officer of the corporation. The rule of construction that the expression of one thing excludes all others applies, and it is therefore to be presumed that the Legislature did not intend to create a disqualification by reason of the relationship of the judge to any person connected with the corporation except an officer thereof. That this is the proper construction of a statute prohibiting action by one who is related to a party to the suit is well established. It was directly held under a statute precisely like ours in this respect that the judge was not disqualified by his relationship to a stockholder. *Searsburgh T. Co. v. Cutler*, 6 Vt. 322. And a statute prohibiting a sheriff or constable from serving process in a case to which he is a party, or is related to a party, does not apply to prevent him from serving process in a case where a corporation is a party and he is a stockholder therein. *Adams v. Wiscasset Bank*, 1 Me. 385, 10 Am. Dec. 88; *Merchants' Bank v. Cook*, 21 Mass. (4 Pick.) 415. The Supreme Court of Maine in the above case stated the reasons in very apt and convincing language as follows:

"The argument arising from inconvenience is very strong. * * * Shares are continually changing owners; and a corporation of this kind, if disposed to be evasive, might, by frequent and secret transfers, abate every process commenced against them."

These reasons apply with greater force to the present case. If the corporations of this state could disqualify a judge and obtain a change of the place of trial whenever some relative of the judge within the third degree was or should become a stockholder of such corporation, it might be made very difficult, as against many corporations, to find a judge or a court where the cause to which such corporation was a party could be tried. No great effort of the imagination is necessary to perceive the consequences of such a rule. In many cases it would operate to defeat justice. We are satisfied, therefore, that the subdivision should not be construed so as to include the stockholder as a party where the corporation only is named as such.

The petitioner relies on the decision in *Howell v. Budd*, 91 Cal. 342, 27 Pac. 747, in support of his position. In that case the sons of the judge were the vendees of certain persons claiming heirship to an estate under an executory contract by which such heirs agreed to convey to the sons an interest in the estate, in consideration of their services as attorneys in establishing the heirship. The decision in the case would settle the question of such heirship. The sons were therefore as much interested in the controversy as the parties themselves. Upon a distribution they would not be improper parties,

and would have a right to appear in respect to their personal interests. The general notice of the proceeding to be given to all persons would be notice to them, as well as to every other person who claimed any interest in the estate. In view of this direct interest as compared with the remote and indirect interest of the stockholders of a corporation, and because of the provisions of the section itself above referred to implying the contrary intention in the case of corporations, we do not think this case should be extended to include cases like the one at bar. Our conclusion, therefore, is that Judge Craig was not disqualified to act in the matter by reason of his wife's ownership of stock in the corporation defendant.

[7] We have shown that there is no allegation in the petition to the effect that Judge Craig was himself at any time a stockholder in said corporation. Inasmuch as it may be claimed that his ownership was a matter within his personal knowledge and that he should have taken cognizance thereof at the mere suggestion, it may be proper to present some further considerations on the subject. Upon the hearing in the District Court of Appeal an affidavit of Judge Craig was filed by the respondents, showing that he had not been the owner of any stock in the corporation since the date of June 13, 1917. There is no information obtainable from the record to show that ownership at that date would disqualify him. The cause was submitted, as we have said, upon a demurrer to the petition. The petition does not set forth the complaint in the action pending in the superior court, nor purport to state the substance thereof. No evidence was introduced at the hearing, either in the District Court of Appeal or in this court, as to the character of said action or as to the allegations of the complaint therein. The petitioners in their briefs set forth what purports to be a statement of some of the facts alleged in said complaint. As these facts were not alleged we cannot take notice of them when presented in this manner. It is true that the liability of a stockholder for the debts and liabilities of the corporation is direct and is created as soon as the corporate debt or liability is contracted or incurred (Const., art. 12, § 3), so that, if the liability involved in the action was contracted or incurred prior to the disposition by Judge Craig of his stock, as stated in his affidavit, he might still be interested in the action and be disqualified by subdivision 1 of section 170. But there can be no presumption in this case that such liability did exist at that time, for we have no facts upon which it could be predicated. Hence the contention that he is disqualified by reason of his own interest is not sustained by the allegations or proof.

It may properly be suggested that there is no good reason for further contention in the

court below upon this subject. By calling in Judge Curtis, Judge Craig has already indicated his intention not to try the case. If it is improper for him to do so, or to choose the judge, under the actual circumstances of the case, as they may appear, the objection can easily be obviated by requesting the Governor to designate the judge to try the case.

The application for a peremptory writ of prohibition is denied, and the proceeding is dismissed.

We concur: ANGELLOTTI, C. J.; WILBUR, J.; OLNEY, J.; LAWLOR, J.; LENNON, J.; MELVIN, J.

(181 Cal. 270)

MAJORS v. SUPERIOR COURT OF CALIFORNIA IN AND FOR ALAMEDA COUNTY et al. (S. F. 9025.)

(Supreme Court of California. Sept. 24, 1919.)

1. COSTS §276 — SUIT IN FORMA PAUPERIS NOT STAYED ON DISCHARGE OF JURY UNTIL PAYMENT OF COSTS.

In view of earlier statutes and common-law rules, St. 1917, p. 788, declaring that if in a civil case the jury be discharged without a verdict the jury fees shall be paid by the parties who shall have required a jury, and until they are paid no further proceedings shall be allowed, did not require in and for plaintiff suing in forma pauperis to pay the fees of a jury which was discharged, where plaintiff after trial was begun obtained leave to amend the complaint, where there was no vexatious conduct on plaintiff's part.

2. COSTS §276 — RIGHTS OF PLAINTIFF IN SUIT IN FORMA PAUPERIS ARE IN DISCRETION OF COURT.

Whether one once admitted to sue in forma pauperis should on vexatious conduct, delay, etc., be dispauperized, is for the court to determine in the exercise of its discretion, which discretion should be exercised as in the case of one originally seeking to be admitted to sue in forma pauperis, with a view to confine the privilege most strictly to those who having a substantial right to enforce or preserve are absolutely unable to otherwise proceed.

3. COSTS §180—DISCRETION OF COURT AS TO SUIT IN FORMA PAUPERIS SHOULD BE EXERCISED WITH UTMOST CARE.

On application to sue in forma pauperis, the court should exercise its discretion in granting such relief with the utmost care, to the end that unworthy persons who are neither indigent nor possessed of substantial rights may not enjoy the privilege.

In Bank.

Petition by Ergo A. Majors for a writ of prohibition to be directed against the Superior Court of the State of California in and for the County of Alameda, and the Honor-

able T. W. Harris, Judge thereof. Writ denied.

D. C. Dutton, of Oakland, and H. F. Peart, of San Francisco (Green Majors, of Oakland, of counsel), for petitioner.

Esra W. Decoto and T. P. Wittschen, both of Oakland, for respondents.

C. A. Linn, of Napa, and Milton T. U'Ren, of San Francisco, for Andrew Martin.

MELVIN, J. When this case was in the District Court of Appeal of the First Appellate District, Division No. 1, Mr. Justice Waste prepared the opinion of the court, which was as follows:

"Application for writ of prohibition prayed to be directed against the superior court of the state of California in and for the county of Alameda, Hon. T. W. Harris, judge thereof, staying proceedings in a civil action therein pending, until plaintiff therein shall have paid the fees of the jurors in the first trial; the jurors having been discharged without finding a verdict.

"Andrew Martin, as plaintiff, commenced an action against the defendant Majors (petitioner here), to recover damages for the death of plaintiff's minor daughter, alleged to have been occasioned by the wrongful acts of said defendant. When the case was at issue and ready for trial, Martin demanded a trial by jury and sought to be allowed to further prosecute the action in forma pauperis. The superior court denied him that right and refused to proceed to trial without prepayment of the fees for the jury, as required by the then existing statutes and the rules of the court.

"On application to the Supreme Court that tribunal issued its peremptory writ of mandate directing the lower court 'immediately upon receipt of the writ to issue an order, in due form of law, granting petitioner leave to prosecute his said suit * * * in forma pauperis * * * without being required to pay any costs.' Martin v. Superior Court, 178 Cal. 289, 168 Pac. 135, L. R. A. 1918B, 813.

"Thereafter, pursuant to the direction of said writ, respondents set the action for trial, a jury was impaneled and sworn, and the trial of the cause proceeded in forma pauperis. During the trial, the jury having been in attendance two days, the plaintiff Martin obtained leave to amend his complaint. Defendant, petitioner here, was given time to answer and the jury was discharged. The fees for the jury were not, and have not been, paid.

"On motion of the plaintiff in the action, and over the objection of the defendant (petitioner here), the lower court has reset the cause and is about to proceed with the trial on the day set. Respondents in their return admit, or allege, the foregoing facts 'and in this connection allege that there is no provision in the statutes of this state or in the law of this state, providing for the payment of jurors serving in civil cases, where the action is being prosecuted by the plaintiff in forma pauperis.'

"In this contention respondents are correct and the action of the trial court must be upheld.

"In opposition to the respondents, petitioner relies upon provisions of the California statutes establishing fees of trial jurors, and decisions of the highest courts in this and other jurisdic-

tions, which he contends by analogy and parity of reasoning support his views. In the most recent legislative enactment on the subject it is provided:

"*'If in any trial in a civil case the jury be for any cause discharged without finding a verdict, the fees of the jury shall be paid by the party who shall have announced that a trial by jury is required, but may be recovered as costs if he afterwards obtain judgment; and until they are paid no further proceedings shall be allowed in the action.'* Stats. 1917, pp. 788, 789. The italics are ours for illustration.

"Section 17 of the Act of March 28, 1868 (Stats. 1867-68, p. 436), provides: 'If in any trial, in a civil case, the jury be for any cause discharged without finding a verdict, the fees of the jury shall be paid by the plaintiff, * * * and until they are paid no further proceedings shall be allowed in the action.' This language is almost identical with the provision of the section of the statute of 1917, already quoted by us, and petitioner cites *Lukes v. Logan*, 66 Cal. 33, 4 Pac. 883, referred to and approved in *Fairchild v. King*, 102 Cal. 320, at page 323, 36 Pac. 649, and *Carpenter v. Jones*, 121 Cal. 362, 53 Pac. 842, construing the language of the early statutes quoted, and squarely upholding refusals by trial courts to proceed where fees of jurors have not been paid after nonsuit or disagreement. But counsel for petitioner fails to note the vital distinction between those cases and the case in interest here. In none of the earlier decisions was the question presented as to the rights of the parties in a cause in forma pauperis. Neither did the court in any of these cases consider the vital question of the right of a litigant in a civil case to have the benefit of a jury trial regardless of his financial inability to prepay the fees for such service.

"But the whole question of the rights of a litigant in forma pauperis so recently engaged the attention of the Supreme Court of this state in this very case (*Martin v. Superior Court*, supra), that we do not need to look elsewhere for authority on which to decide the question presented by the proceeding now before us. 'The fundamental question thus presented,' says the court in its opinion, 'is of the right of the petitioner [Martin] to proceed with the prosecution of his action in the superior court in forma pauperis, and therefore without the payment in advance of the legal fees.' The court points out that this privilege, so far as regards the exemption from court fees, was conceded to litigants at common law, and holds that the power to grant such exemption, in proper cases, now exists in our courts of general jurisdiction without the declaration of express statute.

"Continuing, the court says: 'With the power in our superior courts thus declared, to admit suitors to commence or having commenced to prosecute their actions in forma pauperis in all proper cases, the next consideration is whether or not the Legislature has by its enactments designed to curtail that power. Quite aside from the question as to the power of the Legislature to do this thing, it is obvious that only the plainest declaration of legislative intent would be construed as even an effort to do this thing. We find no such expressed intent. All of the statutes dealing with the payment and prepayment of fees, such as section 4295 of the Political Code, are general in their nature and have to do with the orderly collection and dis-

position of the fees, payment or prepayment of which is prescribed by law. Neither individually nor collectively are they even susceptible of the construction that the design of the Legislature was to deny to the courts the exercise of their most just and most necessary inherent power. They have applicability to all cases where the court has not, in the exercise of that power, remitted the payment of the fees on behalf of a poor suitor, and in every instance the court's order to this effect is sufficient warrant to every officer charged with the collection of fees to omit the performance of that duty in the specified case."

"Petitioner seeks to render the decision of the Supreme Court inapplicable by his assertion that in the opinion the aforementioned section of the statute of 1917 (*supra*) was not referred to, and, so far as the language of the court discloses, was not considered. However, the earlier statutes, containing language so similar as to be almost identical, were before the court and were referred to in the opinion. Furthermore, the statute of 1917 had been passed and was in effect previous to the rendition of the decision, and the decision and the statute must be considered together.

"We fail to see a distinction between the status of a litigant in *forma pauperis* before a trial by a jury, and the same litigant after a partial trial, and discharge of the jury without finding a verdict. The act of 1917 refers to and regulates only the payment of fees where they can be and are paid by litigants. It nowhere refers to or relates to actions in *forma pauperis*. It is silent on the subject. We can see in it no declaration of legislative intent to curtail the inherent power of the superior court to admit suitors to commence, or having commenced, to prosecute their actions in *forma pauperis* in proper cases."

[1] Subsequently, the matter was transferred to this court in order that we might further examine the petitioner's contentions that in view of the peremptory provision whereby the clerk of the superior court was commanded to collect all jury fees each day in advance, the language requiring settlement of unpaid fees as a prerequisite to further proceedings could apply only to persons prosecuting actions in *forma pauperis* and that the language quoted by Mr. Justice Waste from the statute of 1868, although reproduced in substance in the act of 1917, could apply in the latter statute only to fees earned by jurors in criminal cases. Petitioner calls our attention to the facts that juries in criminal cases are paid by the counties in which the trials take place; that in ordinary civil actions fees must be paid each day in advance; and that the only causes in which jurors remain uncompensated when for any reason they are discharged are actions in which the trial is conducted under an order in *forma pauperis*. He argues, therefore, that there is no case in which the provision of the statute of 1917 that until the jury fees are paid "no further proceedings shall be allowed in the action" could possibly operate or be at all applicable excepting in civil actions proceeding in *forma pau-*

peris. He therefore insists that the statute of 1917 unequivocally applies to the trial of *Martin v. Majors*, and that, the jury having been discharged without finding a verdict, "no further proceedings shall be allowed in the action" until the jurors are paid.

To this argument respondents answer that for many years the law had been in virtual accord with the quoted section of the act of 1917, yet this court in *Martin v. Superior Court* announced no exception to the rule that in all stages of a trial a poor suitor shall have all of the benefits of uncompensated service from jurors and court officers.

There was no substantial change in the statutes amendatory of the act of 1868 with reference to the compensation of jurors until the statute of 1917 was adopted. *Stats. 1869-70, pp. 148-176; Stats. 1871-72, p. 188. Section 631, subd. 5, Code of Civil Procedure*, provides that a trial by jury may be waived in certain actions by the several parties to an issue of fact, "by failing, at the beginning of each day's session, to deposit with the clerk the jury fees and * * * mileage for such day"; but this subdivision (adopted in 1915) throws no light upon the problem presented to the court in the matter at bar. Petitioner declares that there is a wide and fundamental difference between the fee bill of 1868 and its early successors and that of 1917. In the act last framed, while there is a provision for payment of jurors by the county, all of their compensation in civil cases must come from the daily prepayment of the proper fees. By the earlier acts the fees were payable, in civil cases, by the prevailing party, before the entry of the verdict. There was also the provision that, if the sum received by each juror should be found at the end of the term to be less than the legal per diem and mileage, the difference should be paid by the county.

But it is argued by respondent that, inasmuch as actions prosecuted in *forma pauperis* were not specified in terms by the statute, and because the Legislature was dealing with the general practice in jury cases, the lawmakers only had in mind the situation which might arise in a suit or proceeding in which solvent litigants might be engaged. Respondents, in short, contend that the apparent restricted meaning of the requirement for payment of fees prior to further proceedings after discharge without verdict of a jury arises from unintentional inclusion in a statute adopting a new rule for prepayment of fees in ordinary cases of language which had been applicable to all litigants when used in earlier enactments. It is also asserted on behalf of respondents that in giving to the fee bill the interpretation suggested by petitioner this court would be going contrary to the spirit, if not the letter, of the decision in *Martin v. Superior Court*. With reference to the point last stated we agree with respondents that a very

liberal view of the rights of poor litigants was adopted by this court in the Martin Case. There it was decided that only the plainest declarations of legislative intent would be construed as an effort to curtail the authority of courts given by the common law to admit litigants to sue in forma pauperis. In view of the language of the opinion in Martin v. Superior Court and of an examination of the various fee bills themselves, we are constrained to agree with respondents.

Since the submission of the cause it has been suggested by a member of the court that perhaps the legislators who enacted the statute of 1917 might have had in mind the fact that at common law a vexatious suitor in forma pauperis or one who unnecessarily delayed or otherwise damaged his adversary might be dispaupered and prevented from having further benefit of uncompensated service of jurors. This leads to an inquiry whether or not it is reasonable to suppose that the new matter in the act of 1917 was an attempt automatically and without the intervention of a court to dispauperize any one who had failed of a verdict from the jury first drawn. Such a result might follow the enforcement of the letter of the law of 1917.

Common-law courts, it is true, were jealous of extending the privilege of suing in this form. In Lilly's Practical Register (edition of 1735) p. 851, we are informed that Rolle, Chief Justice, said:

"That he did not use to admit any one generally to sue in forma pauperis, that is, to sue in all causes, but only to sue so in one cause by virtue of that admittance, 1654. B. S. So that if he had other cause to shew, he must petition again to be admitted to sue in forma pauperis, & sic toties quoties."

The same author in the same article uses the following language:

"If one that is admitted to sue in forma pauperis, will not proceed according to the rules of the court, but useth delays to vex his adversary, the court will dispauper him. (Mich. 22 Car. B. R.) For the law doth not favour the poor to do injury to others, but to help them to recover their right, where they want ability of themselves to do it."

There was a rule also that if a pauper gave notice of trial and did not proceed he should be dispaupered. A note of this rule is found in 91 Eng. Rep., Full Reprint, 433.

However, the rule seems to have been enforced, generally speaking, only upon some showing of vexatious conduct on the part of the pauper. In Blood v. Lee, reported in volume 95, Eng. Rep., Full Reprint, at page 912, we find the following interesting matter:

"Wilmot, C. J., cited, from his own manuscript notes, the following cases relating to paupers and costs: Winter v. Slow, Mich. 4 Geo. 2, B. R., was trover by a pauper: at the trial, the plaintiff proved a demand and refusal at the time of serving the writ, which being after the

commencement of the action, he became nonsuited; and having brought a second action for the same thing, it was moved that he might pay the costs of the nonsuit in the former action, before he proceeded in the second action; but the court refused to grant the motion, because they thought the plaintiff had not been vexatious. In Taylor v. Lowe, Trin. 7 & 8 Geo. 2, B. R., the plaintiff being a pauper, and having given five or six notices of trial and thereby vexed the defendant, it was moved that he might pay costs of former notices, or be restrained from proceeding to trial; but while the admission to sue in forma pauperis stood they would make no rule about costs, but made a rule to shew cause why he should not be dispaupered, which was made absolute upon an affidavit of service thereof."

In Hullock's Law of Costs (edition of 1796) 213, a case is cited where a single nonsuit made costs at once due, and it was ruled that the pauper might not thereafter proceed without paying costs, or showing, according to the act of Parliament, that he was whipped. The same learned author, at the same page, cites Winter v. Slow, supra, where it appeared that the nonsuit was not upon the merits, but occasioned by a mistake of plaintiff's attorney, and therefore in the court's opinion not vexatious. In Noaks v. Watts, 98 Eng. Rep., Full Reprint, 609, it was decided that a pauper shall not pay costs for not going on to trial, as other plaintiffs do; but if the costs are taxed the court would prevent his being vexatious by obliging him to pay them before going to trial.

It was declared in Doe dem. Leppingwell v. Weake, 2 Smith's (John Prince) Reports, 676, that withdrawing the record at the third day of the assizes, after giving notice of trial, was vexatious conduct meriting dispaupering of the plaintiff, but in that case it was decided that defendants had waived their right to complain.

In Brittain v. Greenville, 93 Eng. Rep. Full Reprint, 1072, the court denied a motion to tax costs after a lessor admitted in forma pauperis had a verdict against him. The purpose was to ground a further motion to stay his proceedings in a second ejectment. The decision seems to be grounded, in part at least, upon the failure of the moving party to proceed in the usual way to dispauper his adversary. It was held, however, that plaintiff's conduct was not vexatious.

In Doe dem. Leppingwell v. Trussell, 6 East 504 (probably a companion to Doe dem. Leppingwell v. Weake, supra), it was found that the plaintiff suing in forma pauperis had caused much delay by twice setting the case for trial and afterwards countermanding the notice, in one instance, before the term, and in the other withdrawing the record on the third day of the assizes. The defendant had incurred above £100 costs in procuring evidence, and his attorney swore that he believed the merits to be in favor of the defendant. The reporter describes the proceedings and their result as follows:

"To shew that the proper course was to move that the party should be dispaupered in case of vexatious delay, 2 Salk. 506; Taylor v. Lowe, 2 Stra. 903; Brittain v. Greenville, 2 Stra. 1122, and 2 Tidd's Practice, 893, were cited. It was contended that the lessor of the plaintiff ought at least to have countermanded his notice, and thereby saved a great part of the expense which the defendant had sustained.

"On this day Lawes shewed cause upon an affidavit, which stated, that the lessor of the plaintiff having about 30 copies of registers to procure, and several witnesses to collect, among whom was an old and infirm man, was unable to get to the assizes in time, and therefore was under the necessity of withdrawing the record.

"The court, however, made the rule absolute for dispaupering the lessor of the plaintiff, but discharged it as to the payment of costs."

Under the heading "Forma Pauperis" in 1 General Index to the English Common-Law Reports (Biddle and McMurtrie Edition of 1882), at page 373, we find the two following notes:

"Amendment without costs not demandable of right. Foster v. Bank, li. 878; 6 Q. B. 878. Withdrawing record to amend must pay costs of the day. Thompson v. Hornby, lviii. 977; 9 Q. B. 978."

In *Weston v. Withers*, 2 Durnf. & E. 511, it was held that after nonsuit in trespass the court will stay proceedings in a second action between the same parties for the same cause until payment of the costs of nonsuit, notwithstanding the fact that the plaintiff suing in forma pauperis was a prisoner at the time of bringing the second action.

It will be at once evident from the above citations that the common-law courts were not very ready to extend the privileges of a second trial to one suing in forma pauperis if there were circumstances indicating vexatious conduct. It will be also apparent that no very definite nor fixed rule was followed. But even the practice at the common law did not in general dispauperize one who merely failed to obtain a verdict, or who by the action of his counsel in securing a postponement of the cause for correction of pleadings permitted a jury to be discharged before submission of the issues of fact. We cannot justly decide, therefore, that a rule analogous to that for dispaupering litigants at common law was intended by the Legislature of 1917.

Besides, there could be no good reason for requiring a plaintiff excused from paying jury fees at the first trial to pay on a second trial the fees from which he was so excused. Some reason might exist for failing to extend the privilege to a second trial without fees, but that would be accomplished, not by forcing him to pay the charges from which he had been exempted, but by exacting the usual charges for a second trial.

[2] The question whether one once admitted to sue in forma pauperis should, on ac-

count of vexatious conduct, delay, etc., be prevented from having further benefit of uncompensated service, is one for the court having jurisdiction in the case or proceeding to determine in the exercise of a wise discretion. Its discretion here, as in the case of one originally seeking to be admitted to sue in forma pauperis, should be exercised with a view to confine the privilege most strictly to those who, having a substantial right to enforce or preserve, are absolutely unable otherwise to so do, and who, once having been admitted to proceed in forma pauperis, diligently pursue a course free from unreasonable delay or vexatious conduct of any kind.

[3] In conclusion, we wish most emphatically to declare our conviction that such discretion should be used with the utmost care, to the end that unworthy persons who are neither indigent nor possessed of substantial rights may not enjoy this privilege.

Petition denied. Alternative writ discharged.

We concur: ANGELLOTTI, O. J.; LENNON, J.; WILBUR, J.; OLNEY, J.; LAW-LOR, J.

(42 Cal. App. 656)

In re OLSEN'S ESTATE. (Civ. 2958.)

(District Court of Appeal, First District, Division 1, California. Aug. 13, 1919. Rehearing Denied by Supreme Court Oct. 9, 1919.)

1. WILLS §130—HOLOGRAPHIC WILLS SUFFICIENTLY DATED BY USING FIGURES.

The figures "4/12/17th" are a sufficient dating for holographic will.

2. WILLS §130—HOLOGRAPHIC WILL CONSISTING OF TWO CLAUSES SUFFICIENT THOUGH ONE IS UNDATED.

A writing containing two clauses, the first dated and the second undated, each clause being signed by testator, and written all at one time by him, held to constitute a single instrument, and not a will and an undated codicil.

3. WILLS §130—INSTRUMENT SUFFICIENTLY INTELLIGIBLE AS HOLOGRAPHIC WILL.

An instrument written and signed by testator, reading, "mod clark I leev hore \$2000 more cash money. My my is cleere i leev hore alle," held sufficiently intelligible to constitute a holographic will.

Appeal from Superior Court, City and County of San Francisco; Thomas F. Graham, Judge.

In the matter of the estate of Jack Olsen, deceased. Petition to probate will by Maude Clark, contested by Otto Stein and Gus Stein, also known as Otto Ottoson and Gus Ottoson. From an order and decree admitting holographic will to probate, contestants appeal. Affirmed.

Ambrose Gherini and Edwin H. Williams, both of San Francisco, D. Edwin Lyons, for appellants.

Samuel M. Shortridge, J. E. Harper, and Cullinan & Hickey, all of San Francisco, for respondent.

RICHARDS, J. This is an appeal from an order and decree admitting the olographic will of one Jack Olssen to probate upon the petition of the devisee named therein.

The following is a copy of the document in question:

"4/12/17th

"mod clark 351 jones st progfeeld Apa Apar-
mass 201 I leev hore \$2000.00 more cash mony

"Jack Olssen

"My my is cleere i leev hore alle

"Jack Olssen"

The trial court in its findings construed the above document, with the proper spelling of the words therein, to read as follows:

"4/12/17th.

"Maude Clark, 351 Jones street, Brookfield
Apartments, Apartment 201, I leave her \$2000-
00 more, cash money. Jack Olssen.

"My mind is clear. I leave her all.

"Jack Olssen."

[1] To this reading the appellants offer no particular objection, but insist that the original document, even with this reading, has not the qualities of an olographic will, and is otherwise too indefinite as to its intent to be given effect. The first arrow of the appellants is aimed at the date of the instrument, but we think this assault is sufficiently met by the decision of the Supreme Court in the matter of the Estate of Chevallier, 159 Cal. 161, 113 Pac. 130, in which the figures "4-14-07" was held to amount to a sufficient dating of an olographic will. The appellant insists that the addition of the letters "th," in connection with the figures at the head of the instrument in question here, renders their meaning uncertain; but we think that this is a hypercriticism, and that no real distinction can be found between the two cases.

The appellants' next contention is that, even if the instrument shall be held to be sufficiently dated and signed, as to the first portion thereof, the closing clause of the document must be regarded as an undated codicil. This question, however, must be determined by the circumstances under which the instrument was drawn, as revealed by the testimony in the case, from which it appears that the testator was, on the date which the document bears, a patient at the St. Francis Hospital in San Francisco, where he died five days later, and that, being then on his deathbed, he was observed by his nurse attempting to write something upon a piece of newspaper, and was asked by her if he would like to have some writing paper, and upon his nod-

ding his head affirmatively she went out and got him a desk pad of writing paper; whereupon he asked her to telephone to the proponent, Maude Clark, which she did within the next 10 or 15 minutes, during which he was writing upon the piece of paper which the nurse identified. He had practically completed such writing when she returned to the room, and folding up the paper, he put it away. Within a half hour thereafter the proponent of this will came to the room of the testator, when he gave her the folded paper, telling her to take care of it, and not lose it, for it meant a whole lot to her. The folded paper, in the precise form in which the said proponent received it, was produced in court.

[2] From these facts we think the trial court was justified in arriving at the conclusion that the instrument in question was written all at one time, and was to be construed as a single instrument expressive of the will of the testator.

[3] As such we are satisfied that the reading thereof adopted by the trial court renders it a sufficiently intelligible and properly executed writing to constitute an olographic will, and hence that the trial court was not in error in admitting same to probate.

The order and decree are affirmed.

We concur: WASTE, P. J.; LANGDON,
Judge pro tem.

(42 Cal. App. 585)

SPOTTON v. DYER. (Civ. 2824.)

(District Court of Appeal, First District, Division 2, California. Aug. 8, 1919. Rehearing Denied by Supreme Court Oct. 6, 1919.)

1. APPEAL AND ERROR ⇨704(2)—APPELLANT BY FAILING TO PRESENT EVIDENCE ADMITS FINDINGS CORRECT.

On appeal from order denying motion to vacate judgment under Code Civ. Proc. § 663, and to change conclusions of law on the ground that they are not supported by the findings, appellant by failing to present evidence to appellate court concedes that the findings are correct and responsive to the issue.

2. APPEAL AND ERROR ⇨931(2)—FINDINGS ARE TO BE CONSTRUED MOST STRONGLY IN FAVOR OF RESPONDENT.

On appeal from order denying motion to vacate judgment on ground that the conclusions of law are not supported by findings under Code Civ. Proc. § 663, findings are to be construed most strongly in favor of respondent, and any uncertainty is to be resolved against appellant in support of the judgment.

3. BILLS AND NOTES ⇨134—WRITTEN CONTRACT AND NOTE THEREUNDER ARE TO BE CONSTRUED TOGETHER.

Under Civ. Code, § 1642, a written contract and a note, executed contemporaneously there-

with as a part of the same transaction, are to be taken together, though neither refers to the other.

4. BILLS AND NOTES §835—TRANSFEREE OF NOTE WITH KNOWLEDGE OF CONDITIONS STANDS IN PLACE OF PAYEE.

Where payment of note was made subject to performance of a condition by collateral written agreement, payee's transferee, who takes note with knowledge of such condition, is in no better position than original payee.

5. BILLS AND NOTES §164 — NOTE WITH STATEMENT OF CONDITIONS THEREIN NONNEGOTIABLE.

Under Civ. Code, §§ 3088, 3092, a statement on face of note that note was not to be paid unless payee performed certain condition would have destroyed negotiability of note.

6. BILLS AND NOTES §164—NOTE PAYABLE ON CONDITION NONNEGOTIABLE IN HANDS OF INDORSEE WITH KNOWLEDGE.

Where note was executed contemporaneously with written agreement and as part of same transaction, a condition limiting payment of note on performance of certain condition by payee, contained in the collateral agreement and not in the note itself, rendered note nonnegotiable in the hands of the payee and his indorsee with knowledge of the condition.

7. BILLS AND NOTES §132—MAKER OF NOTE COULD AVOID PAYMENT ON PAYEE'S NONPERFORMANCE OF CONDITIONS.

Where collateral agreement made payment of note conditional upon performance of certain condition and further provided that maker, if dissatisfied with contract, could rescind before certain date, maker could avoid payment of note because of payee's nonperformance of condition, notwithstanding maker's failure to rescind before specified date.

8. BILLS AND NOTES §113—PAYING ONE INSTALLMENT NOTE NOT WAIVER OF CONDITIONS UNPERFORMED.

The mere fact of paying one of a series of installments conditioned upon the performance of an act by the payee does not constitute a waiver, either of the right to have the act performed, or the correlative right to refuse to make further payments until it is performed.

9. BILLS AND NOTES §132—TIME NOT ESSENCE OF PERFORMANCE OF CONDITION OF CONTRACT.

Where payment of note was made conditional, by collateral agreement, upon payee's construction, by certain date, of certain number of feet of billboard, payee might have performed after such date under Civ. Code, § 1492; time not being of the essence of the condition of the contract.

10. BILLS AND NOTES §113—PAYMENT OF INSTALLMENT NOTE NOT WAIVER OF FUTURE PERFORMANCE OF CONDITION.

Where payment of certain amounts on July 1st and October 1st were made conditional upon payee's performance of certain conditions by June 1st, maker's payment of July 1st installment, notwithstanding payee's failure to perform condition, did not waive maker's right

to refuse October payment because of continuing breach.

Appeal from Superior Court, City and County of San Francisco; James M. Seawell, Judge.

Action by E. K. Spotton against Edward F. Dyer. From an order denying a motion to vacate judgment against him and to change conclusions of law on the ground that they are not supported by the findings, plaintiff appeals. Affirmed.

Gavin McNab and R. P. Henshall, both of San Francisco, for appellant.

Powell & Dow, of San Francisco, for respondent.

BRITTAİN, J. [1] The plaintiff appeals from an order denying his motion made under the provisions of section 663 of the Code of Civil Procedure to vacate a judgment against him and to change the conclusions of law on the ground that they are not supported by the findings. None of the evidence is before the court. In such a case the appellant necessarily concedes that the findings are correct and responsive to the issues.

[2] On April 1, 1914, the two instruments involved in this suit were executed. One was a contract between Charles H. Green, of San Francisco, and Edward F. Dyer, of Cleveland, Ohio, and the other a promissory note, negotiable in form, for \$10,000, made by Dyer to Green payable October 1, 1914. Under the terms of the contract, among other things, Green was to complete and transfer to the Green-Dyer Company on or before June 1, 1914, 10,000 lineal feet of billboards in and near the cities of San Jose, Santa Cruz, and Salinas. These billboards constitute "the plants" to which reference is made in the findings. The contract recited the payment of \$10,000 by Dyer, coincident with its execution, and bound Dyer to make two other payments of \$10,000 each on or before July 1, 1914, and on or before October 1, 1914, "provided, however, that no payment shall be made by said Dyer other than said ten thousand (\$10,000) dollars until the said plants shall have been duly and legally transferred to the Green-Dyer Company, as hereinabove required, and until said plants shall have been completed as provided in paragraph nine hereof." The initial \$10,000 only having been paid, the proviso applied to the future payments Dyer agreed to make. The proviso was in paragraph 3 of the contract. Paragraph 9 contained the requirement for Green to complete the plants. The lengthy contract was set forth in full in the findings, and in introducing it the court found that the consideration for the execution of the note by Dyer was the execution of the contract by Green. It was further found that the note and contract

were concurrent and dependent; executed at the same time, between the same parties, and with reference to the same subject-matter; and "that said note evidences and was intended * * * to evidence the final payment of \$10,000 required by paragraph third of said contract to be paid on or before October 1, 1914. That said final payment was evidenced by said note for convenience of collection only, and there was no understanding between the defendant and said Green that the note was to be negotiated." In support of the judgment, any uncertainty in the findings must be resolved against the appellant, and they are to be most strongly construed in favor of the respondent. *Gould v. Eaton*, 111 Cal. 639, 44 Pac. 319, 52 Am. St. Rep. 201; *Breeze v. Brooks*, 97 Cal. 72, 31 Pac. 742, 22 L. R. A. 257; *Cooley v. Bruns- wig*, 30 Cal. App. 58, 157 Pac. 13.

[3] In neither instrument was there any reference to the other. This fact did not militate against the operation of the rule that several contracts relating to the same matter between the same parties, and made as parts of substantially one transaction, are to be taken together. Civ. Code, § 1642. Paraphrasing this rule and citing *Goodwin v. Nickerson*, 51 Cal. 166, a leading text-writer says:

"Where there is a contemporaneous written contract affecting the terms of the note, it is to be construed with the note. * * * Any lawful condition annexed to the note by a collateral written agreement may be enforced." *Daniel on Negotiable Instruments*, § 156.

In the familiar application of this rule to notes secured by mortgages, frequently one or each of the instruments refers to the other. The rule is not changed where no such reference is made. In the hands of the original payee or of a transferee of the note with knowledge of the collateral agreement, whether or not the note is negotiable in form, it is nonnegotiable in fact. *Metropolis, etc., Bank v. Monnier*, 169 Cal. 592, 147 Pac. 265.

After the execution of the note and contract and before the maturity of the note, Green, for value, transferred the note to the International Banking Corporation. The court found that prior to and at the time of such transfer, and at all times mentioned in the complaint, the bank had notice and knowledge of the existence of the contract and of all the provisions thereof, and that it took the transfer with such notice and knowledge. After maturity of the note the bank transferred it to the plaintiff, not for value nor in the due course of business, but for the purpose of collection only. At no time after the execution of the contract was the capacity of the billboards in excess of 7,468 lineal feet, Green having failed to increase the plants to the contractual 10,000 lineal feet.

The complaint was in the ordinary form

of a suit on the promissory note. The defendant set up the contract, the failure of Green to complete the plants, and the knowledge of the bank. The last finding was that the note had not been paid, "but that by reason of the provisions of the said contract, and the facts herein found in connection therewith, there is nothing due or owing from the defendant on said note." The conclusions of law, each of which is attacked by the appellant, are that the bank and its assignee, the plaintiff, are bound by the provisions of the contract governing the payment of moneys represented by the note; that as to the bank the note was nonnegotiable because of the accompanying contract of which the bank had notice; that under the provisions of the contract the defendant was not required to pay the moneys represented by the note because of the noncompletion of the plants; that there is nothing due, owing, or recoverable from the defendant; and that the defendant is entitled to judgment.

The appellant maintains the decision of the Supreme Court in the case of *Flood v. Petry*, 165 Cal. 309, 132 Pac. 256, 46 L. R. A. (N. S.) 861, is determinative of this case. It appears from the report of that case that *Petry* undertook to erect a building for *Flood*. The contract provided that the final payment, which was to have become due 35 days after completion, should be made partly in cash and the balance by a note payable 18 months thereafter. The note was executed when the contract was signed, and contained the clause:

"This note is negotiable and payable without defalcation or discount and without any relief or benefit whatever from stay, valuation, appraisement, or homestead exemption laws."

Petry pledged the note to secure a loan from a bank. He failed to perform the building contract. *Flood* sued him and the bank for cancellation of the note, alleging the bank had notice of the contract. Judgment for *Flood* was affirmed in the District Court of Appeal, but on hearing in the Supreme Court the judgment was reversed upon the ground that the particular note was an advance payment upon the executory agreement of *Petry* to complete the building, and, notwithstanding the bank's knowledge of the building contract, *Petry's* subsequent breach of the executory agreement did not affect *Flood's* liability to the bank. In reaching this conclusion, as applied to the particular note, great stress was laid upon the statement of negotiability contained in the note. In the main opinion it was said:

"If Dr. Flood had said to *Petry*, 'Take this note and, if you like, negotiate it,' the bank, knowing that fact, would have been justified in accepting it for a valuable consideration before maturity and before breach of the executory contract. But he did say substantially the same thing more emphatically than by word of mouth. He wrote it. It was to that extent a waiver of

the terms of the building contract and was a payment before performance, upon an executory agreement."

[4-6] In the present case, after the payment of the first \$10,000, the contract expressly provided that Dyer was not to pay anything more until the billboards were completed. The court found the bank knew of this condition in the contract when it took the note, and that the note and contract were interdependent. As appears from both the main opinion and the concurring opinion of Mr. Justice Shaw in the Flood Case, the decision was based largely upon the ground that under the circumstances disclosed by the evidence, and by the assurance of negotiability written on the face of the note, Flood was estopped from denying that it was negotiable. In the present case, in the absence of evidence and in consideration of the knowledge of the bank of the express statement in the contract, no element of estoppel appears. Under section 1842 of the Civil Code, the contract of which the bank had notice was the entire contract evidenced by both the formal contract and the note. It was said by Mr. Justice Shaw, in his special concurring opinion in the Flood Case, the note would have been uncollectible had it remained in the hands of Petry. In this case, by reason of the knowledge of the bank of the condition in the contract, it was in no better position than the original payee. If, on the face of the note in the present case, the statement had been made, that it was not to be paid unless Green completed the billboards, it would have destroyed its negotiability. Civ. Code, §§ 3088 and 3092, in effect prior to the amendments of 1917 (St. 1917, p. 1534). A condition, limiting the payment of a note on the happening of a contingency, contained in the collateral agreement and not in the note itself, renders the note nonnegotiable in the hands of the original payee and his indorsee with knowledge of the condition. *National Hardware Co. v. Sherwood*, 165 Cal. 1, 130 Pac. 881; *Smiley v. Watson*, 23 Cal. App. 413, 138 Pac. 367. In the Flood Case the bank was protected because the note was negotiable. In this case by reason of the condition in the contract, of which the bank had notice, the note was nonnegotiable in its hands, and in the hands of its assignee for collection after the date of its maturity.

[7] The sixth paragraph of the contract provided that if for any reason Dyer became dissatisfied with his contract with Green, and before April 1, 1915, elected to withdraw, Green should repay to him all moneys theretofore advanced by Dyer under the contract. Upon the assumption that this clause constituted a special right to rescind, it is argued that to relieve Dyer of his obligation to make the October payment he was compelled to rescind the contract, returning to Green everything of value he had re-

ceived. Under the contract, in addition to completing the plants and repaying Dyer if he elected to withdraw, Green was obligated to do a number of other things not involved in the present action. The contract provided that certain stock of the Green-Dyer Company should be placed in escrow until April 1, 1915, and, if Dyer elected to proceed further under the contract, it should then be equally divided between Green and Dyer. If, on the other hand, Dyer elected to withdraw from the venture, the stock was to remain in the hands of the depository, and if Green failed to repay Dyer the money he had advanced, the stock was to be delivered to Dyer for his security. If Dyer had rescinded, or if rescission was intended by the sixth paragraph, the result would have been the nullification of this provision for security. To hold that Dyer was compelled to abandon his contractual rights as a prerequisite to his enforcement of them would be absurd. There is no finding that Dyer received anything of value from Green in exchange for the \$20,000 he paid, other than the right to stand upon the terms of the contract, and the evidence, if any was adduced on this subject, is not before the court.

[8-10] It is argued that since the plants were to have been completed by June 1, 1914, and Dyer paid the second \$10,000 July 1, 1914, he waived Green's breach and could not rely upon it to defeat the October payment. From the findings it does not appear what actuated Dyer to make the July payment. In support of the judgment it may be inferred that the circumstances were such that Dyer did not waive any of his rights. Even though the second payment was voluntary, that alone would not bind him to make the third payment. The mere fact of paying one of a series of installments conditioned upon the performance of an act by the payee does not constitute a waiver either of the right to have the act performed or the correlative right to refuse to make further payments until it is performed. The fact that Dyer was entitled to complete performance before the second payment was made did not relieve Green from the duty to finish the work. Time was not of the essence of this condition of the contract, and Green might have performed after June 1, 1914, Civ. Code, § 1492. Dyer was not obligated to make any payment except the first until the plants were completed. After June 1, 1914, every day's failure on the part of Green to do the work was a breach of the contract, and the fact that Dyer may have waived the breach up to July 1st did not preclude him from refusing to make the October payment because of the continuing breach. *Woodard v. Glenwood, etc., Co.*, 171 Cal. 514, 153 Pac. 951.

It is further argued that, since the bank was not the assignee of the entire contract, Dyer could not offset against its claim

Green's failure to complete the billboards. It does not appear that Dyer is seeking to offset anything against the bank's claim. Under the terms of the contract the October payment never matured. It was not to be made unless Green completed the billboards, and the bank knew this when it took the note.

The judgment is affirmed.

We concur: LANGDON, P. J.; HAVEN, J.

(42 Cal. App. 596)

PEOPLE v. NEETENS. (Crim. 470.)

(District Court of Appeal, Third District, California. Aug. 11, 1919.)

1. FALSE PRETENSES ⇐31—INFORMATION INSUFFICIENT SHOWING NO CONNECTION BETWEEN REPRESENTATIONS AND OBTAINING OF THE MONEY.

An information charging that defendant obtained \$100 by means of false pretenses as to a conversation with a third person relating to the payment of a mortgage, *held* defective, not showing or indicating any causal connection between the false representation and the obtaining of the money.

2. FALSE PRETENSES ⇐4—ELEMENTS OF OFFENSE STATED.

The elements of the crime of obtaining money by false pretenses consists of a fraudulent representation, defendant's knowledge of the falsity, the making of the representation with intent to deceive the innocent party, and the innocent party's reliance thereon.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, False Pretense.]

3. FALSE PRETENSES ⇐38 — INDIOTMENT CHARGING CONVERSATION AS TO PROPOSED RELEASE OF MORTGAGE AND EVIDENCE OF STATEMENT OF RELEASE HAD, CONSTITUTED VARIANCE.

In a prosecution for obtaining money by false pretenses, which the information asserted were made with reference to a conversation with a third person as to the payment of a mortgage, and arrangement to release the premises, testimony that defendant stated the mortgagee had released the premises constituted a variance from the averments of the information.

4. FALSE PRETENSES ⇐49(1) — CORROBORATION OF PROSECUTING WITNESS INSUFFICIENT TO SUSTAIN CONVICTION.

In a prosecution for obtaining money by false pretenses, where the alleged false representations were wholly oral, testimony of the prosecutor's wife *held* insufficient corroboration of the prosecutor's testimony to sustain a conviction within Pen. Code, § 1110.

5. CRIMINAL LAW ⇐55—INSTRUCTION AS TO EFFECT OF DRUNKENNESS AS EXCUSING CRIME ERRONEOUS.

In a prosecution for obtaining money by false pretenses, an instruction that drunkenness

affords no excuse for the commission of a crime, and that evidence of drunkenness can only be considered for the purpose of determining the degree of the crime, is erroneous, not being in accord with Pen. Code, § 22, declaring that whenever the actual existence of any purpose, motive, or intent is necessary to constitute any particular species of crime the jury may consider the fact that accused was intoxicated.

6. CRIMINAL LAW ⇐823(1)—ERRONEOUS INSTRUCTION NOT CURED BY GIVING CORRECT ONE.

An erroneous instruction is not cured by the giving of one correct in law.

Appeal from Superior Court, San Joaquin County; J. A. Plummer, Judge.

Alexander Neetens was convicted of obtaining money under false pretenses, and he appeals from the judgment and order denying motion for new trial, and the order denying motion in arrest of judgment. Reversed.

Frank A. Henning, of Stockton, for appellant.

U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

BURNETT, J. Appellant was convicted of obtaining money under false pretenses, and he appeals from the judgment, the order denying a motion for a new trial, and the order denying a motion in arrest of judgment.

[1] The information upon which he was convicted charged the offense as follows:

"The said Alexander Neetens did on or about the 24th day of November, A. D. 1918, * * * devise and intend by unlawful ways and means, and by false and fraudulent representations and pretenses to obtain and get into his possession the personal property of one Jakob Hieb, in the manner following, to wit: That the said Alexander Neetens did, at and in the county aforesaid, and on or about the date aforesaid, willfully, unlawfully, knowingly, designedly, falsely, and fraudulently pretend and represent to said Jakob Hieb that he, the said Alexander Neetens, had met one Dan Seyer in the city of Stockton, * * * and had made arrangements with the said Dan Seyer to pay a mortgage which the said Dan Seyer held on the property of one Christina Wagenmann on De Forest avenue, in the city of Lodi, county of San Joaquin, * * * and that he desired to obtain from the said Jakob Hieb the sum of one hundred dollars until 10 o'clock a. m. on November 25, 1918, at which time the said \$100 would be paid to the said Jakob Hieb."

Then follows an averment of the falsity of the statement as to said meeting and agreement with Seyer. The information proceeds:

"And the said Jakob Hieb believing said false and fraudulent pretenses and representations so made as aforesaid to be true, and being de-

ceived thereby, was induced by reason of the said false and fraudulent pretenses and representations so made as aforesaid to deliver and pay over to the said Alexander Neetens the sum of \$100, * * * and the said defendant then and there, by means of said false and fraudulent pretenses and representations so made as aforesaid, did then and there willfully, unlawfully, knowingly, designedly, and fraudulently receive and obtain from the said Jakob Hieb the said sum of \$100, * * * with the intent to cheat and defraud the said Jakob Hieb of the same, and the said defendant did then and there willfully, unlawfully, and fraudulently take and carry away the same."

It is quite apparent that said information is defective, the most serious fault being the absence of any fact showing or indicating any causal connection between the false representation and the loan or transfer of the \$100 from Hieb to defendant. From no allegation does it appear that Hieb was interested in said mortgage or its release, and why he should advance money for said payment is left entirely to conjecture. Under the decision of *People v. Canfield*, 28 Cal. App. 792, 154 Pac. 33, the information herein would be held fatally defective; but the Supreme Court in *People v. Griesheimer*, 176 Cal. 44, 167 Pac. 521, has taken a different view of this requirement of the rules of pleading, and it may be that the doctrine of that decision is sufficiently flexible and potential to save the information herein.

[2] The case, however, should be reversed, we think, by reason of the insufficiency of the evidence to support the conviction. The elements to be alleged and proven in a charge like this are well known. The fraudulent representations must clearly appear. It must be shown that they were known by the defendant to be false, or were made under circumstances not warranted by the knowledge of the defendant; that they were made with intent to deceive the innocent party; that the person injured relied upon the representation, and that otherwise he would not have parted with his money. *People v. Jordan*, 66 Cal. 10, 4 Pac. 773, 56 Am. St. Rep. 73.

[3, 4] As to these elements it is well to observe that the only representation as to an existing fact, upon which the charge can possibly be sustained, is that the defendant had met one Dan Seyer, and had made arrangements with him "to pay a mortgage which the said Dan Seyer held on the property of one Christina Wagenmann." It is also apparent that the only important feature of this alleged representation consists of the allegation as to said "arrangement." The circumstance of meeting Dan Seyer is surplusage, or, at least, mere matter of inducement. The vital consideration is that he had made arrangements or had agreed with Seyer to pay a certain mortgage. When we turn to the testimony of Hieb we find that he first related the conversation with defendant without mentioning this representation at all,

and the only thing stated by him tending in any manner to support that allegation of the information is found in his answer to this suggestive question: "What, if anything, was said about any conversation with Dan Seyer?" His answer was: "Yes, he said that during the week he had been in talking to Seyer and he had released the house." That "he had released the house" is materially different from the allegation that he "had made arrangements to release" it. The variance seems substantial. Of course, the proof should correspond essentially with the allegation of the pleading. Moreover, if we concede that there is a sufficient correspondence in this respect between the testimony and the information, then there is a failure of proof, because there is no corroboration. Section 1110 of the Penal Code provides:

"Upon a trial for having, with an intent to cheat or defraud another designedly, by any false pretense, obtained the signature of any person to a written instrument, or having obtained from any person any labor, money, or property, whether real or personal, or valuable thing, the defendant cannot be convicted if the false pretense was expressed in language unaccompanied by a false token or writing, unless the pretense, or some note or memorandum thereof is in writing, subscribed by or in the handwriting of the defendant, or unless the pretense is proven by the testimony of two witnesses, or that of one witness and corroborating circumstances."

It is admitted that the so-called false representation was entirely oral. It is true that another witness testified to said conversation between the defendant and Hieb, namely, the wife of the prosecuting witness. She related the conversation as follows:

"When Mr. Neetens came over there he asked if he had a little money. Mr. Hieb says: 'Yes; I have got a little, but I need it for paying my taxes.' He said: 'I only want it until to-morrow to pay off the mortgage on Mrs. Wagenmann's house, pay the money to Mr. Seyer, and then I will pay the money back Monday morning at ten o'clock.'"

She was present during the entire interview, and in her testimony is not a word about any representation as to a conversation or arrangement between defendant and Seyer as to said mortgage. It is true that she was not asked the direct question as to whether any such representation was made by defendant, but it is a fair inference from her testimony that no such representation was made. At any rate she failed in this respect to furnish any corroborative evidence, and we find no circumstance in the case supplying the omission.

[5] Again, in his charge the learned trial judge instructed the jury as follows:

"It is a well settled rule that drunkenness is no excuse for the commission of a crime. Drunkenness forms no defense whatever to the fact of guilt, for when a crime is committed

by a party while in a fit of intoxication the law will not allow him to avail himself of his own gross vice and misconduct to shelter himself from the legal consequences of such crime. Evidence of drunkenness can only be considered by the jury for the purpose of determining the degree of the crime."

Such an instruction is erroneous in this class of cases. The authority for the instruction cited by the lower court, namely, *People v. Vincent*, 95 Cal. 428, 80 Pac. 581, and *People v. Methever*, 132 Cal. 326, 64 Pac. 481, each involved a charge of murder, which offense is divided into degrees. The offense of obtaining money by false pretenses is capable of no such division, and the principle to be applied is enunciated in *People v. Phelan*, 93 Cal. 111, 28 Pac. 855. Therein it is said:

"The intent with which a building is entered being a necessary element to constitute the crime of burglary, it is proper for the jury to take into consideration the fact that the accused was intoxicated at the time, in determining the intent with which he committed the act; and an instruction to the jury to the effect that they could not consider such evidence for any other purpose than that of determining the degree of the crime is prejudicially erroneous, there being no question as to the degree of the crime, the evidence showing without conflict that the building was entered in the night-time."

In this case, as we have stated, there is no degree of the crime, and the instruction was therefore equivalent to saying that the jury could not consider the evidence of drunkenness for any purpose; whereas, the truth is that "the purpose, motive, and intent of the defendant" were and are involved in the charge, and the correct rule is prescribed in section 22 of the Penal Code as follows:

"No act committed by a person while in a state of voluntary intoxication is less criminal by reason of his having been in such condition. But whenever the actual existence of any particular purpose, motive, or intent is a necessary element to constitute any particular species or degree of crime, the jury may take into consideration the fact that the accused was intoxicated at the time, in determining the purpose, motive, or intent with which he committed the act."

[6] This instruction was also given by the court, but it did not correct the error for the reason that "an instruction plainly erroneous is not cured by a correct instruction in some other part of the charge." *People v. Westlake*, 124 Cal. 457, 57 Pac. 487.

There is evidence in the record that the defendant at the time of the alleged offense was under the influence of liquor. Whether it contained more than the much discussed 2½ per cent. of alcohol we are not advised, but a finding that he was intoxicated would not be unsupported. Therefore it was important that the jury should be correctly instructed as to this feature.

The case for the people is weak, and we think the interests of justice demand a reversal of the verdict. Accordingly the judgment and the order denying the motion for a new trial are reversed.

We concur: CHIPMAN, P. J.; HART, J.

(42 Cal. App. 573)

COMMONWEALTH BONDING & CASUALTY INS. CO. v. PACIFIC ELECTRIC RY. CO. (Civ. 2921.)

(District Court of Appeal, Second District, Division 2, California. Aug. 7, 1919.)

1. STREET RAILROADS ⇐117(28)—CONTRIBUTORY NEGLIGENCE OF DRIVER OF TRUCK COLLIDING WITH CAR FOR THE JURY.

Whether the driver of a motor truck was guilty of contributory negligence in attempting to cross before defendant's street car, running 20 miles an hour, *held* for the jury.

2. NEGLIGENCE ⇐68 — ASSUMPTION THAT ANOTHER WILL USE CARE NOT CONTRIBUTORY NEGLIGENCE.

Though one may not willfully close his eyes to danger on the assumption that another will act with care, he cannot be deemed negligent when, if a reasonable use of his faculties does not warn him to the contrary, he rests on such assumption.

3. APPEAL AND ERROR ⇐980(2)—DEVIATION FROM INSTRUCTIONS APPEARS ONLY WHEN VERDICT NOT SUPPORTED BY EVIDENCE.

Only when the evidence does not support the verdict can the appellate court say the instructions, which did not direct a verdict for either party, were not followed.

4. TRIAL ⇐260(1) — INSTRUCTIONS REPETITION OF THOSE GIVEN PROPERLY REFUSED.

Requested instructions sufficiently covered by the instruction given are properly refused, though correct.

5. STREET RAILROADS ⇐118(15) — INSTRUCTION ON ISSUE OF LAST CLEAR CHANCE RAISED BY EVIDENCE, PROPER.

In an action against a street railway company for personal injuries by running its car into a motor truck crossing the track, question of last clear chance *held* raised by the evidence, and therefore properly instructed on.

6. STREET RAILROADS ⇐98(7)—ATTEMPT TO CROSS BEFORE CAR NOT NECESSARILY CONTRIBUTORY NEGLIGENCE.

A person is not guilty of contributory negligence merely because he attempts to cross a street railway track, where cars may legally run at 20 miles an hour, when a car is approaching.

7. STREET RAILROADS ⇐99(10) — DUTY OF TRUCK DRIVER TO USE ORDINARY CARE BEFORE CROSSING TRACK.

All that is required on any given occasion of a driver of a vehicle in attempting to use a street railway crossing, even where cars may

legally run 20 miles an hour, is to exercise ordinary care to observe coming cars through his senses of sight and hearing.

8. STREET RAILROADS \Leftrightarrow 99(7)—CROSSING BEFORE CAR UNDER REASONABLE BELIEF OF SAFETY NOT CONTRIBUTORY NEGLIGENCE.

It is not negligence for an automobile driver to attempt to cross a street railway track, at a point where cars legally may operate at 20 miles an hour, in front of an approaching car such a distance away that an ordinarily prudent person would believe he could cross safely.

Appeal from Superior Court, Los Angeles County; G. W. Nichol, Judge.

Action by the Commonwealth Bonding & Casualty Insurance Company against the Pacific Electric Railway Company. From judgment for plaintiff, defendant appeals. Affirmed.

Frank Karr, R. C. Gortner, E. E. Morris, and A. W. Ashburn, all of Los Angeles, for appellant.

Haas & Dunnigan and E. B. Drake, all of Los Angeles, for respondent.

SLOANE, J. The plaintiff corporation was the insurer of the Los Angeles Daily Express Company upon its liability to its employees under the workmen's compensation law and brought this action to recover from the defendant Pacific Electric Railway Company for damages caused by the collision of one of the latter's electric street cars with a motor truck of the express company, on which one George L. Makley was riding, and which was driven by a fellow workman, Fenn Hart. Both of these men were employees of the express company. Makley was thrown from the motor car by the collision, and had both legs cut off by the electric car. The plaintiff company, having paid the compensation allowed Makley under the workmen's compensation law, is maintaining this action under its subrogated claim against the electric railway company.

The collision took place in Hollywood, in the city of Los Angeles, at the intersection of Hollywood boulevard, which runs approximately east and west, and Wilton place, a street running north and south. The motor car was proceeding toward the south on Wilton place, and the electric car was going toward the east on the south track of the electric company's double track railway on Hollywood boulevard. The verdict of the jury was in favor of the plaintiff, and awarded damages in the sum of \$8,000. Defendant's motion for a new trial was denied, and the appeal is from the judgment upon the judgment roll and a bill of exceptions. The grounds relied on are insufficiency of the evidence and alleged errors of the court in giving and refusing instructions.

The main contention made by appellant

is that the evidence establishes contributory negligence. It does not seem to be disputed that the evidence was sufficient to justify the jury in finding that the defendant's motorman was guilty of negligence in driving his car at an excessive and unlawful rate of speed. The speed limit at the place of the accident, under the traffic ordinance of the city of Los Angeles, was 20 miles per hour. It was testified by a number of witnesses that the defendant's car approached the scene of the accident at a rate variously estimated at from 30 to 40 miles per hour. The issue as to liability for damages, therefore, hangs on the question of contributory negligence.

There may be eliminated from this consideration the manner of the approach of the motor truck to the street intersection. The evidence sufficiently discloses that after entering the street intersection both the driver and Makley saw the approaching electric car, and that the motor truck was slowed down and under sufficient control so that it could have been stopped before reaching the track on which the electric car was approaching. The driver of the motor truck and Makley claim that at this point, where they could have stopped in safety, they saw the electric car approaching, at a distance of about 200 feet, at what appeared to them to be a reasonable rate of speed. They were then going at about 8 miles per hour, and were about 20 feet from the car track on which the electric car was approaching. The driver speeded up his motor and attempted to cross in front of the electric car. Then the collision occurred. Makley, testifying as to conditions just as they attempted to cross the car tracks, says:

"I then looked to the west. When I looked to the west I saw a car about 200 feet down the track toward Taft street. I supposed this car was running at a reasonable rate of speed. I saw the car, of course, and it appeared to be coming at a reasonable rate of speed. It looked that way to me. I continued on across the boulevard. * * * When we got to the west-bound track I saw that it was coming at a high rate of speed, and I raised to jump from the truck, and before I could do so the front of the car struck on the front part of the truck and knocked it from under my feet."

The testimony of Fenn Hart, the driver of the truck, as to the situation at this juncture, was as follows:

"My auto truck at the time I first observed the car that collided with us—the front end of the truck was possibly eight or ten feet from the north rail of the north track; that would put me somewhere around fifteen feet where I was sitting in the car back from the north rail of the north track. * * * When I saw the car it was close to Taft street. I couldn't say how far Taft is, but it is the first street west—it is a block. I couldn't tell how fast the car was mov-

ing, but it seemed to be traveling at a reasonable rate of speed. I was going about eight or ten miles an hour at the time; the front end of the automobile truck was eight or ten feet from the first track. I was watching this car practically all the time. When I was north of the north track, possibly eight or ten feet—something like that—I opened up the throttle. When the front end of my truck was between the two tracks, more to the south than the north, I saw that I didn't have time to get across in front of it, and I tried to stop. One of my front wheels passed over the north rail of the south track, and then was when the collision happened. Just before it collided with me I saw it was traveling at least thirty-five miles per hour."

It was shown in evidence that the width between the rails of each of the car tracks was 5 feet, and the distance between the south rail of the north track and the north rail of the south track was 7 feet. Starting with the front of the car 10 feet north of the first track, the motor truck had probably 30 feet to go, besides its own length, before it would clear the approaching electric car. Fifty feet would cover the entire distance, as testified to by these witnesses. As they there saw the situation, the electric car was 200 feet or more distant, approaching at what they supposed was a "reasonable rate of speed." Under the city ordinance that rate might not lawfully exceed 20 miles per hour. If the auto motor's accelerated speed reached even 10 miles per hour, the driver of the motor car could clear the tracks while the electric car at 20 miles per hour covered 100 feet of the intervening space. Of course, there can be no such mathematical accuracy of calculation in such a case, but this estimate would still leave another hundred feet as a margin of safety. They took the chances. Was it negligence, as a matter of law? Or was the jury entitled to determine the question of negligence as one of fact, in view of the conditions shown by the testimony?

[1] The fact that one voluntarily assumes a certain degree of risk is not conclusive of negligence. In these days of rapid transit and congested traffic, every man who crosses a busy street, or drives an automobile, takes chances, and serious ones. The question is, are they greater than is reasonably necessary to meet the ordinary requirements of business, or even pleasure? Where the precise facts under consideration are such as to give rise to an honest difference of opinion between intelligent men, the question is one for the jury. We think this is such a case.

[2] If the jury accepted the testimony of the witnesses for plaintiff, as they fairly could, it is evident that the element of miscalculation on the part of the men on the autotruck was in underestimating the speed of the approaching electric car when they determined to pass in front of it. To what extent were they entitled to rely upon

the presumption that the railway company's servants were observing the speed limits, in justification for their mistake? Clearly not to the extent of shutting their eyes and crossing blindly in front of a moving car. But these men did not do that. They used their eyes and exercised their judgment, and thought that the rate of speed was reasonable, and, in view of the distance to be traveled by the electric car, would permit them to cross in safety. This would have been the result if the defendant's car had been traveling within the limits prescribed by law. Under these circumstances we think the jury would be justified in concluding that the men on the truck supplemented their own judgment of the speed of the electric car with the presumption that the law was being obeyed. This they had a right to do. Although, as already stated, one may not willfully close his eyes to danger on the assumption that another will act with care and prudence and in observance of the law, yet he cannot be deemed negligent when, if a reasonable use of his faculties does not warn him to the contrary, he rests on such assumption. *Harris v. Johnson*, 174 Cal. 55, 161 Pac. 1155, L. R. A. 1917C, 477, Ann. Cas. 1918E, 560; *Mann v. Scott*, 182 Pac. 281; *Medlin v. Spazler*, 23 Cal. App. 242, 137 Pac. 1078.

[3] Appellant's second assignment of error is that the jury disregarded the instructions of the court. We fail to understand how it is made to appear in this case that the jury disregarded any of the instructions of the court in arriving at its verdict. The instructions did not direct a verdict for the defendant, but left the way open for a verdict for either the one or the other of the parties, according as the jury found upon certain ultimate facts. It is only in the event that the evidence does not support the verdict that we can say that the instructions were not followed.

[4, 5] No useful purpose would be served by discussing all of appellant's exceptions to the rulings of the court in granting and refusing instructions. We are satisfied that the instructions fairly covered all the matters necessary to a correct understanding by the jury of the law of the case. Some of the instructions refused correctly stated the law, but upon points sufficiently covered by the instructions given. It was, for instance, sufficiently pointed out that Makley owed a duty to look out for himself in crossing the car tracks, and might not blindly rely on the driver; and that neither of them could shut their eyes to the dangers from approaching cars, and rest secure in the assumption that the electric cars would approach the crossings in a careful and prudent manner. There was no necessity for the instructions offered and refused relating to the effect of negligence of the Commonwealth Bonding Company and the Los

Angeles Daily Express on the right of plaintiff to recover, from the fact that their only connection with the events of the accident was through the agency of the men in charge of the motor truck; and it was sufficiently pointed out that contributory negligence on their part would defeat a recovery by plaintiff.

We think, also, that the instruction as to the "last clear chance" was not out of place. It might have appeared to the jury, under the evidence, that the occupants of the truck were at fault in attempting to cross the tracks in front of the approaching car; but that after they had placed themselves in a position of danger, which was discovered by them too late to extricate themselves, the defendant, having knowledge of their dangerous situation, might, by the exercise of diligence, still have avoided the accident. It may well be that a motorman, with a better knowledge of the rate of speed at which his car is traveling, may discover the imminent danger of persons attempting to cross the track before they themselves become aware of it; and in such a case, notwithstanding their careless disregard of danger, if he had time to stop or slow up his car his would be the last clear chance.

[6-8] We think instructions 11 and 12 correctly stated the law in declaring that "it cannot be said that a person is guilty of contributory negligence merely because he attempts to cross a street railway when a car is approaching"; that "all that is required on a given occasion of a driver of a vehicle in attempting to use a street railway crossing is to exercise ordinary care of his sense of sight and hearing to observe coming cars"; and that it is not negligence to attempt to cross in front of an approaching street car "if it is at such a distance away that an ordinarily prudent person, would believe he could make such crossing in safety, although it may afterwards appear by evidence that a different course of conduct would have been safer on his part." Counsel for appellant, while admitting the correctness of these instructions as applied to street crossings where the speed limit is from 4 to 8 miles an hour, claims that the rule should not apply in localities where the allowed speed is 20 miles an hour. We do not see the force of the distinction. There are, ordinarily, on many lines of street railway, where a speed of 20 miles per hour is permitted, cars passing at such frequent intervals that it is rarely that a car is not approaching a given crossing. It is, of course, in such localities incumbent on one attempting to cross the tracks to take into account this greater rate of speed in determining how far in advance of an approaching car he can prudently attempt to pass. But to say he is guilty of negligence in attempting to cross at all in front of an approaching car would place

an intolerable burden and hardship on the traveler by team or automobile. We think the doctrine of *Clark v. Bennett*, 123 Cal. 275, 55 Pac. 908, *Scott v. San Bernardino Traction Co.*, 152 Cal. 610, 93 Pac. 677, and *Campbell v. Los Angeles Traction Co.*, 137 Cal. 565, 70 Pac. 624, applies to crossings located as was the one under consideration here, as well as to crossings where a slower rate of speed is prescribed, subject to the qualification as to a prudent determination as to the distance of the car to correspond with the different rates of speed.

The judgment is affirmed.

We concur: FINLAYSON, P. J.; THOMAS, J.

(42 Cal. App. 482)

BROWN v. RIVES et al. (Civ. 2929; L. A. 4874.)

(District Court of Appeal, Second District, Division 2, California. July 29, 1919. Opinion of Supreme Court Denying Rehearing Sept. 25, 1919.)

1. ACKNOWLEDGMENT §48 — NOTARY TAKING ACKNOWLEDGMENT OF PERSON USING FICTITIOUS NAME NOT LIABLE.

Where one forged deed to fictitious grantee, assumed the fictitious name, and sold the land, a notary, who certified that the forger was "known to be the person whose name is subscribed to the within instrument," was not liable, under Civ. Code, §§ 1185, 1200, and Pol. Code, § 801; the certificate being true as far as the notary was concerned.

On Rehearing in Supreme Court.

2. ACKNOWLEDGMENT §48 — NEGLIGENCE OF NOTARY TAKING ACKNOWLEDGMENT NOT PROXIMATE CAUSE OF DAMAGE TO PURCHASER OF LAND.

Where one forged deed to fictitious person, assumed the fictitious name, and sold the land, negligence of notary in taking the forger's acknowledgment without proper examination, etc., as required by Civ. Code, §§ 1185, 1200, and Pol. Code, § 801, was not the proximate cause of loss to the purchaser.

In Bank.

Appeal from Superior Court, Los Angeles County; Pat R. Parker, Judge.

Action by George W. Brown against E. E. Rives and the American Surety Company of New York. From judgment for defendants, plaintiff appeals. Affirmed in the District Court of Appeal, and rehearing denied in the Supreme Court.

W. N. Goodwin and Goodwin & Morgage, all of Los Angeles, for appellant.

Dale H. Parke and Bicksler, Smith & Parke, all of Los Angeles, Walter F. Dunn, of Monrovia, and John P. Dunn, of Los Angeles, for respondents.

THOMAS, J. This is an action against a notary public and his sureties for damages alleged to have resulted from the negligence of the notary. The facts in regard to this case, as we get them from the record here, are as follows:

On May 26, 1916, Martin L. Kelsey and Anna B. Kelsey, his wife, were, and for many years prior thereto had been, and now are, the owners of lots 15, 16, and 17, in block 9, of Van Ness Square, in Los Angeles city, and such ownership was then shown in the proper records of Los Angeles county. Prior to said May 26, 1914, one Leonard C. Canfield conceived a felonious scheme to obtain money by forging the names of Kelsey and his wife and the notarial certificate of their acknowledgments to a deed purporting to convey said property to a fictitious person as grantee, and placing such forged deed of record, and then, assuming the name of such fictitious grantee, to sell said property to such person as he might be able to victimize. In furtherance of this scheme said Canfield forged the names of Kelsey and his wife to a deed purporting to grant said property to a fictitious grantee, designated as Helmer E. Rabild, and attached thereto a forged certificate of acknowledgment of the execution of said deed before W. B. Julian, a notary public of Los Angeles county. This forged deed was recorded in the recorder's office of Los Angeles county on May 27, 1914.

On or about June 10, 1914, said Canfield called plaintiff on the telephone and stated to plaintiff that the person speaking was Helmer E. Rabild, and offered to sell and convey said three lots to plaintiff for \$4,750, subject to taxes for the current year. In the same conversation he stated that he would furnish certificates of title issued by the Title Insurance & Trust Company, showing title to said property vested in plaintiff, free from all incumbrances, except taxes and certain building restrictions. Plaintiff accepted this proposition over the telephone, and in the same conversation stated that he would instruct the Title Insurance & Trust Company to pay \$4,750 when it could issue its certificates that title to said property appeared from the records of Los Angeles county vested in plaintiff. In furtherance of said scheme Canfield prepared a deed of said property, in which the name of Helmer E. Rabild appeared as grantor, and Geo. W. Brown as grantee, and prevailed upon the assistant cashier of a Monrovia bank to introduce him to defendant E. E. Rives as Helmer E. Rabild, and thereupon defendant Rives, without further evidence or knowledge that the person so introduced was in fact Helmer E. Rabild, attached to said deed a certificate signed by him as notary public of Los Angeles county, and impressed with his notarial seal, reciting that "on this 12th day of June, 1912, before me, E. E. Rives, a notary public in and for said county, personally

appeared Helmer E. Rabild, known to me to be the person whose name is subscribed to the within instrument, and acknowledged that he executed the same," and returned said deed, with the above certificate attached, to said Canfield. Canfield then delivered the deed to the Title Insurance & Trust Company, with instructions to record the same, and when it issued its certificates showing title to all of said property to be of record in plaintiff, subject to certain taxes, restrictions, and easements, to send its check, drawn in favor of Helmer E. Rabild, to post office box No. 615, Monrovia, Cal. The Title Insurance & Trust Company filed said deed for record with the county recorder of Los Angeles county, and it was recorded June 24, 1914. Upon the same day said title company issued its certificates of title that the official records of Los Angeles county showed title to each of said lots vested in George W. Brown on June 24, 1914, subject to said taxes, restrictions, and easements, and thereafter, but on the same day, issued its check in favor of Helmer E. Rabild for \$4,750, and sent the same by mail, addressed to Helmer E. Rabild, box No. 615, Monrovia, Cal. Said check was thereafter paid by the bank upon which it was drawn, and returned to said title company, indorsed "Helmer E. Rabild." Before said check was drawn by said title company, plaintiff had deposited with it \$4,750, with instructions to pay said sum to Helmer E. Rabild when the records of the county of Los Angeles showed the title of each of said lots to be vested in George W. Brown, and it issued its certificates of title to that effect, and the check drawn by said title company and mailed to Helmer E. Rabild, as above stated, represented the \$4,750 delivered to it by plaintiff. Neither plaintiff nor the title company ever saw Canfield during the negotiations consummated by the pretended sale, and all communications with him were by telephone or by mail. The lots in question were of the reasonable value of \$2,500 each.

When satisfied that the deed recorded May 27, 1914, was a forgery, plaintiff commenced this action to recover from the notary, Rives, and his bondsman, \$4,750, resting his claim for damages upon the contention that the certificate of the notary attached to the deed of June 12, 1914, was false in fact, and its falsity the proximate cause of plaintiff's loss. The court found the facts to be substantially as above stated, but concluded therefrom that the certificate complained of was not the proximate cause of the loss, and entered judgment dismissing the action, with costs to defendants. Plaintiff appeals from the judgment on the judgment roll alone.

[1] The findings in this case are very clear and specific. Among other things, the court found as follows:

"The court further finds * * * that at all of the times herein mentioned there existed no

such person as Helmer E. Rabild. That the name Helmer E. Rabild was used and designed by the said Leonard C. Canfield to identify some fictitious person, who did not exist, but under whose assumed personality he, the said Leonard C. Canfield, would conduct his negotiations with reference to the sale and transfer of this property to the plaintiff, and that such secret intention on the part of the said Canfield was not known to the defendant Rives. That Helmer E. Rabild was at all times herein mentioned the name assumed by and used by the said Leonard C. Canfield, and by him alone, and that at the time of the execution of the deed to the plaintiff herein, and the acknowledgment thereof before the defendant notary, E. E. Rives, Helmer E. Rabild, in so far as there was any Helmer E. Rabild, did, in the person of said Leonard C. Canfield, appear before the said notary and acknowledge the execution of the instrument as in the notarial certificate stated, and that the certificate of the said notary did truthfully so set forth the fact that Helmer E. Rabild had executed the said instrument."

It therefore conclusively appears that the very individual who signed and acknowledged the deed, and who was referred to therein, regardless of the name under which he had transacted business with others, did actually appear before the notary. This being true, the notarial certificate of acknowledgment spoke the truth, and was not false.

Section 1185 of our Civil Code provides:

"The acknowledgment of an instrument must not be taken, unless the officer taking it knows or has satisfactory evidence, on the oath or affirmation of a credible witness, that the person making such acknowledgment is the individual who is described in and who executed the instrument; or, if executed by a corporation, that the person making such acknowledgment is the president or secretary of such corporation, or other person who executed it on its behalf."

Section 1200 of the same Code reads as follows:

"An officer taking proof of the execution of any instrument must, in his certificate indorsed thereon or attached thereto, set forth all the matters required by law to be done or known by him, or proved before him on the proceeding, together with the names of all the witnesses examined before him, their places of residences, respectively, and the substance of their testimony."

Appellant contends that said certificate of acknowledgment is false, in the light of the facts in this case, based upon his understanding of the limitations imposed by our laws upon a notary public in taking and certifying to an acknowledgment of a deed to real property in this state. It will be noticed that the first section above quoted imposes upon the notary the duty of certifying that "the person making such acknowledgment is the individual who is described in and who executed the instrument" (italics ours); not that the person who executed the instrument is the person whom he claims to be, or that the

name given is his true name, as manifestly contended for by appellant. This makes all the difference in the world.

In this case Rives, the notary, had never seen Canfield before. Rives, however, was well acquainted with the assistant cashier of the bank at Monrovia, who introduced Canfield to him as Rabild. The assistant cashier knew him by that name, and none other. That was the name he gave when he opened his account at that bank. This is the man, regardless of the fact that his true name was Canfield, who executed the deed, and whose execution thereof passed all the title that stood in the name of Rabild, and acknowledged to the notary, that he executed the same. Under the holding of this court in *Anderson v. Aronsohn*, 28 Cal. App. Dec. 216,¹ this was sufficient basis for the statement contained in the certificate that the notary knew "that the person making such acknowledgment is the person who is described in and who executed the instrument." The certificate stated the absolute truth, although, according to this record, Canfield was a liar and a forger. Had "Rabild" come to this notary alone, with the deed already signed, accompanied by no one whom the notary knew, and had asked him to acknowledge the same, another question would be before us. In that case we think the "satisfactory evidence," referred to in the section, would have to be received. This latter evidence, however, was not necessary under the facts as disclosed here. We are confronted in this case with a condition, not a theory. Such being true, this court will never knowingly mulct any person for telling the truth and acting honestly.

Our attention is called to the case of *Joost v. Craig*, 131 Cal. 504, 63 Pac. 840, 82 Am. St. Rep. 374, as supporting appellant's position here. We do not think that case in point. In that case the certificate was, in fact, false. In this case it is true. In that case it was said:

"If the deed is not genuine, but is forged, the notary and his sureties ought to be held for all damages unless they have taken the precautions expressly required by the statute."

That, we think, is tantamount to saying that if the deed is genuine the notary, or his sureties ought not to be held for any damages, even though they have not taken such precautions. In the case at bar, the deed was genuine. True, it was executed by Canfield under said assumed name—Rabild. Under this assumed name, however, as before stated, he opened his bank account at Monrovia. Under this assumed name he was known to the banker. To him he was Mr. Rabild of Monrovia—the very man mentioned in the body of the deed, and, as ap-

¹ Reversed by Supreme Court on rehearing. See 184 Pac. 12.

pellant urges in his brief, who "signed the name Helmer E. Rabild in the presence of defendant Rives and requested the notary to certify his acknowledgment thereof." This deed was genuine, and the certificate of acknowledgment attached thereto was true. In such case there can be no liability on the part of the notary, under section 801 of the Political Code, or any other statute. As was said in the case of *Anderson v. Aronsohn*, supra:

"The language of *Joost v. Craig*, 181 Cal. 504 [63 Pac. 840, 82 Am. St. Rep. 374], clearly recognizes a situation in which a notary may comply with the law and yet be honestly mistaken, and injury result to innocent parties by reason of his mistake, and yet the notary not be liable."

The same is true here. It is further said in the *Joost* Case:

"The certificate here gave assurance that the notary knew of his own knowledge, and not upon mere hearsay, that the grantor was Charles A. Anderson of Redwood City. If this certificate was not true, the notary should be held."

The foregoing is tantamount to saying, and we think it does say, by a perfectly rational inference to be deduced therefrom, that if the certificate was true the notary should not be held liable, regardless of whether the information upon which he based such certificate was hearsay or otherwise.

There is no doubt but that the first deed—the alleged deed from Kelsey and wife to "Helmer E. Rabild"—was a forgery. Nor is there room for argument that the second deed—the deed from "Rabild" to Brown, plaintiff here—was genuine. The only trouble with this deed was that it conveyed nothing, the grantor having nothing to convey, for reasons that are obvious. To hold that the notary and his sureties were liable, as contended for by appellant, whenever for some reason there appeared some flaw in the title to the property sought to be conveyed by such deed, or because the grantor in such instrument had no title to convey, and under such circumstances as disclosed by the record here, would be so revolutionary an act on the part of this court that it would cause business to quake to its very foundation. Such certainly cannot be the law. The notary public and his bondsmen are in no sense insurers of the title. It is true that, without the certificate of acknowledgment to the purported deed from Rabild to plaintiff, the deed could not legally have been recorded; and, if not recorded, it follows that the certificate of title thereafter issued could not have shown the title of record in plaintiff. But the fact that the certificate of title did not so show was not because the notary's certificate of acknowledgment was false, as we have already seen. Under these circumstances, if the said cer-

tificate of acknowledgment was true, there was no liability. And it was true.

It was urged on the argument, while conceding the legal right to transact business in that way, that no one has the right to adopt a fictitious or assumed name for the purpose of the commission of a crime. This is true. It is also true that if one does commit a crime under such fictitious or assumed name, and causes a second party to suffer damages (as was done by Canfield to plaintiff here), still that fact alone is not the basis, legal or otherwise, for the predication of an action for the recovery of such damages against a third party, who knew absolutely nothing of such fact, and who has acted honestly, and certified correctly, in so far as whatever he did had to do with the case is concerned.

In view of these conclusions, we think no other point urged needs consideration.

The judgment appealed from is affirmed.

We concur: FINLAYSON, P. J.; SLOANE, J.

Opinion of Supreme Court Denying Rehearing.

PER CURIAM. [2] The application for a hearing in this court, after decision by the District Court of Appeal of the Second Appellate District, Division 2, is denied. We base our denial solely upon the fact that it clearly appears that any negligence on the part of the notary, Rives, was not a proximate cause of the injury to plaintiff.

We deem it proper to further point out that in the case of *Anderson v. Aronsohn*, 28 Cal. App. Dec. 216, which is referred to in the opinion, the decision of the District Court of Appeal was vacated by this court and the cause ordered to a hearing herein, where it is now pending.

All concur.

(42 Cal. App. 602)

DILLWOOD v. RIECKES et al. (Civ. 2010.)

(District Court of Appeal, Third District, California. Aug. 11, 1919.)

1. EVIDENCE §83(4)—ACTION OF BOARD OF COUNTY SUPERVISORS IN PURCHASING LAND—PRESUMPTION.

It must be presumed that in purchasing land the board of supervisors of a county exercised its power to accomplish one or more of the objects contemplated by the authority given by Pol. Code, § 4041, subd. 6, empowering boards to purchase land for public pleasure grounds, parks, and other like purposes.

2. COUNTIES §1—POLITICAL SUBDIVISIONS OF STATE—DIFFERENCE FROM MUNICIPAL CORPORATIONS.

Counties are political subdivisions of the state for governmental purposes, and not, like municipal corporations, incorporations of the

inhabitants of specified regions for purposes of local government.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, County.]

8. COUNTIES \Leftrightarrow 142—MANAGEMENT OF AGRICULTURAL PARK—LIABILITY FOR DESTRUCTION OF STALLION.

Where a county, pursuant to Pol. Code, § 4041, subd. 6, through its board of supervisors purchased land for an agricultural park, and erected stables wherein stalls were rented, such county was not liable for destruction by fire of a stallion kept in a stall, on the ground the acts of the county officers in the management of the park which caused the fire were in a proprietary capacity, not in the exercise of governmental functions.

4. COUNTIES \Leftrightarrow 88—MAINTENANCE OF PARK—PERSONAL LIABILITY OF OFFICERS—BURNING OF HORSE.

Where county officers under the direction of the board of supervisors undertook to burn grass in the county's agricultural park, which resulted in the burning of a valuable stallion in the park stables, the officers were liable if they burned the grass, an undertaking discretionary with them, in a negligent manner.

Appeal from Superior Court, San Joaquin County; J. A. Plummer, Judge.

Action by Jennie E. Dillwood against W. H. Riecks and others. From judgment for defendants, plaintiff appeals. Judgment reversed, and new trial ordered.

Gordon A. Stewart and Lawrence Edwards, both of Stockton, for appellant.

Charles Light and H. C. Stanley, both of Stockton, for respondents.

CHIPMAN, P. J. This is an action to recover damages for the loss of plaintiff's horse, alleged to have perished by fire on June 14, 1916, through the negligence of defendants. The defendants, other than defendant Quail, are sued as members of the board of supervisors of San Joaquin county and as individuals. Defendant Quail is sued as county surveyor and in his individual capacity. It is alleged in the amended complaint that plaintiff is the owner of a stallion named "Ishmael," of the value of \$5,000; that on the day above mentioned and some time prior thereto plaintiff "had kept said stallion in a stall at the county fair grounds; that upon said fair grounds there is a race track and stables for the care of horses using said race track."

Paragraph 4 is as follows:

"That during all the times herein mentioned the said fair grounds was and now is the property of the county of San Joaquin, and was and is managed and controlled by said defendants, and is owned and held by the county for the holding of county fairs, and to be rented from time to time for the holding of exhibitions in motor and horse racing, fairs, and public exhibitions of various kinds, for which a charge is

made and collected by the county of San Joaquin from said parties; that the horse stalls on said fair grounds are likewise rented to divers persons to be used by them in the care of horses trained by them on such race track of said fair grounds, and for the use of which horse stalls a charge of one and $\frac{50}{100}$ (\$1.50) dollars a month is made for each stall rented as aforesaid; that the said horse 'Ishmael' was on the said 14th day of June, 1916, in a stall on said fair grounds, for the use of which stall said charge of one and $\frac{50}{100}$ (\$1.50) dollars was made and collected by the county of San Joaquin; that the said defendants, by their agents and employes, on the 14th day of June, 1916, set fire to and burned the grass, then standing around and near the stall in which plaintiff's horse was then standing, and carelessly and negligently permitted said fire to be communicated with said stall, setting the same on fire, thereby destroying said horse, to the damage of the plaintiff in the sum of five thousand (\$5,000) dollars."

It is alleged that the plaintiff duly filed with the board of supervisors a claim for damages for the loss of said horse, which was by the board refused payment. The complaint is verified. A general demurrer to the complaint was overruled, and defendants answered denying most of the averments of the complaint. Defendants—

"Admit that horse stalls on said fair grounds are rented to divers persons to be used by them in the care of horses trained by them on such race track of said fair grounds, and for the use of which a small charge of \$1.50 per month is made for each stall rented as aforesaid, but allege that said sum of \$1.50 is used exclusively in keeping up the track used by the occupants of said stalls free of charge, and without profit to the county of San Joaquin."

The cause was tried by the court without a jury. The court made findings as follows:

"(2) That on the 14th day of June, 1916, plaintiff was the owner of a five year old standard bred pacing stallion named 'Ishmael,' of the alleged value of \$5,000; (3) that on said last-named date, and for some time prior thereto, the said plaintiff had kept said stallion in a stall at Agricultural Park, commonly known as the county fair grounds, or race track grounds; that upon said Agricultural Park there is a race track and stalls for the care of horses using said race track; (4) that during all the times herein mentioned the said Agricultural Park was and now is the property of the state of California, and that the board of supervisors of the county of San Joaquin during all of the times herein mentioned did exercise a control over same as the agents of the state of California in a public and governmental capacity, and that the county of San Joaquin rented a stall upon said Agricultural Park to said plaintiff for the rental of \$1.50 per month, and that the said stallion 'Ishmael' was in said stall on the 14th day of June, 1916, and that the rent for said stall was paid to the county of San Joaquin by said plaintiff; that the grass standing around and near said stall was on the 14th day of June, 1916, set fire to and burned by certain

persons confined in the county jail of San Joaquin county as prisoners acting under the direction of certain employees and officers of the highway maintenance department of the county of San Joaquin, and said county prisoners and employees of the said county of San Joaquin carelessly and negligently permitted said fire to become communicated with said stall, setting the same on fire, and thereby destroying said horse."

As conclusions of law the court found:

"(1) That said board of supervisors had no power or authority to manage and control said Agricultural Park except as agents of the state of California, and had no power or authority whatever to rent said stall to said plaintiff, or to permit said stallion Ishmael to be kept in said stall or in said Agricultural Park; (2) that said plaintiff is not entitled to take anything by said action."

Judgment accordingly passed for defendants, from which plaintiff appealed, and brings the record here on a bill of exceptions.

Appellant specifies the following grounds in support of her contention that the judgment is against law: (1) That, while the evidence shows that plaintiff's horse was destroyed through the carelessness of the employees of the county of San Joaquin, the court held the county not liable; (2) that, while plaintiff's horse was destroyed through the negligence of persons acting under the instructions of certain officers of the county, the court held that such officers were neither liable as officers nor as individuals; (3) that the court failed to find the value of the horse Ishmael.

There is no controversy as to the facts. It was alleged that the county became the owner "by a grant deed conveyed to the county of San Joaquin, during the year 1911, 85.65 acres of land, and being the property commonly known as 'Agricultural Park,' and also as the 'County Fair Grounds,' and being the same property upon which the plaintiff's horse was destroyed by fire." It is alleged in the complaint that these grounds were "managed and controlled by said defendants, and is owned and held by the county for the holding of county fairs, and to be rented from time to time to private parties for the holding of exhibitions in motor and horse racing, fairs and public exhibitions of various kinds."

[1] It appeared that by resolution of the board of supervisors all moneys received for rent should be placed in a fund to be called "Agricultural Park Fund," and was to be used in the care and maintenance of the grounds. The particular purpose for which the board of supervisors made the purchase does not appear. By subdivision 6 of section 4041 of the Political Code the board is given power "to purchase" land for "public pleasure ground, public parks, and other public purposes, * * * and to * * *

take care of, manage and control the same." It must be presumed that in purchasing this land the board exercised its power to accomplish one or more of the objects contemplated by the statutory authority given to it. Furthermore, the pleadings and the evidence show that the land has been devoted to public purposes—the holding of "county fairs, exhibitions in motor and horse racing, fairs, and public exhibitions of various kinds." It is not contended that the small charge for the use of the stalls or for the use of the grounds for fairs and exhibitions was for profit or for purposes other than as contributions towards the care and maintenance of the park. It appeared that on the day of the accident defendant French, a member of the board of supervisors, who seems to have had charge of these grounds for the board, gave directions to have the prisoners held in the jail go to the park and burn the dry grass, concededly a proper thing to have done. Section 4041 of the Political Code authorized the board to make such use of "convicted prisoners in the county jail." The burning of the grass was done under the immediate supervision of defendant Quall, who had general charge of the prisoners for all work done by them.

[2] Appellant's principal contention is that the liability of the county is the same as that of a municipal corporation, a city, or town; and, viewed in that light, the county or its officers were liable for the reason that the acts done in the management and care of the park in question were done by the officers in a proprietary capacity, and not in the exercise of governmental functions; citing *Chafor v. City of Long Beach*, 174 Cal. 478, 163 Pac. 670, L. R. A. 1917E, 685, Ann. Cas. 1918D, 106.

Appellant's major premise, that the legal status of a county is the same as that of a municipal corporation, is not sustained by reason or authority. Law writers and the courts have very clearly pointed out the distinction between the two organizations. The Supreme Court thus dealt with the question in *People v. McFadden*, 81 Cal. 480, 22 Pac. 851, 15 Am. St. Rep. 66:

"It is clear, therefore, that the Constitution does not hold counties to be municipal corporations, or 'corporations for municipal purposes'; but so far as they are to be regarded as corporations at all they are 'political corporations.' And this is in harmony with the common acceptance of the terms 'municipality' or 'municipal corporation,' as used in the common and written law of both England and America time out of mind. This view is also in harmony with those provisions of the statutes and codes which define counties to be 'bodies politic and corporate,' and also with the decision of this court, made before the adoption of the Constitution, when it declared that a county is not a municipal corporation within the meaning of that term as used in the Political Code."

The following terse statement is found in *County of San Mateo v. Coburn*, 130 Cal. 636, 63 Pac. 80:

"A county is a governmental agency or political subdivision of the state, organized for purposes of exercising some functions of the state government, whereas a municipal corporation is an incorporation of the inhabitants of a specified region for purposes of local government."

In *Reclamation Dist. No. 1500 v. Superior Court*, 171 Cal. 672, 679, 154 Pac. 845, 848, the court said:

"The counties are governmental agencies of the state, * * * and the property intrusted to their governmental management is public property. The proprietary interest in all such property belongs to the public, and, if there be a legal title in the county, it is a title held in trust for the whole public. [Citing cases.] In the absence of constitutional restrictions, the Legislature has full control of the property held by the counties as agencies of the state, and may dispose of that property without the consent of the county or without compensating it."

In *Hersey v. Neilson et al.*, 47 Mont. 132, 31 Pac. 80, Ann. Cas. 1914C, 963, the authorities will be found collected to the proposition that counties are political subdivisions of the state for governmental purposes. The doctrine is fully stated in *Sacramento v. Chambers*, 33 Cal. App. 142, 164 Pac. 613. It is also clearly set forth in 7 R. O. L. p. 925.

The Supreme Court of Kansas, in *Silver v. Board of Commissioners of Clay County*, 76 Kan. 228, 91 Pac. 55, thus states the principle:

"It is well-established law that a county is an involuntary corporation for governmental purposes, and is in no sense a business corporation; that the powers and obligations of the county are such only as the law prescribes or as arise by necessary implication therefrom. * * * Cities, however, in this state, are municipal corporations, and neither their powers nor obligations are so restricted, and decisions as to their liability for negligence have no application."

Finally, "the several counties, as they now exist, are hereby recognized as legal subdivisions of this state." Const. art. 11, § 1.

[3] It results from the foregoing that the decision in *Chafar v. City of Long Beach*, 174 Cal. 478, 163 Pac. 670, L. R. A. 1917E, 685, Ann. Cas. 1918D, 106, relied upon by plaintiff, is not controlling where a county is involved. Necessarily, counties being but agencies of the state their functions are exclusively governmental, and are such only as are imparted to them by the state. In conferring power upon the board of supervisors to purchase land for "public pleasure grounds, public parks, and other public purposes and to take care of and manage the same," the purchase is for the benefit of the people of the state, and not exclusively for the people of the county; and, as was

said in *Reclamation District No. 1500 v. Superior Court*, supra, "property so acquired is held by the counties as agencies of the state."

[4] Whether or not the officers connected with the burning of this grass are individually liable presents a more difficult question. In *Doeg v. Cook*, 126 Cal. 213, 58 Pac. 707, 77 Am. St. Rep. 171, it was said that "the very decided trend of modern decision is to hold such officers liable for acts of nonfeasance, or for the negligent performance of a duty when the duty is plain, when the means and ability to perform it are shown, and when the performance or nonperformance, or the manner of its performance, involves no question of discretion. In short, where the duty is plain and certain, if it be negligently performed, or not performed at all, the officer is liable at the suit of a private individual especially injured thereby." In *Taylor v. Manson*, 9 Cal. App. 382, 387, 99 Pac. 410, the rule as stated in *Doeg v. Cook* was applied. In the case of *Edwards v. Brockway*, 16 Cal. App. 626, 117 Pac. 787, the defendant Brockway was held not liable for the reason that there were no facts showing that Brockway "was guilty of official negligence as superintendent of streets or that he failed and neglected to perform any official duty imposed upon him either by law, ordinance, or order, or regulation of his superiors." In *Doeg v. Cook* the court quotes approvingly from *Shearman and Redfield on Negligence* (3d Ed., § 156), where the rule is thus given:

"The liability of a public officer to an individual for his negligent acts or omissions in the discharge of official duty depends altogether upon the nature of the duty of which the neglect is alleged. Where the duty is absolute, certain, and imperative, involving merely the execution of the set task—in other words, is merely ministerial—he is liable in damages to any one specially injured, either by his omitting to perform the task, or by performing it negligently or unskillfully. On the other hand, where his powers are discretionary, to be exercised or withheld according to his judgment as to what is necessary or proper, he is not liable to any private person for a neglect to exercise those powers, nor for the consequences of a lawful exercise of them, where no corruption or malice can be imputed, and he keeps within the scope of his authority."

The early case of *Huffman v. San Joaquin County*, 21 Cal. 426, was an action for damages resulting from want of proper repairs to a bridge. The statute at that time devolved upon boards of supervisors the management and control of bridges in their respective counties and upon the road overseers of the county the duty of keeping bridges on public highways in repair. In sustaining a demurrer to the complaint the court said:

"If any remedy exists for injuries resulting from neglecting to keep such bridges in repair,

it must be sought either against the road overseers or supervisors personally."

In *Hover v. Barkhoof*, 44 N. Y. 113, it was held that one who assumes the duties, and is invested with the powers of a public office, is liable to an individual who sustains special damage by a neglect properly to perform such duties.

Relying upon the distinction made between the discharge of duties plainly and certainly devolved upon the officer and duties which he may or may not perform at his discretion, it is contended that in the present case the duty to burn the grass as a preventive of damage which might otherwise accrue was discretionary and not compulsory, and hence, under the decision in *Doeg v. Cook*, supra, and the rule as stated by *Shearman and Redfield*, supra, the defendants are not individually liable.

The cases involving the question are generally cases arising from the neglect to do some act—cases of nonfeasance rather than misfeasance. It seems to us quite clear that where the power to do the act exists, though its performance is left to the discretion of the officer, if he acts in execution of such discretion his liability would be the same as in the discharge of a mandatory duty, and if he performs the act or discharges the duty in a negligent manner he would be liable in an action for damages by a person injured thereby. Whether the duty performed be discretionary or compulsory there is no reason why like consequences should not follow the negligent performance of the duty.

The rule, as stated by *Shearman and Redfield* and in *Doeg v. Cook*, has reference more particularly to acts of nonfeasance, where it was entirely discretionary with the officer to do or not to do the act. It is perhaps a debatable question whether or not the duty "to care for, manage, and control" this agricultural park did not impose upon the supervisors a plain and certain duty to burn this dry grass in order to prevent damage to the property itself or to individuals using it, still, having determined that it should be burned and having undertaken to do it, it was their duty to see that the work was not done in a careless and negligent manner, failing in which a liability arose for damages resulting from their negligence.

There was evidence tending to show that the management and care of the park grounds were being exercised by defendant Supervisor French, under direction of the board of supervisors; that the "chain gang," composed of prisoners in the county jail, was placed in the charge and control of defendant Surveyor Quail, when put to work on the highways or elsewhere; that Fred E. Smith was the acting assistant highway maintenance engineer, and was given instruc-

tion by defendant Quail to go to the fair grounds and burn the grass; that Engineer Smith communicated these instructions to James McAfee, the guard of the "chain gang," and directed him to take the "chain gang" to the grounds and burn the grass, and that the work was finally done under the immediate direction of McAfee. The court found that the grass was "burned by certain persons confined in the county jail of San Joaquin county as prisoners, acting under the direction of certain employes and officers of the highway maintenance department" of the county, and that through their negligence plaintiff's horse was burned to death. The view taken by the court "that said plaintiff is not entitled to take anything by said action" will account for its failure to make findings of fact as to the defendants' connection with the accident, either as officers of the county or as individuals. The court, doubtless, held, as is now urged as the law by respondents, that no liability of defendants, either as officers or as individuals, was shown. This, we think, was error. There should have been findings of fact showing the acts done by the defendants and each of them, and the circumstances attending the acts. It would then be possible to draw the correct conclusion of law from such acts as to the liability or nonliability of defendants.

The judgment is reserved and a new trial ordered.

We concur: HART, J.; BURNETT, J.

(42 Cal. App. 699)

BATES et al. v. RANSOME-CRUMMEY CO.
et al. (Civ. 2879.)

(District Court of Appeal, First District, Division 2, California. August 15, 1919. Rehearing Denied by Supreme Court Oct. 13, 1919.)

1. APPEAL AND ERROR ⇐347(1)—DOCKET OF JUDGMENT ENTRY IMPORTS NOTICE TO ALL PERSONS INTERESTED.

Under Code Civ. Proc. §§ 650, 659, 939, as amended by St. 1915, pp. 201, 205, 207, the time of serving notice of motion for new trial and proposed bill of exceptions depends on service of notice of entry of judgment, while time to appeal begins to run from entry of judgment when docketed, and the docket is a public record importing notice to all parties interested (Code Civ. Proc. §§ 668, 671, 672, 673).

2. APPEAL AND ERROR ⇐345(1)—MOTION FOR NEW TRIAL AFTER TIME TO APPEAL DOES NOT EXTEND TIME.

Where no appeal was taken within 60 days after entry and docketing of judgment, and at the expiration of such 60 days no new trial pro-

ceedings were pending, the right to appeal was lost, although a motion for a new trial was subsequently filed and overruled, in view of Code Civ. Proc. §§ 650, 659, 939, as amended by St. 1915, pp. 207, 201, 205.

3. CONSTITUTIONAL LAW §316—STATE APPELLATE PROCEDURE IS WITHIN LEGISLATIVE CONTROL.

The construction of Code Civ. Proc. § 939, as amended by St. 1915, p. 205, as not permitting a motion for new trial filed after time for an appeal from the judgment had expired, to extend the time in which to appeal, is not in violation of Const. U. S. art. 14, § 1, relating to due process.

4. APPEAL AND ERROR §345(1)—JUDGMENT FINAL ON FAILURE TO APPEAL OR MOVE FOR NEW TRIAL WITHIN SIXTY DAYS.

The contention that, so long as defendant's right exists to move for new trial or to vacate the judgment, it does not become final, cannot be sustained since under Code Civ. Proc. §§ 659, 939, as amended by St. 1915, pp. 201, 205, upon failure within 60 days after the entry of judgment either to appeal or to commence proceedings for new trial, the judgment becomes final.

Appeal from Superior Court, Santa Clara County; W. A. Beasley, Judge.

Action by Amy Bates and others against the Ransome-Crummey Company and another. Judgment for plaintiffs, and defendants appeal. Appeal dismissed.

R. M. F. Soto, of San Francisco, for appellants.

Beggs & McComish, of San Jose, for respondents.

BRITAIN, J. Amy Bates and 10 other property owners sued the Ransome-Crummey Company, a corporation, and Louis Lightston, treasurer of the city of San Jose, to quiet title to their respective properties and for an injunction restraining the defendants from interfering with the plaintiffs' properties or asserting any interest therein or lien thereon. Louis Lightston, as treasurer, filed a disclaimer. The Ransome-Crummey Company answered, and by way of cross-complaint sought to establish the lien of a street assessment and the validity of bonds issued to represent the assessments on the respective parcels of land of the plaintiffs. After answer to the cross-complaint, the case was tried, findings responsive to the issues of fact were signed, and as a conclusion of law therefrom the court determined the plaintiffs were entitled to a judgment and decree quieting their titles. The appeal by the defendants is from the judgment entered pursuant to the decision.

At the outset the court is met with the claim on the part of the respondents that the appeal was not taken in time. If this claim is well founded in law, this court has no jurisdiction of the appeal, and cannot con-

sider any error claimed to have been made by the trial court. The jurisdiction of the trial court to render its judgment is not questioned. It has always been held that an appeal from a judgment taken after the time limited by the statute to appeal cannot be considered and must be dismissed. *Gray v. Palmer*, 28 Cal. 416; *Contra Costa v. Soto*, 138 Cal. 57, 70 Pac. 1019. A motion for a new trial is a proceeding distinct from that of an appeal. Under a former statute, even after the filing of a stay bond on appeal, the trial court had power pending the appeal to grant a new trial. *Knowles v. Thompson*, 133 Cal. 245, 65 Pac. 468; *Union Collection Co. v. Oliver*, 162 Cal. 755, 124 Pac. 435. The result of an order granting a new trial was to set the entire case at large and to give the trial court authority to try the case anew. *Miller & Lux v. Enterprise, etc., Co.*, 169 Cal. 419, 147 Pac. 567.

[1] In 1915 the Legislature amended sections 650, 659, and 939 of the Code of Civil Procedure. St. 1915, pp. 201, 205, 207. Under section 650, when a party desired to have exceptions taken at the trial settled in a bill of exceptions, he might at any time within 10 days after notice of the entry of the judgment, or such further time as might be allowed, serve his proposed bill of exceptions. If he intended to move for a new trial, he was required within 10 days after receiving notice of the entry of the judgment to file with the clerk and serve upon the adverse party a notice of his intention so to move. Code Civ. Proc. § 659. He might appeal from the judgment within 60 days after its entry; but, if proceedings on motion for a new trial were pending, the time to appeal from the judgment was extended for 30 days after the determination of the new trial proceedings. Code Civ. Proc. § 939. Section 963 of the Code of Civil Procedure was also amended (St. 1915, p. 209), and the privilege of appealing from a new trial order, except in specific cases of which this is not one, was withdrawn. In summarizing these provisions of the Code, reference has been made only to those relating to cases tried by the court without a jury.

[2] Under these amended sections the time of serving notice of motion for a new trial and to propose a bill of exceptions is made dependent upon the service of notice of the entry of the judgment, while the time to appeal begins to run from the time of entry of judgment. The Code provides that upon the entry of the judgment it shall be docketed, and when so docketed the judgment becomes a lien upon the real property of the judgment debtor. The docket is a public record, and as such imparts notice to all persons interested. Code Civ. Proc. §§ 663, 671, 672, and 673. The party aggrieved by a judgment under these amended provisions of the statutes was given the election of appeal-

ing directly within 60 days from the entry of the judgment, or, if he desired to move either for a new trial or to vacate the judgment in the trial court, he might do so. If he did so within the 60 days allowed for an appeal, the time within which he might appeal was extended automatically until 30 days after the determination of the new trial proceedings. No such provision for extension of time was made in the statute because of the pendency of proceedings to vacate the judgment on the ground that the conclusions of law were not supported by the findings. The losing party was not required to move for a new trial, until he received notice of the entry of the judgment, unless the record showed he had waived such notice. He was not required to wait, however, until he received the notice of entry, but might have given notice of his intention to move for a new trial at any time after judgment. Of his own motion, therefore, he might have extended the time within which to appeal by serving notice of motion for new trial at any time within the 60-day limitation for appeal, even though he had not received notice of the entry of the judgment. If at the expiration of the 60-day period within which an appeal might be taken, no notice of intention to move for a new trial was given; in other words, if there was no proceeding for a new trial pending, the time to appeal from the judgment elapsed, and the privilege of appealing from the judgment, or of having a new trial order reviewed on appeal, terminated. There is no statutory requirement by which the prevailing party in a suit is required to give notice of the entry of the judgment. Because there is no such provision, the judgment debtor might in effect indefinitely extend the time of appeal by waiting until he was served with notice of the entry of judgment, and might appeal from the judgment at the expiration of 6 months or a year, or, for that matter, 10 years, from its entry, if it should be held that the right of appeal does not terminate at the expiration of 60 days after the entry of judgment, if no proceedings for a new trial are then pending.

In the particular case the findings of fact and conclusions of law were filed October 18, 1915. Judgment was entered November 24, 1915. The 60 days within which an appeal might have been taken expired January 23, 1916. Notice of intention to move for a new trial was dated and presumably served February 21, 1916, or 29 days after the time to appeal from the judgment had expired, without new trial proceedings having been com-

menced. Motion for new trial was denied April 14, 1916, and notice of appeal was served and filed April 24, 1916, or more than 3 months after the time to appeal had elapsed.

On behalf of the appellants it is argued that under the rule of liberal construction doubtful clauses affecting the right of appeal should be construed in favor of the right. It does not appear that the language of section 939 is doubtful. It provides that the appeal shall be taken within 60 days, but the time is extended if, or as the appellants contend, when, new trial proceedings are pending. In the present case no such proceedings were pending when the time of appeal elapsed.

[3] It is argued that under the construction given to section 939 of the Code of Civil Procedure it is unconstitutional, as in violation of section 1 of article 14 of the Constitution of the United States, because the appellants are deprived of their property without due process of law and are denied equal protection of the laws. Similar contentions have failed to meet the approval of courts. The matters of motions for new trial and appeal are entirely within the control of the Legislature. It might altogether abolish the right to move for a new trial, as it has abolished the privilege of appealing from an order made upon a motion for a new trial. *Lancel v. Postlethwaite*, 172 Cal. 329, 156 Pac. 486; *Woodruff v. Colyear*, 172 Cal. 440, 156 Pac. 475.

[4] It is argued, because it is the duty of the plaintiff diligently to prosecute an action to a finality, that so long as the right of the defendant to move for a new trial or to move to vacate the judgment exists, it does not become final; but citation of authority is not necessary to support the statement that for the purposes of appeal the judgment is final under the express terms of the statute as soon as it is entered. When the defendant fails within 60 days after the entry of judgment either to appeal or to commence proceedings for a new trial, the judgment becomes final for all purposes at the expiration of the 60-day period. The matters determined are res judicata, and under the rule of *United States v. Throckmorton*, 99 U. S. 61, 25 L. Ed. 93. An appeal from such a judgment is not within the provisions of the statute, and vests no jurisdiction in the appellate court.

The appeal is dismissed.

We concur: LANGDON, P. J.; HAVEN, J.

(42 Cal. App. 776)

ANDERSON v. ADLER et al. (Civ. 3005.)

(District Court of Appeal, First District, Division 1, California. Aug. 20, 1919. Rehearing Denied by Supreme Court Oct. 16, 1919.)

1. APPEAL AND ERROR ⇨110—ORDER DENYING MOTION FOR NEW TRIAL NOT REVIEWABLE.

St. 1915, p. 209, amending Code of Civ. Proc. § 963, does not allow an appeal from an order denying a motion for new trial, and such an appeal must be dismissed.

2. LANDLORD AND TENANT ⇨33—FINDING OF MODIFICATION OF LEASE BY EXECUTED ORAL CONTRACT SUSTAINED BY EVIDENCE.

In an action to foreclose a chattel mortgage given by a tenant to secure payment of rent, a finding that defendants were excused from full performance of lease terms by reason of an executed oral agreement modifying the terms of the original contract *held* supported by the evidence.

3. CONTRACTS ⇨238(2) — EXECUTED ORAL AGREEMENT IS ONE WHOSE TERMS HAVE BEEN PERFORMED.

Civ. Code, § 1698, provides that "a contract in writing may be altered by a contract in writing, or by an executed oral agreement, and not otherwise," and an "executed agreement" is one the terms of which have been fully performed.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Executed Contract.]

4. CONTRACTS ⇨237(1)—ORAL MODIFICATION OF LEASE BASED ON SUFFICIENT CONSIDERATION.

An agreement adding to the terms of an existing agreement between the same parties, and by which new and onerous terms are imposed upon one of the parties, without any compensating advantage, requires consideration to support it.

Appeal from Superior Court, San Diego County; W. A. Sloane, Judge.

Action by J. M. Anderson against J. R. Adler and others. From judgment for plaintiff for less relief than demanded and from an order denying plaintiff's motion for new trial, plaintiff appeals. Appeal from order denying motion for new trial dismissed, and judgment affirmed.

Wright, Winnek & McKee, of San Diego, for appellant.

A. J. Morganstern, of San Diego, for respondents.

WASTE, P. J. Plaintiff brought this action to foreclose a chattel mortgage, given to secure the payment of the term rent, and installments, to become due under a lease of a hotel building in San Diego, alleging the sum of \$13,500 to be due and unpaid on account of such rents. The trial court found that the terms of the original lease, as to the

amount of the rent therein reserved, had been modified by an executed oral agreement, and entered its decree and judgment in favor of plaintiff foreclosing the mortgage for the sum of \$3,333.35, with interest, attorney's fees, and costs.

Upon the entry of this judgment, plaintiff filed a notice of intention to move for a new trial. This proceeding was decided by the court below on June 19, 1916, the court denying said motion. Plaintiff filed notice of appeal, both from the judgment and from the order denying his motion for a new trial.

[1] The amendment of 1915 to section 963 of the Code of Civil Procedure (Stats. 1915, p. 209) does not allow an appeal from an order denying a motion for new trial. So far as that appeal is concerned, it is unauthorized and must be and is dismissed. *Gray v. Cotton*, 174 Cal. 256, 162 Pac. 1019.

[2] Appellant's contention on appeal is that the court erred, in law and fact, in finding, as it did, that defendants were excused from full performance of the terms of the lease in question by reason of an executed oral agreement materially changing the terms of the original contract.

The lease was for a period of ten years, at a term rental of \$150,000, payable in monthly installments of \$1,250. The building was to contain approximately 100 rooms, with suitable and sufficient halls, light courts, and light rooms, and a lobby, or entrance, to said building. As part of the consideration for the making of the lease, the lessees were to furnish and equip the building for hotel purposes, and were to give a chattel mortgage, upon the furnishings and equipment, to the amount of \$10,000, as security for the term rent, installments of rent, and performance of the other conditions of the lease.

The alleged oral modification may be summarized as follows: Instead of a building containing approximately 100 rooms, the lessor provided one containing only 88 rooms. When the lessees discovered this discrepancy, they refused to go on with the lease, furnish the building, or pay the rent reserved. The lessor then agreed to waive that portion of the lease providing rentals, and agreed with the lessees that if they were unable to pay the rent reserved the lessor would meet the conditions and would waive the clause, or provision, of the lease relating to the payment of rent, and would accept as rental, under such conditions, such a sum of money from time to time as defendants could pay out of the proceeds of the business, and that he would demand only such rental as would enable defendants to make a profit out of the business.

Pursuant to this agreement, so the trial court found, the deal was consummated and the lessees entered into the occupancy and possession of the building, equipped and operated a first-class hotel. They kept the

operating expenses as low as possible, and for a number of months paid plaintiff whatever balance remained on hand for receipts, after paying said expenses of operation, and cost of keeping up the equipment. The plaintiff received and accepted said balances as and in full satisfaction of all rentals due from defendants from February, 1914, to, and including, the 24th day of September, 1914.

Upon these findings the court based its conclusion and judgment that the defendants had paid the rent of the premises for the months of February to September 24, 1914, and gave judgment for the plaintiff for the amount due by way of rent from the last-named date to December 15, 1914, at which time plaintiff re-entered the premises. It is conceded that the rent was not paid according to the terms of the lease, and that but for the alleged modification of the lease and chattel mortgage the rent for the months just specified was not paid.

The findings of the trial court, which we have just briefly summarized, indicate that there was an executed oral modification of the written agreement of lease, and, so far as this contention is concerned, it only remains to determine whether or not the evidence supports the findings. Without stating the testimony, we are of the opinion that it does. While the testimony of the plaintiff tends to strongly negative the evidence on the part of the defendants bearing on the alleged oral modification of the lease, in another sense it gives color and support to defendants' claim. He admits the giving of rebates on the rent for a period of months, and for the period from February to September, in the year 1914, accepted and credited as rent many small sums, in explanation of which fact he testified he had agreed that when defendants collected the money they would turn it in in weekly payments, instead of paying in advance at the first of the month. But, whatever conflict may have arisen in the evidence, and the credibility to be given to the respective parties and their witnesses, was for the trial court to determine.

[3] "A contract in writing may be altered by a contract in writing, or by an executed oral agreement, and not otherwise." Civ. Code, § 1698. An "executed agreement" is one the terms of which have been fully performed. *Henehan v. Hart*, 127 Cal. 656, 657, 60 Pac. 426.

When therefore the trial court, on sufficient evidence, found the existence of an executed oral contract modifying the terms of the original lease as to the rent, and further found that it had been fully performed, it finally settled the issues of this case. The cases cited by appellant on this subject deal with executory and not executed contracts.

[4] There can be no doubt of the principle, contended for by the appellant, that an agreement adding to the terms of an existing

agreement between the same parties, and by which new and onerous terms are imposed, upon one of the parties, without any compensating advantage, requires consideration to support it. But this, of course, may consist either in a new consideration, or in some favorable modification of the original contract. *Main Street, etc., Co. v. L. A. Traction Co.*, 129 Cal. 301, 305, 61 Pac. 937. The evidence in this case, on which the court based its findings, shows that the oral agreement which became executed was, by both parties to the lease, regarded as a most favorable modification of the original contract, by the lessor much more preferable than having an empty hotel on his hands, and by the lessees as affording them an opportunity to make a profit out of the venture.

There is nothing in the contention of appellant that the executed oral agreement, proved in this case, for the purpose of altering the previously written lease, does not require to be done, or suffer, something not required to be done, or suffered, by the terms of the writing.

The judgment is affirmed.

We concur: RICHARDS, J.; KERRIGAN, J.

(42 Cal. App. 683)

In re MARSHALL'S ESTATE. (Civ. 2960.)

(District Court of Appeal, First District, Division 1, California. Aug. 14, 1919.)

1. DESCENT AND DISTRIBUTION §1—TAXATION §858—STATUTE OF SUCCESSION DETERMINES HEIRSHIP AND LIABILITY FOR TAX.

Under California law the right of heirship in an intestate's estate is founded on the statute of succession, and such statute must be looked to, to measure the rights and obligations of a person as heir of a decedent's estate for the purposes of fixing the inheritance tax due the state.

2. DESCENT AND DISTRIBUTION §14—HUSBAND AND WIFE §274(1)—INHERITANCE OF STEPDAUGHTER ON DEATH OF STEPFATHER INTESTATE.

Under Civ. Code, § 1386, subd. 8, a stepdaughter succeeded to the title to any estate vested in her stepfather at the time of his death, he having died intestate, so far as such estate consisted of community property of his predeceased spouse, the daughter's mother, and himself, or of separate property which he had inherited from such predeceased spouse.

3. DESCENT AND DISTRIBUTION §14—SOURCE OF TITLE MATERIAL IN DETERMINING HEIRS OF INTESTATE WIDOWER.

The source of the title of a widower who has died intestate, whether or not from his predeceased wife, is immaterial, so far as the extent of his estate in his property is concerned; but the source of his title is material in estab-

lishing the identity of his heirs, as a stepdaughter, under Civ. Code, § 1386, subd. 8.

4. TAXATION — § 875(1), 886½ — STEPDAUGHTER TAKING AS HEIR OF STEPFATHER LIABLE FOR INHERITANCE TAX.

The stepdaughter of a widower, who dies intestate, leaving property which had been either community property or separate property of his deceased spouse, and which he had inherited, under Civ. Code, § 1401, as it existed prior to the amendment of 1919, which property, under section 1386, subd. 8, goes to the stepdaughter, takes as an heir of her stepfather, and as a stranger to him, and must pay a 5 per cent. inheritance tax on the balance left after her exemption of \$500, as provided in Inheritance Tax Act, § 4, subd. 4, and section 6, subd. 5.

Appeal from Superior Court, Fresno County; Geo. E. Church, Judge.

In the matter of the estate of Thomas E. Marshall, deceased. From an order determining the amount of the inheritance tax due the state from Marjorie O'Neill, sole heir, there is an appeal. Order reversed, and trial court directed to overrule objections to the report of the inheritance tax appraiser, and to make its order confirming report and fixing tax.

Robert A. Waring, J. Paul Miller, Jas. Atteridge, and Adrian C. Stanton, all of Sacramento, for appellant.

Haven & Athearn, of San Francisco, for respondent.

BARDIN, Judge pro tem. This is an appeal from an order determining the amount of inheritance tax due the state of California from Marjorie O'Neill, the respondent herein, and sole heir of the estate.

There is no controversy about the facts of the case, and, so far as they are pertinent to this appeal, may be briefly stated as follows: Thomas E. Marshall died intestate, leaving as his entire estate property which had either been the community property of himself and his predeceased spouse, Della Marshall, or property which had formerly been the separate property of such predeceased spouse, and which he had inherited upon her demise. Marshall and his spouse left no issue of their bodies, but Della Marshall left an only child, named Marjorie O'Neill. This child was never adopted by Thomas E. Marshall, nor did he ever stand in the mutually acknowledged relation of a parent to such child, and she is not a grandchild of Thomas E. Marshall, and is a stranger in blood to him.

The sole question involved in this appeal is this: Is Marjorie O'Neill entitled to the exemption of \$10,000 provided for by subdivision 2 of section 6 of the Inheritance Tax Act, chapter 589 of the Statutes of 1917, and to the 1 per cent. rate on the balance of her inheritance as provided by subdivision 1 of

section 4 of said act, or is she entitled to an exemption of \$500 only, as provided in subdivision 5 of section 6 of the same act, and required to pay a tax of 5 per cent. on the balance of her inheritance, as provided in subdivision 4 of section 4 thereof? In other words, is the amount of the inheritance tax to be paid by Marjorie O'Neill to be determined upon the theory that she takes from Della Marshall, or from Thomas E. Marshall, and as a stranger to his blood?

[1-3] It is fundamental that under our law the right of heirship in an intestate's estate is founded upon the statute of succession, and it is to that statute that we must look in order to measure the rights and obligations of Marjorie O'Neill as an heir of the estate of Thomas E. Marshall. It is clear from the facts that, under the provisions of subdivision 8 of section 1386 of the Civil Code, considered in connection with the introductory portion of the section, Marjorie O'Neill succeeded to, and there must be distributed to her, the title to any estate vested in Thomas E. Marshall at the time of his death; he having died intestate, so far as such estate consisted of community property of his predeceased spouse and himself, or of separate property which he had inherited from such predeceased spouse. Respondent's title to such property would, of necessity, be derived from the estate of Thomas E. Marshall, for under section 1401 of the Civil Code, as it existed prior to the amendment of 1919, it was provided that "upon the death of the wife, the entire community property, without administration, belongs to the surviving husband." Mr. Marshall became the absolute owner of the community property from the moment of the death of his wife. It was never any part of his deceased wife's estate. Estate of Klumpke, 167 Cal. 415, 139 Pac. 1062. And the title to the common property having passed absolutely to the present intestate, as well also such of the separate estate of his predeceased spouse, as was set out in the report of the inheritance tax appraiser, then whatever title would, by virtue of subdivision 8 of section 1386 of the Civil Code pass to Marjorie O'Neill must go directly to her from the estate of Thomas E. Marshall. The source of his title is immaterial so far as the extent of his estate in such property is concerned; but the source of his title would be material in establishing the identity of his heirs under subdivision 8 of the section last referred to. The respondent's relationship to her deceased mother would be the determining factor in establishing her status as an heir of Thomas E. Marshall; but the title to the property she is entitled to receive by reason of that status would not relate back for its origin, to her mother. It would come directly to her from her stepfather. She would take as the heir of Marshall. Estate of Watts, 175 Pac. 415.

It was the view of this court in the case of *Wright v. Rohr*, 182 Pac. 469, in which a petition for hearing in the Supreme Court was denied, that subdivision 8 of section 1386 of the Civil Code establishes a rule of succession applicable in the specified contingencies, and did not create a limitation upon the power of the surviving holder of community property to convey such property, and the subdivision of the section referred to fully recognized the right of the owner to dispose of such property either by gift inter vivos, or by last will and testament. And this court previously expressed the same views in the case of *Veirs v. Roberts*, 179 Pac. 689, in which it was unsuccessfully contended by the appellants that proceeds of the community property held by a widow should be regarded as held in trust for the issue of her predeceased spouse and herself, and that under the provisions of section 1386 of the Civil Code she had no legal right to make a transfer of the property.

[4] Since Marjorie O'Neill takes as an heir of Marshall, and her inheritance consists of property to which he had the full and unconditional title, there seems no escape from the conclusion that she takes as a stranger to him and that she should, therefore, be compelled to pay the greater tax. Not only do we believe our conclusion in this case to be in entire harmony with the previous decisions of this court, to which reference has already been made, but also to be in full accord with the opinion of the Supreme Court, as to the effect of subdivision 8 of section 1386 of the Civil Code, as expressed in *Estate of Brady*, 171 Cal. 1, 151 Pac. 275.

It follows, then, that the order of the trial court, modifying the report of the inheritance tax appraiser, should be reversed, and the trial court be directed to overrule the objections to said report, and make its order confirming said report and fixing the tax as therein provided. It is so ordered.

We concur: WASTE, P. J.; RICHARDS, J.

(42 Cal. App. 705)

BURKE v. NORTON et al. (Civ. 2965.)

(District Court of Appeal, Second District, Division 2, California. Aug. 15, 1919.)

1. LANDLORD AND TENANT §198—RE-ENTRY BY LESSOR RELEASING LESSEE FROM FUTURE ACCRUING RENTS.

The retaking of the premises by the lessor releases the lessee from subsequently accruing rents, unless the lease expressly provides otherwise, as in a provision that for failure to observe covenants or conditions the lessor shall have the right to enter and at his option terminate the lease.

2. LANDLORD AND TENANT §103(2)—DECLARATION OF FORFEITURE OF LEASE PROVIDING FOR RE-ENTRY IN ACTION FOR RENT ERRONEOUS.

Where a landlord, by lease providing that for breach of condition he might re-enter and at his option terminate the lease for the lessee's failure to pay, brought action for the rent, the trial court improperly declared forfeiture of the lease, which also provided that all the remedies given the lessor were cumulative.

3. LANDLORD AND TENANT §184(2)—SECURITY DEPOSITS. APPLICABLE TO JUDGMENT FOR ARREARS OF RENT.

In view of the terms of the lease, *held*, that a \$5,000 security deposit made by the lessees was intended to be applied to any arrears of rent, so that the trial court in an action therefor properly ordered the deposit applied to satisfaction of the judgment.

4. APPEAL AND ERROR §1153—MODIFICATION OF ERRONEOUS JUDGMENT BY APPELLATE COURT.

Where the trial court fully ascertained the rights of the parties and erred merely by entering an erroneous judgment, the duty of the appellate court is to modify the judgment so as to finally settle the controversy.

Appeal from Superior Court, Los Angeles County; H. D. Gregory, Judge.

Action by Carleton F. Burke against I. H. Norton and others. From the judgment, plaintiff appeals. Modified and affirmed.

Newlin & Ashburn, of Los Angeles (Eugene D. Williams, of Los Angeles, of counsel), for appellant.

Haas & Dunnigan, of Los Angeles, for respondents.

THOMAS, J. This is an action brought to recover rent, attorney's fees, damages, and restoration of the premises held by the defendants, I. H. Norton, H. Joe Isaacs, and M. M. Norton, under a certain lease entered into by them with the plaintiff on July 12, 1912, for a period of seven years and three months, commencing October 1, 1912, and ending December 31, 1919, at a total rental of \$179,925 payable in certain installments. The defendants entered into possession of the premises, and either themselves, or by subtenant, remained in possession thereof until the filing of the suit.

Rent for the months of June, July, and August, 1915, amounting in all to \$5,520, was not paid when due, or at all. On July 27, 1915, the plaintiff caused to be served on defendants a notice requiring that within 20 days they pay said rent or surrender the possession of the premises; and also caused to be served upon defendants another notice, in similar terms, except that it was required that within 3 days they pay said rent or surrender possession of the premises. The defendants did neither. Thereafter, and on Au-

gust 20, 1915, this action was filed. Default of all the defendants, except the three above named, with whom the lease was made, having been regularly entered, and said defendants having answered, trial was had, and judgment rendered for plaintiff in the sum of \$5,770, including \$250 attorney's fees. The judgment also provided:

"That the said judgment is subject to a credit of \$5,000, and subject to another credit of \$175."

It also contained the further provision:

"That the agreement of lease entered into between the plaintiff and the defendants, I. H. Norton, H. Joe Isaacs, and M. M. Norton on the 5th day of July, 1912, be forfeited by the defendants and terminated as of date of August 31, 1915."

With the two last-quoted provisions plaintiff is dissatisfied, and because thereof appeals from the said judgment, and the whole thereof.

Appellant urges two points for reversal of the judgment here:

(1) That "the court erred in declaring a forfeiture of the lease"; and (2) that "the court erred in ordering that the sum of \$5,000 (held by plaintiff as security for the performance of the conditions of the lease, and to be applied in payment of rent reserved for the last two months of the lease) should be applied in satisfaction of the judgment."

The appeal is by the alternative method. The record consists only of the transcriptions of the clerk and reporter, and appellant's opening brief. The points submitted to us, therefore, are purely questions of law. Did the trial court err?

Appellant concedes that in certain cases such forfeiture of the term is properly declared as part of the judgment, but insists that, under the terms of the lease here involved, no forfeiture was worked by the bringing of the unlawful detainer suit; and that in the absence of an election by plaintiff to declare a forfeiture, and a prayer for a decree to that effect, none occurred or could properly be adjudged. In this action the complaint did not demand a forfeiture of the lease, nor was the question of forfeiture at all within the issues as made by the pleadings.

By the lease it was provided that—

"It is further expressly understood and agreed that each and all of the provisions of the lease are conditions precedent, to be faithfully and fully performed by said lessees to entitle them, or any of them to continue in possession of said premises; and if the said lessees shall fail to pay the rental aforesaid when the same becomes due and payable, or if they fail to keep, observe or perform any other covenant, condition or obligation of this lease on their part to be kept or performed, the lessor shall have the right to enter into possession of the demised premises and to remove all persons and property therefrom, and, at his option, to terminate

this lease. It is further understood that each and all of the remedies given to the lessor hereunder are cumulative; and that the exercise of one right or remedy by the lessor shall not impair his right to any other remedy; and the lessees hereby waive all claim for damages that may be caused by the lessor in re-entering and taking possession of said premises as herein provided, and all claims for damages that may result from the destruction or injury of or to said premises or buildings thereby, and all claims for damages to, or loss of such property belonging to the lessees or any of them, or any other person, firm or corporation as may be in or upon the premises at the time of such re-entering."

Did the trial court treat the phrases we have italicized in the provisions of the lease quoted above as having no force or effect? If so, what was the reason? Confronted with these provisions in the lease, can it be successfully maintained that the entry into possession and the removal of all persons and property from the leased premises—assuming such to have been done—would terminate the lease, without some other act on the part of the lessor indicating his election to avail himself of "his option to terminate the lease"? Do the provisions of section 791 of the Civil Code, under which this action was brought, manifest any intention to affect, limit, or control in any respect the terms or provisions of such a lease as the one involved in the case at bar? Is it not a question of construction to be arrived at from the language of the lease, as to whether it was the intention of the parties that a re-entry, by virtue of legal proceedings or otherwise, should of itself constitute an election to declare a forfeiture of the term? The answers to the foregoing questions are, we think, obvious.

To affirm the judgment of the trial court would, it seems to us, be tantamount to saying that the bringing of such an action as this constitutes a conclusive election to declare a forfeiture, and hence that the provisions of the lease involved here, which are quoted above, are rendered nugatory for the reason that the landlord is deprived of any expeditious or efficacious remedy for carrying out the terms of the lease as written. This we do not understand to be the law. Are the provisions referred to obnoxious to equity or to public policy? We think not. We are of the opinion that the construction placed upon the lease by the trial court converts the lease into something other and different than the parties themselves intended. The entry by plaintiff here was an entry "by virtue of the expressed provisions of said lease," and is perfectly good, unless such entry is prohibited by some law to which our attention has not been called.

[1, 2] As we understand it, the rule is that—

"The retaking of the premises by the lessor releases the lessee from subsequently accruing rents, unless the lease expressly provides oth-

erwise." *Watson v. Merrill*, 136 Fed. 359, 69 C. C. A. 185, 69 L. R. A. 719; *Grommes v. St. Paul Trust Co.*, 147 Ill. 634, 35 N. E. 820, 37 Am. St. Rep. 248; 1 *Taylor on Landlord and Tenant* (8th Ed.) §§ 377, 378; 2 *Wood on Landlord and Tenant* (2d Ed.) § 477.

A very complete and, we think, a fair discussion of the subject is contained in the second case just cited. The court in that case, among other things, said:

"There is nothing illegal or improper in an agreement that the obligation of the tenant to pay all the rent to the end of the term shall remain, notwithstanding there has been a re-entry for default; and, if the parties choose to make such an agreement, we see no reason why it should not be held valid as against both the tenant and his sureties."

We think this language is applicable to the case at bar. To hold otherwise, it seems to us, would be to place a lessee in a position to retain the premises without the payment of rent, and to compel the lessor to rely wholly upon the financial responsibility of the lessee and seek his rent from month to month by action, or to wholly terminate the lease, either of which would be less advantageous to the landlord than the right to re-enter and, if necessary, to relet the premises, looking to the lessee for only that portion of the rental reserved which represents the difference between what the landlord could obtain from any person upon such reletting and the total monthly rental. We do not hesitate to say that a construction which would thus permit a lessee to determine his own liability is, as we understand them, repugnant to the decisions of this state. *Belloc v. Davis*, 38 Cal. 242; *Wilcoxson v. Stitt*, 65 Cal. 596, 4 Pac. 629, 52 Am. Rep. 310; *Smith v. Mohn*, 87 Cal. 489, 25 Pac. 696; *Banbury v. Arnold*, 91 Cal. 606, 27 Pac. 934; *Freeman v. Griswold*, 4 Cal. Unrep. 256, 34 Pac. 327; *North Stockton, etc., v. Fischer*, 138 Cal. 100, 70 Pac. 1082, 71 Pac. 438; *Central Oil Co. v. Southern Refining Co.*, 154 Cal. 165, 97 Pac. 177; *Reed v. Hickey*, 13 Cal. App. 136, 109 Pac. 38; *Harron v. Cutting*, 19 Cal. App. 780, 127 Pac. 827.

From what we have said, it follows that the court erred in declaring a forfeiture of the lease.

It is urged by appellant that, there having been no forfeiture of the lease presented by the issues as framed by the pleadings, and none demanded by the plaintiff, and further that the bringing of this action did not constitute a termination of the term or of the lease, and that hence there was no forfeiture of the lease, it follows that the court erred in ordering the application of the sum of \$5,000, held by appellant under the terms of the lease, to the settlement of the judgment, because by such action the plaintiff was deprived of a valuable security, to which he was entitled under the specific terms of the lease. With this contention we are unable to agree.

By clause 19 of the lease referred to, it is provided that—

"It is hereby mutually covenanted and agreed that said lessees have paid to said lessor the sum of five thousand (\$5,000.00) dollars as security for the faithful performance by said lessees of each and all of the terms and covenants and conditions herein contained on the part of said lessees to be kept and performed, and that said sum of five thousand (\$5,000.00) dollars shall be held by said lessor as security for said faithful performance by said lessees, and that in the event that said lessees shall fail to keep and perform each and all of the terms and covenants and conditions herein contained, on their part to be kept and performed, said five thousand (\$5,000.00) dollars, or such proportion thereof as may be necessary shall be retained by said lessor and applied [italics ours] by him on account of the damages sustained by reason of the failure of said lessees to faithfully perform any of the conditions herein contained on their part to be performed. But notwithstanding the retention of said sum of five thousand (\$5,000.00) dollars by said lessor, said lessor shall have all and every action, right, remedy, claim and demand against said lessees for all damages sustained by him in excess of the sum of five thousand (\$5,000.00) dollars, up to the sum of twenty-five thousand (\$25,000.00) dollars by reason and on account of the failure of said lessees to perform the covenants herein contained on their part to be performed, but that in no event shall said lessor be entitled to ask for, demand, claim or receive from said lessees any sum or amount in excess of the sum of twenty-five thousand (\$25,000.00) dollars by reason or on account of any damage sustained by said lessor by or through the failure of said lessees to live up to, abide by or perform any of the terms, covenants or agreements herein contained on their part to be performed."

[3] For this, we think, it conclusively appears that the money so held by plaintiff was to be applied in just such a contingency as has arisen here. This being true, the learned trial court was correct in ordering the same applied to the satisfaction of the judgment.

[4] The practice in this state, from the very earliest time, has been to modify a judgment in the appellate tribunal so as to finally settle the controversy, when the rights of the parties appear from the record to be fully ascertained. *Persse v. Cole*, 1 Cal. 369; *Fox v. Hale, etc., Co.*, 122 Cal. 219, 54 Pac. 731. In the case at bar, we think it conclusively appears that the rights of the parties have been fully ascertained, and that the trial court simply erred by the entering of an erroneous judgment. Hence it seems clear that our present duty is to modify the judgment so as to finally settle this controversy, and render another trial unnecessary.

It is therefore ordered that the clause denominated "3" of the judgment entered herein, which reads as follows, "That the agreement of lease entered into between the plaintiff and defendants I. H. Norton, H. Joe Isaacs and M. M. Norton, on the 5th day of

July, 1912, be forfeited by the defendants and terminated as of date August 31, 1915," be, and the same is hereby, stricken out, and, as so modified, that the judgment be, and the same is hereby, affirmed; and that appellant shall recover his costs of appeal herein.

We concur: FINLAYSON, P. J.; SLOANE, J.

(42 Cal. App. 752)

HIGHLAND PARK INV. CO. v. LIST et al.
(Civ. 3035.)

(District Court of Appeal, First District, Division 1, California. Aug. 19, 1919. Rehearing Denied Sept. 18, 1919; Denied by Supreme Court Oct. 16, 1919.)

1. APPEAL AND ERROR ¶1097(1)—DECISION ON FORMER APPEAL AS LAW OF CASE.

A decision of the appellate court on former appeal in full accord with the authorities establishes the law of the case.

2. CORPORATIONS ¶317(2)—UNDER NO DUTY TO EXAMINE RECORD TO DISCOVER DIRECTOR'S FRAUD IN SALE TO IT.

There was no duty resting on a corporation intending to purchase lots, or upon any of its members, to examine the public records of a county to determine whether a director had purchased the lots from the owner to resell to the company at a profit, or to suspect the director was intending thus to perpetrate a fraud.

3. LIMITATION OF ACTIONS ¶55(1)—FRAUD ON CORPORATION WAS CONSUMMATED WHEN CONVEYANCE TO IT WAS MADE BY DIRECTOR.

As respects the statute of limitations, fraud of corporation's director, consisting in obtaining a secret profit by purchasing lots and selling them to corporation at an advance, was consummated when the conveyance of the lots was made by the director and his wife to the corporation.

Appeal from Superior Court, Los Angeles County; Lewis R. Works, Judge.

Action by the Highland Park Investment Company against R. D. List and others. From judgment for plaintiff, defendants appeal. Affirmed.

Goodrich & Martinson and Tobias R. Archer, all of Los Angeles, for appellants.

Meserve & Meserve and Paul H. McPherson, all of Los Angeles, for respondent.

WASTE, P. J. This is an appeal from a judgment in favor of the plaintiff, after the second trial, the case having once before been before the appellate court. *Highland Park Inv. Co. v. List*, 27 Cal. App. 761, 151 Pac. 162.

The action was brought to recover a sum of money alleged to have been secured by appellant R. D. List as a secret profit upon a sale of certain lots of land to plaintiff cor-

poration. The facts are fully and succinctly stated in the opinion of the court on the former appeal, and do not need to be repeated.

"The directors of a corporation hold a fiduciary relation to the stockholders, and have been intrusted by them with the management of the corporate property for the common benefit and advantage of each and every stockholder, and by their acceptance of this office they preclude themselves from doing any act or engaging in any transaction in which their private interest will conflict with the duty they owe to the stockholders, and from making any use of their power or of the corporate property for their own advantage. * * * For the reason that it is against public policy to permit persons occupying fiduciary relations to be placed in such a position that the influence of selfish motives may be a temptation so great as to overpower their duty and lead to a betrayal of their trust, the rule is unyielding that a trustee shall not, under any circumstances, be allowed to have any dealings in the trust property with himself, or acquire any interest therein. Courts will not permit any investigation into the fairness or unfairness of the transaction, or allow the trustee to show that the dealing was for the best interest of the beneficiary, but will set the transaction aside, at the mere option of the cestui que trust." *Wickersham v. Crittenden*, 93 Cal. 17, 29, 28 Pac. 788, 790; *Sims v. Petaluma Gaslight Co.*, 131 Cal. 659, 63 Pac. 1011; *Pacific Vinegar Works v. Smith*, 145 Cal. 352, 366-367, 78 Pac. 550, 104 Am. St. Rep. 42.

"It is well settled that any secret profit obtained by the president or a director of a corporation by reason of any violation or disregard by him of any obligations incident to the fiduciary or quasi trust relations that he occupies toward the corporation and its stockholders cannot be retained by him but must be accounted for to the corporation. * * * It is universally held as a consequence of this doctrine that he may not on behalf of the corporation contract with himself as an individual, which of course includes contracting with others with whom he has an interest, without the full knowledge and approval of the corporation." *Western States Life Ins. Co. v. Lockwood*, 166 Cal. 185, 190, 196, 135 Pac. 496, 498.

[1] The decision of the appellate court on the former appeal is in full accord with these authorities, and establishes the law of this case, with which, on the facts before us, we are in full accord.

When the decision of the lower court in the first trial of the case was reversed on appeal (*Highland Park Inv. Co. v. List*, supra), it was on the ground, solely, as we read the decision, that one of the essential findings of fact was not sustained by the evidence. That finding of fact was, in substance, that, prior to August 25, 1908, the date of the meeting of the directors of the plaintiff corporation, authorizing the purchasing of the Withington lots, appellant R. D. List learned that the directors of the corporation would vote for the purchase of said lots for the price of \$8,000, and that thereupon, without disclos-

ing the fact to his fellow directors, List purchased the lots, taking the title in his wife's name at a less price, and, without disclosing to the corporation that he had so purchased them, completed the transaction for transfer at the price of \$8,000, to the corporation, thereby reaping a profit of \$3,328.

The judgment sought and recovered in the case, and based on the findings made at the first trial, was not one of rescission. The corporation elected to retain what it had received from List, and to secure from him the profits which he had made on the sale of the land.

Considering the findings, and the judgment entered in the case, the appellate court said:

"There is no doubt but that such a judgment would have been proper were it shown that while the board of directors, of which List was one, was negotiating for the purchase of this property, List secretly obtained title thereto and thereupon resold the property to the company, making a profit thereon. The evidence as it is set out in the transcript does not show that the directors had taken up the matter of the purchase of these particular lots prior to the meeting of August 27, 1908. It appeared without dispute that List had purchased the lots five days prior to this time. None of the witnesses, directors, and stockholders of plaintiff corporation, testified to having talked with List regarding the desire of the corporation to purchase the lots prior to the day upon which the directors' meeting was held at which the resolution authorizing the purchase was adopted. Upon this state of the evidence, the legal situation presented is no different than had it appeared that List had become the owner of the lots 80 or 90 days, or more, prior to the 27th day of August. * * * The facts and circumstances shown in evidence do not support the findings as to the essential matters indicated herein." *Highland Park Inv. Co. v. List*, supra.

The judgment recovered in the lower court on the first trial and again on the second trial, from which judgment this appeal is taken, was the proper form for a judgment in such a case. "The plaintiff corporation was simply seeking to recover such secret profits as were made by one of its officers in a transaction wherein he was forbidden to make any such secret profits, and which profits, in view of the rules we have discussed, belonged to the corporation." *Western States Life Ins. Co. v. Lockwood*, supra; *Ex-Mission Land & Water Co. v. Flash*, 97 Cal. 636, 32 Pac. 600.

On the retrial, the judgment in which is the basis of this appeal, the plaintiff introduced evidence curing the defect in the first trial, pointed out by the court of appeal, and the record now amply shows that List, prior

to August 27, 1908, the date on which he purchased the lots, had knowledge that the corporation desired and intended to purchase the property. The finding of the trial court to that effect is fully supported by the evidence.

[2] The trial court found that the fraud practiced by defendant R. D. List on the plaintiff corporation was not discovered by any of its officers or directors until the month of April, 1909. There is ample evidence to sustain this finding, and the finding itself does not appear to be attacked except upon the theory that the recording of the deed from Withington to List on August 27, 1908, gave notice to the corporation of the fraud. There was no duty resting upon the corporation, or any of its members, on August 27th, to examine the public record of Los Angeles county, nor to anticipate nor to suspect that List would, or even that he was intending to, perpetrate fraud upon the corporation.

"Where no duty is imposed by law upon a person to make inquiry, and where under the circumstances 'a prudent man' would not be put upon inquiry, the mere fact that means of knowledge are open to a plaintiff, and he has not availed himself of them, does not bebar him from relief when thereafter he shall make actual discovery. The circumstances must be such that the inquiry becomes a duty and the failure to make it a negligent omission. *Bank of Mendocino v. Baker*, 82 Cal. 114 [22 Pac. 1037, 6 L. R. A. 883]; *Prouty v. Devin*, 118 Cal. 258 [50 Pac. 880]. In this case, though means of information were open to the plaintiff, it does not appear that there was any duty devolving upon him to make use of them. Nothing had occurred to excite his suspicion, or to put him upon inquiry, and for these reasons, under the facts of this case, we think the finding of the court sufficient and sufficiently supported by the evidence." *Tarke v. Bingham*, 123 Cal. 166, 55 Pac. 760.

[3] The fraud was consummated by the execution and delivery of the deed by List and wife to the corporation on the 31st day of August, 1908, assuming that it was delivered on the date of its execution and acknowledgment. The present action was commenced on August 31, 1911. It was therefore brought within the statutory time of three years, even though the corporation had knowledge from the date of the consummation of the fraud. There is no merit in the appeal. We do not feel it necessary to further discuss the matters raised in the supplemental briefs filed by the appellants.

The judgment is affirmed.

We concur: RICHARDS, J.; KERRIGAN, J.

(42 Cal. App. 747)

McNULTY v. LAWLEY et al. (Civ. 2794.)

(District Court of Appeal, First District, Division 2, California. Aug. 19, 1919.)

1. TURNPIKES AND TOLL ROADS —19—RIGHT OF TOLL ROAD OWNERS TO TAKE MATERIAL FROM SERVIENT LAND.

The owners of a toll road over another's land had the right to grade their road, as reasonably necessary or appropriate, and perhaps the right to use material for filling or surfacing other portions of the road, but no right to take material from the land, even within right of way, without regard to grading operations on the land, but to be hauled miles away, as well as to points on other roads.

2. TURNPIKES AND TOLL ROADS —15—RIGHT OF WAY GIVES RIGHT OF PASSAGE, NOT OWNERSHIP OF SOIL.

An easement of toll road owners for highway purposes over the land of another is for passage only, with necessary incidental powers and privileges to grade the way and repair and maintain it; such incidental powers and privileges giving the owners, holders of the easement, no right of ownership in the soil.

3. APPEAL AND ERROR —932(1)—PRESUMPTION FAVORING JUDGMENT BELOW BY ACCOUNTING FOR SMALLNESS.

In a landowner's action to recover from the owners of a toll road over the land for rock taken from a quarry and for damages, it must be presumed in favor of the judgment for much less than the landowner claimed that the jury made proper allowance for rock used in grading operations by defendant road owners.

4. TURNPIKES AND TOLL ROADS —26½—IMMATERIALITY OF PROCEEDINGS ESTABLISHING AND ABANDONING ROAD IN SUIT AGAINST TOLL ROAD OWNERS.

In an action by a land and quarry owner against the proprietors of a toll road to recover for rock improperly taken, in view of the toll road owners' mistaken theory of the law, rejection of proffered evidence of proceedings of the supervisors in establishing and abandoning an old road was not erroneous; proceedings affecting the old road at a different place having no tendency to prove the width of the right of way past the quarry, while the width of the road was immaterial anyway.

5. APPEAL AND ERROR —1058(1)—EXCLUSION OF EVIDENCE AS HARMLESS.

The exclusion of evidence tending to prove for defendants a point of fact as to which their witnesses testified was harmless.

6. EVIDENCE —113(19)—ASSESSMENT ROLLS AS EVIDENCE OF VALUE OF LAND.

In an action by a landowner against proprietors of a toll road to recover for rock taken from the land and for damages from the taking, the assessment rolls of several successive years were not admissible for defendants as original evidence to prove the value of plaintiff's property.

Appeal from Superior Court, Napa County;
R. H. Latimer, Judge.

Action by Della McNulty against Harry B. Lawley and Charles A. Lawley. From judgment for plaintiff, defendants appeal. Affirmed.

John T. York, of Napa, for appellants.
Aitken, Glensior & Clewe, of San Francisco, for respondent.

BRITTAI, J. The defendants appeal from a judgment for \$779, entered upon the verdict of a jury, in a suit for the value of rock taken from the plaintiff's quarry, and for damages for injury to the land by reason of the taking. The appellants contend that the trial court committed error in rejecting certain evidence and in giving certain instructions concerning their rights as the proprietors of a toll road running over the plaintiff's land and by or through the quarry in question.

Through the plaintiff's land runs a stream, from the left bank of which rose a steep hill in which the quarry was opened. The toll road hugs the bank of the stream, and was graded and used at that point to a width of some 20 feet. The quarry has an opening of about 370 feet along the road. Its floor is substantially level with the road, and, roughly speaking, forms the segment of a circle having a depth at the center of about 70 feet from the nearest edge of the traveled portion of the road to the base of the quarry face. From the base to the top of the quarry, at its deepest central part, the height is about 100 feet, and at the ends of the quarry the height is perhaps 30 feet.

[1] The defendants claimed to be entitled to a right of way for the toll road 86 feet wide, up to a line some 46 to 48 feet further from the creek than the inside line of the traveled and graded way. They also claimed, and here claim as a matter of law, the right to take rock from any part of the right of way. If the appellants' second contention is not correct, their first contention is immaterial. Even though the proper boundaries of the defendants' right of way included the entire quarry, they had no right to take rock which, but for the easement, belonged to the plaintiff. They had the unquestionable right to grade their road in such manner as was reasonably necessary or appropriate for its use, and perhaps the further right to use the material so separated from the land for filling or surfacing other portions of their road. They had no right to take material from plaintiff's soil, even within the boundaries of the right of way, without regard to grading operations on the plaintiff's land, but to be hauled, as some of it was, to points on the toll road miles away from the plaintiff's land, as well as to points on other roads, public and private. As well might they have claimed the right to operate

for their own benefit a gold mine on any portion of the right of way.

[2] The easement for highway purposes is for passage only over the land, with necessary incidental powers and privileges to grade the way and to repair and maintain it upon or adjacent to the lands of the respective abutting owners. These incidental powers and privileges give the holders of the easement no right of ownership in the soil. Lord Mansfield said the rule was express "that the king has nothing but the passage for himself and his people; but the freehold and all profits belong to the owner of the soil." *Goodtitle v. Alker*, 1 Burr. 143. Material may be taken from the highway for the purpose of building or repairing the same in front of the adjoining land, or for bringing it down to grade, but the taking of such material, not for the improvement of the highway at the point from which they are taken, but merely for use in improving other portions thereof, is unjustifiable. 13 R. C. L. Highways, § 112. The text in *Ruling Case Law* is amply supported by authority. In two cases cited by respondent the facts were substantially the same as in this case, and the rule was applied. *Dist. of Columbia v. Robinson*, 180 U. S. 92, 21 Sup. Ct. 283, 45 L. Ed. 440; *Smith v. City of Rome*, 19 Ga. 89, 63 Am. Dec. 298. In this state the broad general principles underlying the rule have been discussed in a number of cases. *Wright v. Austin*, 143 Cal. 236, 76 Pac. 1023, 65 L. R. A. 949, 101 Am. St. Rep. 97; *North Fork, etc., Co. v. Edwards*, 121 Cal. 662, 54 Pac. 69; *Burris v. People's Ditch Co.*, 104 Cal. 248, 37 Pac. 922. The authorities relied upon by the appellants on this branch of the case, when carefully examined, tend rather to support the argument of the respondent, and do not overcome the rule applied by the Supreme Court of the United States and recognized in this state.

[3, 4] There was some evidence on the part of the defendants that a part of the rock taken was from the ends of the quarry for the purpose of widening and straightening the road. On the other hand, the plaintiff's evidence was that a great portion of the rock was taken from the main quarry face, which was outside of the right of way claimed by the appellants. The jury visited the quarry. The verdict was for much less than the plaintiff claimed. It must be presumed in favor of the judgment that the jury made proper allowance for any grading operations. Even though the main quarry face had been within the claimed right of way, it was not nor could it be claimed the quarrying at that point was in furtherance of grading operations. The rock taken was not used by the defendants on that part of their road locat-

ed on the plaintiff's land. Under these circumstances, and following the rules laid down in the foregoing authorities, the actual location of the inner boundary of the right of way was immaterial. There was no error, in view of the defendants' mistaken theory of the law, in rejecting the proffered evidence of proceedings of the supervisors in establishing and abandoning an old road.

[5] The rejection of this evidence was correct for other reasons. A county road, 66 feet wide, had been laid out and constructed, at least in part. It was abandoned in order that the defendants' predecessor might utilize such parts of it in the construction of his toll road as he desired. He was not compelled to nor did he utilize it either for its full length or its full width. The county road never ran across the plaintiff's land, and did not pass the quarry. The toll road is largely in the mountains, and was constructed, as at the plaintiff's place, of such a width as the proprietary owners of the easement deemed necessary to accommodate the mountain traffic. It was maintained at this point at a width of 18 or 20 feet for over 40 years. Proceedings affecting the old county road at a different place had no tendency to prove the width of the right of way past the plaintiff's quarry. Moreover, witnesses of the defendants testified in regard to their claims to a right of way 66 feet wide. If it could be held that there was technical error in excluding the evidence, the defendants were not injured. In such a case the judgment would not be disturbed. *Estate of Wlneteer*, 176 Cal. 28, 167 Pac. 516; *Code Civ. Proc.* § 475.

The instructions of which complaint is made by the appellants were in accord with what has been said of the law regarding the use of material in the highway. In view of the law, they were perhaps more favorable to the appellants than they were entitled to have.

[6] The plaintiff testified concerning the value of the rock taken. On cross-examination she testified that she did not know for what her property was assessed. On behalf of the defendants it was sought to introduce the assessment rolls of several successive years. The offer was properly rejected. The assessment rolls would not have contradicted the plaintiff's evidence, and they were not admissible as original evidence of value. The only case cited by the appellants on this subject supports the action of the trial court. *Central Pac., etc., Co. v. Feldman*, 152 Cal. 303, 92 Pac. 849.

The judgment is affirmed.

We concur: LANGDON, P. J.; HAVEN, J.

(42 Cal. App. 780)

McCLENDON v. HEISINGER et al.
(Civ. 2899.)

(District Court of Appeal, First District, Division 2, California. Aug. 21, 1919.)

1. EVIDENCE ¶441(12)—PAROL EVIDENCE VARYING WRITTEN GUARANTY OF NOTE INADMISSIBLE.

In action on guaranty of a note indorsed on its back, any conversation regarding plaintiff payee's agreement that, if the five defendants would sign the guaranty, plaintiff would stand his pro rata share of any loss that might be occasioned to them, held inadmissible as varying the writing.

2. GUARANTY ¶87 — FAILURE TO PLEAD FRAUD AS DEFENSE TO ACTION ON GUARANTY WAIVER THEREOF.

In an action on guaranty of a note indorsed on its back, where defendants have not pleaded fraud by plaintiff in procuring their guaranty by an oral agreement to bear his pro rata share of any loss that might be occasioned to them by it, they cannot rely on the defense.

3. FRAUDS, STATUTE OF ¶20—ORAL CONTRACT OF GUARANTY OF DEBT OF ANOTHER INVALID.

If plaintiff payee of a note had made to defendant an oral agreement to bear his pro rata share of any resulting loss to them as guarantors, such agreement would have amounted to nothing more than a contract of guaranty of the debt of another, which would not have been enforceable unless in writing.

4. SET-OFF AND COUNTERCLAIM ¶24—AGREEMENT TO SHARE IN LOSS OF GUARANTORS NOT ENFORCEABLE UNTIL PAYMENT BY THEM.

Where plaintiff, payee of a note, agreed that if defendants would guaranty it he would stand his pro rata share of any loss occasioned to them, in the absence of allegation and proof that defendants have suffered any loss they cannot rely on plaintiff's agreement as a counterclaim against his cause of action on the guaranty, having no existing cause of action, as required by Code Civ. Proc. § 438, as it would not accrue until their liability had matured by actual payment.

5. GUARANTY ¶49 — RELEASE OF GUARANTORS BY IMPAIRMENT OR SUSPENSION OF CREDITOR'S RIGHTS AGAINST PRINCIPAL.

The consent of plaintiff, payee of a corporate note, as director of the corporation, to the transfer of its assets to a trustee for creditors, did not constitute an act impairing or suspending plaintiff's rights or remedies against the company to release other directors from liability on their guaranty of the note, under Civ. Code, § 2819.

Appeal from Superior Court, City and County of San Francisco; Frank J. Murasky, Judge.

Action by W. J. McClendon against S. L. Heisinger and others. From judgment for plaintiff, defendant Heisinger and another appeal; Alice M. McClendon, as administra-

trix of plaintiff, being substituted as respondent on his death. Judgment affirmed.

Everts & Ewing and M. G. Gallaher, all of Fresno, Lafayette J. Smallpage, of Stockton, and Walter E. Hettman, of San Francisco, for appellants.

Byron F. Stone, Jr., and Richard C. Harrison, both of San Francisco, for respondent.

HAVEN, J. Action on a contract of guaranty. Plaintiff and defendants were the directors of the California Rochdale Company, a corporation. Defendants guaranteed the payment to plaintiff of a promissory note of said company in the sum of \$5,000, which amount was subsequently reduced by payments made thereon to \$4,132.20, the amount sued for herein. The contract of guaranty was written on the back of the note, and was signed by the five defendants contemporaneously with the execution of the note. After the maturity of the note the California Rochdale Company transferred all of its assets to a trustee for the benefit of its creditors. Subsequently a settlement was effected with some of the creditors, leaving the corporation indebted to the plaintiff and to certain other creditors. Thereafter, with the consent of the corporation and of such remaining creditors, and with the consent of the defendant Heisinger, said trustee transferred the assets then remaining in his hands to a committee of three, consisting of the plaintiff, the defendant Heisinger, and the defendant Bennett, which transfer was found to have been made in trust for the benefit of such remaining creditors. The trial court rendered judgment in favor of plaintiff and against defendants, all of the defendants having defaulted except Heisinger and Bice, from which judgment the non-defaulting defendants prosecute this appeal.

The defenses of each of the defendants were: First, that he had signed the contract of guaranty in reliance upon a prior agreement of plaintiff to the effect that, if the five defendants would sign the same, plaintiff would stand his pro rata share of any loss that might be occasioned to them by reason thereof; second, that, without the consent of the guarantors, plaintiff had released the maker of the note from all liability thereon; and, third, that after the execution of the contract of guaranty, the California Rochdale Company, with the consent of the plaintiff, but without the consent of the guarantors, transferred all of its assets to one Smith as trustee for the benefit of its creditors, and that thereafter the plaintiff without the consent or knowledge of the guarantors, executed a waiver in writing of all his rights as holder of the note to participate in the assets of said corporation. At the close of the trial the court granted plaintiff's

motion to strike out the testimony of certain witnesses by which defendants attempted to prove an oral agreement between plaintiff and defendants that plaintiff would stand his pro rata share of any loss that might be suffered by them by reason of said guaranty, hereinabove referred to in the first defense, and in accordance with the remaining evidence found that no such agreement had been made.

[1, 2] We cannot agree with appellants' contention that this ruling was erroneous. If there was any conversation regarding such an agreement, it was inadmissible, as the contract sued upon was in writing, was complete in itself, and superseded all negotiations or conversations which preceded or accompanied its execution. Appellants do not attempt to dispute the well-established rule that parol evidence is inadmissible to vary the terms of a written instrument. They argue, however, that plaintiff is estopped from enforcing his contract of guaranty because of the oral agreement which they claim he entered into; that, if he made such oral agreement without intention of fulfilling it, it constituted fraud in the procurement of the contract of guaranty, which would preclude its enforcement. There is no merit in this contention. Fraud as a defense must be pleaded and proved. This defendants have not done.

[3, 4] Appellants further claim that the introduction of parol testimony to establish this oral agreement was not an attempt to vary the terms of a written contract, but that it evidenced another collateral agreement, which constituted a part of the consideration for the execution of the contract of guaranty. If such an agreement were made, it would have amounted to nothing more than a contract of guaranty of the debt of another, which would not have been enforceable unless in writing. The cases cited by appellants do not bear out their contention in this regard. Nor would such an agreement constitute a counterclaim against plaintiff's cause of action, as claimed by appellants, for the reason that the agreement pleaded and attempted to be proved was to "stand his pro rata share of any loss that might be occasioned said defendant by reason of his becoming the guarantor of said note." The record contains no allegation nor proof that appellants have as yet suffered any loss by reason of their guaranty. They had therefore, no "existing" cause of action against plaintiff under such alleged agreement, as is required by section 438 of the Code of Civil Procedure. A cause of action upon contract is not "existing," within the meaning of the above section, until a liability upon such contract has matured. Provident Mutual Building Loan Association v. Davis, 143 Cal. 253, 76 Pac. 1034. No loss would be occasioned to defendants with-

in the meaning of the alleged agreement until actual payment was made by them. Even recovery of judgment against them would not have given rise to a matured right of action in their favor against the plaintiff. *Oaks v. Scheifferly*, 74 Cal. 478, 16 Pac. 252.

[5] The trial court found that "the plaintiff did not at any time * * * release the California Rochdale Company from liability on the note referred to in said complaint or from any part of its liability on said note." Appellants' contention that plaintiff released the corporation "or its representative, Smith," from its obligation upon the note, is unwarranted. Smith was the trustee for the creditors. The California Rochdale Company passed a resolution authorizing and directing defendant Heisinger, president of the corporation, upon acceptance of a certain compromise settlement by a majority in number and amount of its merchandise creditors, to deliver to said Smith a copy of said resolution, "which is hereby constituted an authority and instruction to H. L. Smith to retransfer to F. A. Bennett, S. L. Heisinger, and W. J. McCleendon, or their nominees, all of the assets heretofore transferred to him by the California Rochdale Company." Plaintiff and Heisinger, as creditors of said corporation, each executed a release to Smith for all claims and demands which he "has or may have against said H. L. Smith on account of the aforesaid transfer of assets, and does hereby consent that said H. L. Smith may transfer said assets and property" to said parties. This release does not purport to be a release of the corporation, or any one else, from any obligation under the note in suit, nor a waiver by plaintiff of any rights thereunder. This is the only release in evidence. Reliance is placed upon section 2819 of the Civil Code, which provides that—

"A guarantor is exonerated, except so far as he may be indemnified by the principal, if by any act of the creditor, without the consent of the guarantor, the original obligation of the principal is altered in any respect, or the remedies or rights of the creditor against the principal, in respect thereto, in any way impaired or suspended."

It is not contended that the original obligation was altered in any respect. The consent of plaintiff, as a director of the corporation, to the transfer of the assets of said corporation for the benefit of creditors, did not constitute an act impairing or suspending the remedies or rights of plaintiff against the corporation. In this connection appellants rely on the well-established rule that "a payee, who voluntarily releases the lien on property which he holds as security for the payment of his note, exonerates the guarantor thereon." The note in suit, however, was unsecured. By his consent to the transfer of the corporate assets to a trustee, plaintiff neither

released any security for his note nor extended the time of payment.

The judgment is affirmed.

We concur: LANGDON, P. J.; BRITAIN, J.

(42 Cal. App. 742)

PACIFIC MFG. CO. v. RASMUSSEN et al.
(Civ. 2887.)

(District Court of Appeal, First District, Division 2, California. Aug. 19, 1919. Rehearing Denied Sept. 18, 1919; Denied by Supreme Court Oct. 16, 1919.)

1. MECHANICS' LIENS ⇨300—VARIANCE BETWEEN NOTICE OF COMPLETION OF BUILDING AND ACTUAL DATE IMMATERIAL.

Appellants in a mechanic's lien foreclosure action may not complain that a notice specified the date of completion of a building as December 19th, whereas the court found the date was really December 24th, since Code Civ. Proc. § 1187, then permitted notice within 10 days after completion, and appellants did not file their lien claim within such time after December 24th, and they were not injured.

2. APPEAL AND ERROR ⇨1011(1)—FINDINGS ON CONFLICTING EVIDENCE NOT REVIEWED.

Where the evidence to support findings of trial court is scant, but conflicting, the findings will not be disturbed.

3. MECHANICS' LIENS ⇨281(2)—EVIDENCE SUFFICIENT TO SHOW ACCEPTANCE OF WORK ON SPECIFIC DATE.

In consolidated actions for foreclosure of mechanics' liens, evidence held sufficient to support the findings of the trial court in relation to the acceptance of the work of both painter and plasterer as of a specific date.

4. MECHANICS' LIENS ⇨132(4)—CLAIM INVALID FOR FAILURE TO FILE NOTICE WITHIN TIME LIMITED.

Where claimants did not file their notices of mechanics' liens, either within the time limited after the notice of completion or within the time limited after the completion of their original contracts, their liens are not valid, because of failure to comply with Code Civ. Proc. § 1187.

Appeal from Superior Court, Alameda County; Everett J. Brown, Judge.

Consolidated mechanics' lien actions, in which the Pacific Manufacturing Company, a corporation, and others, were plaintiffs, and C. H. Rasmussen and others were defendants. From the judgment rendered, Eric Petersen and H. W. Lassen appeal. Affirmed.

Carl F. Wood, and L. D. Manning, of Oakland, for appellants.

W. B. Rinehart, of Oakland, for respondents.

LANGDON, P. J. This is an appeal by Eric Petersen and H. W. Lassen, two of the

plaintiffs in a consolidated action to foreclose mechanics' liens, first, from that portion of the decision of the trial court holding that the sum of \$4,150, found to be the unpaid balance owing from Court Livermore, No. 77, Foresters of America, the owner of the building upon which the work was performed, to the defendant Rasmussen, the contractor, was payable to defendant Farmers' & Merchants' National Bank of Livermore under an assignment, and that such sum was not subject to payment of the amounts found to be due appellants for labor and materials used in the construction of the building; and, second, from that portion of the decision and judgment denying appellants a lien against the land on which the building was constructed. The amounts of the appellants' claims were determined by the findings and judgment ordered in their favor for such amounts against the contractor, Rasmussen.

On May 6, 1914, Court Livermore, through its building committee, entered into an agreement in writing with Rasmussen, as contractor, for the erection of a building on a lot in Livermore, Alameda county. The contract price was to be something over \$14,000, payable in monthly installments during the progress of the work, in sums equal to 75 per cent. of the value of the work done up to the date of payment, the remaining 25 per cent. to be paid 35 days after final completion of the work. The court found that upon the completion of the work there was due the contractor the sum of \$4,150, which had previously been assigned by him to the defendant Farmers' & Merchants' National Bank to secure a note of the contractor, which note was given for money advanced by the bank and used in the erection of the building. The causes of action stated in the complaint of appellant Petersen include a number of claims assigned to said appellant by other lien claimants, which will be considered later.

Appellants contend that a valid notice of completion was never filed by the owner, and that therefore it is precluded from maintaining any defense based upon the ground that the liens were not filed in time, under the provisions of section 1187, Code of Civil Procedure. The facts involved in this determination are that on December 19, 1914, Court Livermore occupied the building, which was substantially completed at that time, but there remained unfinished at that time the exterior painting and a small amount of plastering and concrete work, of the value of about \$4.30. The court found that such occupation and use of the building by Court Livermore, on and after the 19th day of December, 1914, was open and notorious and well known to all of the parties plaintiff and defendant in this action, including all of the lien claimants in the consolidated actions. The court found that the contractor, Rasmus-

sen, completed the construction of said building on the 24th day of December, 1914, and that said building was accepted by said owner on said 24th day of December, and a notice of completion and acceptance thereof was duly filed and recorded in the office of the county recorder of Alameda county on said 24th day of December, 1914, and that all of the parties to this action and all of the lien claimants mentioned therein, except Robert Howden, had knowledge of the completion of said building on and after the actual date of completion thereof as found by the court, to wit, the 24th day of December, 1914.

[1] The notice of completion filed and recorded on December 24th specified the date of completion as of December 19th, and the appellants' objection is that, as the court found said date of completion was really December 24th, the notice should have so stated, and that, as it stated that the completion date was December 19th, instead of December 24th, said notice is fatally defective, as not being in conformity with the statute. Section 1187, Code of Civil Procedure, as it stood at the time of this notice, provided that the owner may within 10 days after completion of any contract file for record in the office of the county recorder a notice setting forth the date when the same was completed, together with his name, etc. While it may be true that if the lien claimants had relied upon this notice of completion as filed, and had filed their claims within the 30 days allowed after the time stated in the notice as the date of completion, the owner would have been estopped to deny that such date, so stated, was not the actual date of completion—in the present case, the claimants and their assignors neither filed their claims within 30 days of the date stated in the notice, nor within 30 days from December 24th, the date found by the court to have been the actual date of completion and the date upon which the notice was filed and recorded. They are, therefore, not injured and in no position to complain.

The court also found that on the 24th day of December, 1914, it was agreed and understood by and between plaintiff Petersen and defendant Rasmussen and said Court Livermore that the work and contract of said plaintiff Petersen should be and the same was accepted on said date, omitting therefrom the aforesaid concrete work, amounting to \$4.30, which it was agreed between the parties aforesaid, on said day, might be performed at such time thereafter as would be proper and convenient for said Petersen, and that as to said last-mentioned work no time of performance was agreed upon and no time of payment fixed; that the performance of same was, by said agreement between the said parties, eliminated from the contract of said plaintiff Petersen, and a new contract made with relation thereto as aforesaid, wherein and whereby it was agreed that

Petersen might perform the same and should receive therefor when performed the sum of \$4.30, the same to be paid by defendant Rasmussen, and that the said Court Livermore did not agree to pay the same.

[2] With reference to the other work remaining unfinished on December 24th—i. e., the exterior painting, contracted to be done by Morrill & Walters, assignors of Petersen—the court found that said contract was accepted as fully performed by said Rasmussen and the said Court Livermore on the 24th day of December, 1914, for all the purposes of the completion of said building; that on the said 24th day of December, 1914, it was agreed and understood between Morrill & Walters, Rasmussen, and said Court Livermore that the work and contract of said Morrill & Walters should be and the same was on said day accepted, omitting therefrom the aforesaid unfinished portion of said work, amounting in value to the sum of \$153, which it was agreed between the parties might be performed at such time thereafter as would be proper and convenient; and that the performance of the same was by agreement between the parties eliminated from the contract of Morrill & Walters and a new contract made with relation thereto.

[3] Appellants contend that there is no evidence to warrant the above findings that new contracts were entered into between the parties for the completion of the cement work and painting work, and that the original contracts for such work were accepted as completed by the owner as of December 24th. It is true the evidence to warrant these findings is scant; but there is a conflict in the evidence, and, if there is any evidence from which these findings could be made, they are not subject to review here. We find in the record the agreement signed by Morrill & Walters, the painters, and also signed by Rasmussen, the contractor, on or about December 24th, which reads:

"We hereby agree that the value of the unfinished painting work on the Foresters' Hall on Saturday, December 19, 1914, as compared with the entire contract price for this painting, amounts to \$153; in other words, our total contract for painting amounts to \$654, and painting work completed December 19, 1914, amounts to \$500, and as above noted the unfinished work amounts to \$153."

A similar agreement was signed by Petersen in relation to the unfinished portion of the plastering and concrete work, amounting to \$4.30. In relation to these two agreements we have the testimony of Rasmussen, the contractor, that, when these agreements were signed, Rasmussen showed to Mr. Walters and to Mr. Petersen, respectively, a letter from the architect, explaining that he wanted to have the building accepted to meet all legal requirements, and requesting an estimate of and agreement concerning the unfinished portion of the work, which letter is

a part of the record here; that Walters was with Rasmussen when the agreement was presented to Petersen; that the letter from the architect was shown to Petersen, and that it was explained to him, as it had been to Mr. Walters, that the owner wanted to have the building accepted, and that the painting might be completed when the weather permitted. We think this evidence is sufficient to support the findings of the trial court in relation to the acceptance of the work of both the painter and plasterer as of December 24th.

[4] Under the findings it therefore appears that neither the plaintiff Petersen nor his assignor, Morrill & Walters, have valid liens under the provisions of section 1187, Code of Civil Procedure. They did not file their notice of lien, either within the time limited after the notice of completion, or in the time limited after the completion of their original contracts. Under the findings of the trial court, this is also true of the lien of the appellant Lassen, and of the various lien claimants whose claims were assigned to Petersen. The judgment is affirmed.

We concur: BRITAIN, J.; HAVEN, J.

(42 Cal. App. 736)

MICHALEK v. NEW ALMADEN CO.
(Civ. 2893.)

(District Court of Appeal, First District, Division 2, California. Aug. 18, 1919. Rehearing Denied by Supreme Court Oct. 16, 1919.)

MINES AND MINERALS §97—EMPLOYEES NOT HAVING INTEREST IN MINE, PAID FOR ORE PRODUCED, NOT PARTNERS.

Where mine owner made oral agreement with certain number of its employees giving them the right to open up abandoned tunnel, agreeing to pay them at specified rate for ore delivered to it, and furnishing them with tools wherewith to do work, the employees were not "mining partners" under Civ. Code, §§ 2511, 2512, 2516, not having any interest in or right to possession of the mine, and the contract being merely one of employment.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Mining Partnership.]

Appeal from Superior Court, City and County of San Francisco; E. P. Shortall, Judge.

Action by A. Michalek against the New Almaden Company. Judgment for plaintiff, and defendant appeals. Reversed.

David M. Burnett, of San Jose, and John J. O'Toole, of San Francisco, for appellant. Arnold C. Lackenbach, R. Porter Ashe, and Roland Becsey, all of San Francisco, for respondent.

HAVEN, J. Plaintiff sued as the assignee of five individuals, who are alleged to have been the members of a mining partnership, for the recovery of the reasonable value of work and labor performed by said assignors under a license for the working of the mining property of defendant. The license was granted by oral agreement between defendant and seven persons, of whom one had died and three others had withdrawn from the partnership prior to the assignment to plaintiff, thus leaving but three of the original licensees who joined in the assignment. The other two assignors are alleged to have become members of the partnership after the acquirement by it of the license. The defendant pleaded a defect of parties plaintiff, both by demurrer and answer; and also pleaded in abatement of plaintiff's cause of action that, if any partnership existed among the plaintiff's assignors, it was a general and not a mining partnership, which transacted its business under a designation not showing the names of the persons interested as partners, and that no certificate had ever been filed or published by such partnership, as required by sections 2468 to 2469 of the Civil Code. Defendant further contended that if the partnership was a general one the entire partnership claim was not assigned to plaintiff. These defenses were valid unless a mining partnership existed. Plaintiff alleged such a partnership. Both parties assumed that it was essential to plaintiff's recovery to allege and prove the existence of a mining partnership, and the jury was so instructed. The vital question involved in the appeal is whether or not a mining partnership existed among plaintiff's assignors by reason of the relations among themselves, or between them and the defendant. There is no conflict in the testimony as to the facts, which may be summarized as follows:

The defendant is the owner of a quicksilver mining property in Santa Clara county. The persons who are alleged to have formed the mining partnership had been working as miners upon this property. In December, 1915, one of such miners, who acted as the spokesman for his associates, approached the foreman of the mine and stated that he and some others of the miners had gone into an abandoned tunnel from another part of the mine and discovered a lot of quicksilver metal there, which they wanted to get out; that the only way to do so would be to open up that tunnel; and that he and six others desired to go into partnership and try to open it up. The foreman referred the miner to his superior officer, the general manager of the mine. At a subsequent interview between the manager, the foreman, and the spokesman for the alleged partners, the foreman advised the manager of the desire of the miners to obtain the privilege referred to, and an oral arrangement was then entered

into between the general manager and the miners whereby it was agreed that the miners should have the privilege of opening up the tunnel referred to, and "to take out the ore and deliver it to the company for one and a half years after the completion of the tunnel," for which the company was to pay them at the rate of \$8 per ton for each one per cent. of quicksilver in the ore delivered by them to defendant at the mouth of the tunnel; that the defendant would furnish them with all the necessary mining tools and supplies for the purpose of opening the tunnel, but that they were to furnish their own board. The miners were to receive nothing in the way of wages, but were to do the work upon their own account. The property to be worked was the property of the defendant. There was no agreement that the miners were to acquire any interest in the mine, nor in the ore when it was taken out; but they were to deliver it to the defendant and to receive compensation for their work at the rate above specified. They were not bound to work any specified length of time, but could stop whenever they found that they would not get enough compensation out of the ore to satisfy them. There was no writing evidencing the contract. The record contains evidence to the effect that the licensees were referred to among themselves and by the employés of defendant as partners, and were generally recognized as such. This is no proof, however, of the existence of the peculiar character of partnership necessary for the successful maintenance of plaintiff's cause of action.

The court instructed the jury that their verdict must be for the defendant, unless they found the existence of a mining partnership, and that the work performed by plaintiff's assignors was so performed by them as a mining copartnership and not as individuals. In definition of a "mining partnership" and its attributes the court read to the jury sections 2511, 2512, and 2516 of the Civil Code. The jury found a verdict in favor of plaintiff, from which the defendant appeals, urging that the verdict is not supported by the evidence. Defendant's motion for a new trial was based, among other things, upon the same ground, and was denied by the trial court.

The facts above recited do not prove the existence of a mining partnership. Under the sections of the Civil Code above referred to and the authorities in which the nature of such a partnership has been considered, the ownership of an interest in a mine, or the right to the possession thereof, or an option to purchase the same, is a prerequisite for the existence of such a partnership. Under section 2511 of the Civil Code:

"A mining partnership exists when two or more persons who own or acquire a mining claim for the purpose of working it and ex-

tracting the mineral therefrom actually engage in working the same."

Under this definition, the ownership or acquirement of a mining claim, or of at least an interest therein, and the actual engagement in working such a claim, are both essential before a mining partnership can be said to exist. A mining partnership exists by reason of the joint interest of the partners in a mining claim. In the case at bar the alleged partners had no such interest when the alleged partnership was formed, nor did they subsequently acquire any. Their contract amounted to nothing more than the privilege of working upon a mine in which they neither had nor were to acquire any interest. It was a contract of employment.

Respondent relies upon certain authorities which hold that the ownership of a mining claim in fee is not necessary for the existence of a mining partnership, and that such partnership "can be formed either to prospect for and locate mines, or to work mines belonging to other persons or to any or all of the individual members." 27 Cyc. 756. An examination of the cases cited by the text-writers discloses that the mining partnerships there involved were decreed by reason of the existence in the partners of some interest in the property, or of a right of possession in their own right, as distinguished from that of the owner. The recent case of *Harper v. Sloan*, 177 Cal. 174, 169 Pac. 1043, 181 Pac. 775, is cited by respondent, and is an example of similar cases. In that case the plaintiff acquired, under his contract, the privilege of purchasing the property, and conveyed to his associates a portion of that right. Such a contract vests in the holder thereof an equitable or contingent interest in the property itself. In *Crowley v. Genesee Mining Co.*, 55 Cal. 273, the court construed a contract by which the plaintiff was employed to work in a mine belonging to defendant for the purpose of taking out what is known as "tribute rock," and delivering it at the defendant's quartz mine, to be crushed at its mill free of cost or expense to the plaintiff, and as compensation for his services one-half of the gross proceeds of each crushing was to be paid to the plaintiff. That contract was held to be a "contract of employment under section 1965, Civil Code." In *Hudepohl v. Liberty Hill Consolidated Mining & Water Co.*, 80 Cal. 553, 558, 22 Pac. 339, 340, a written contract was executed by the superintendent of a mining company to plaintiff and an associate, which contract stated that the mining company leased to the plaintiff and his associate "the right and privilege to work and mine" certain mining property; that the company was to make improvements necessary for commencing and carrying on the work; and that the other parties were to work and mine

the ground and receive one-half of all the gross products as compensation. In construing that contract the court said:

"Such a contract does not create the relation of landlord and tenant, but fixes a rule of compensation for services rendered. It is, in all its essential features, a contract for labor to be performed, and to be paid for by a share of the profits realized from such labor."

It was admitted upon the trial by the attorney for respondent that the contract here involved evidenced a license and not a lease. In *Wheeler v. West*, 71 Cal. 126, 128, 11 Pac. 871, 873, an oral contract was involved, under which defendants were to enter and work a certain portion of the mine as they saw fit and to exercise their own discretion whether they worked it or not. That contract was held to convey to defendants a mere license and not a lease. In distinguishing the legal rights of a licensee from those of a tenant under a lease, the court used the following language:

"There is a broad distinction between a lease of a mine, under which the lessee enters into possession and takes an estate in the property, and a license to work the same mine. In the latter case the licensee has no permanent interest, property, or estate in the land itself, but only in the proceeds, and in such proceeds not as realty, but as personal property, and his possession, like that of an individual under a contract with the owner of land to cut timber or harvest a crop of potatoes thereon for a share of the proceeds, is the possession of the owner"—quoted to the same effect in *Shaw v. Caldwell*, 16 Cal. App. 7, 115 Pac. 941.

De Haro v. United States, 5 Wall. 599, 627, 18 L. Ed. 681, announces the same doctrine.

The verdict was not supported by the evidence in that no mining partnership was proved. Under the facts disclosed by the record, the doctrine of estoppel relied upon by respondent can have no application.

The judgment is reversed.

We concur: LANGDON, P. J.; BRITAIN, J.

(42 Cal. App. 637)

ROSENTHAL v. SILVEIRA. (Civ. 2666.)

(District Court of Appeal, First District, Division 1, California. August 12, 1919. Rehearing Denied by Supreme Court Oct. 9, 1919.)

1. VENDOR AND PURCHASER ⇨85—EVIDENCE INSUFFICIENT TO SHOW ACCEPTANCE OF QUITCLAIM DEED BY VENDOR AND RESCISSION.

Where purchaser served quitclaim deed, releasing his interest in the land, upon vendor who was unable to read or understand the English language, and vendor within two days handed deed to his lawyer, who returned it to pur-

chaser as soon as he could ascertain proper address, there was no acceptance of deed or acquiescence by vendor in rescission of contract.

2. VENDOR AND PURCHASER ⇨123—EVIDENCE SHOWING ASSIGNMENT OF INTEREST BY PURCHASER BEFORE ATTEMPT TO RESCIND.

In purchaser's action to rescind, involving issue of whether third parties, to whom purchaser had transferred interests in the contract prior to purchaser's attempt to rescind, had abandoned their rights, thereby enabling purchaser to revest vendor with title free from any cloud created by the contract, finding that, at time of purchaser's attempt to rescind, such other persons had no interest in the contract, held against weight of evidence.

3. APPEAL AND ERROR ⇨883 — APPELLANT ESTOPPED ON APPEAL TO OBJECT TO CONSIDERATION OF DEED.

Where substance of deed and date book and page of its recordation were read into the record during the trial, and the existence of the deed appeared to have been considered before lower court by all parties, plaintiff was estopped on appeal from objecting to consideration of deed, though deed itself had not been admitted in evidence.

4. DEEDS ⇨121 — VENDOR AND PURCHASER ⇨116—TENDER OF QUITCLAIM DEED INSUFFICIENT AS A RECONVEYANCE TO VENDOR.

Where purchaser made quitclaim of the property to third party, a subsequent quitclaim deed served upon vendor by purchaser was insufficient as a tender of reconveyance, since it failed to revest vendor with title freed from the cloud created by contract of sale, for a quitclaim deed conveys no more than present interest of grantor.

5. VENDOR AND PURCHASER ⇨55—SALE OF TRACT AND CONVEYANCES OF PARTS THEREOF A SEPARABLE CONTRACT.

Contract for sale of large tract of land, requiring vendor to convey one or more acres upon payment of certain price per acre, was a divisible and separable contract, such that full performance of one part might be made by both parties without affecting the subsequent performance or right of performance as to remainder.

6. VENDOR AND PURCHASER ⇨145—RIGHT TO CONVEYANCE OF PROPORTIONAL NUMBER OF ACRES UPON MAKING INITIAL PAYMENT.

Where contract for sale of certain tract of land, at certain price, to be paid within certain time, provided for conveyance of one or more acres upon payment of certain price per acre, purchaser was not entitled to conveyance of proportional number of acres for initial payment made upon execution of contract; such payment being a general payment on price of tract as an entirety.

7. VENDOR AND PURCHASER ⇨334(6) — DEFAULT BY VENDOR IN CONVEYANCE OF PORTIONS OF TRACT SOLD NOT AFFECTING ENTIRE CONTRACT.

Where contract provided for sale of tract of land at certain price to be paid at, or, at purchaser's option, before specified date, and required vendor to convey one or more acres upon

purchaser's payment of a specified price per acre, vendor's refusal to convey certain number of acres upon tender of required amount, before purchaser had exercised option by paying or tendering total purchase price, was not a default by vendor of the entire contract, but was mere refusal to carry out a portion thereof not entitling purchaser to recover initial payment made upon execution of the contract.

8. VENDOR AND PURCHASER ⇨118—VENDEE IN DEFAULT IN FAILING TO PAY OR TENDER VENDOR TAXES ADVANCED.

Where contract required purchaser to pay taxes, but it was subsequently agreed that vendor should pay taxes and that amount due therefor should thereafter be adjusted between the parties, purchaser did not fully perform under the contract without paying or offering to pay taxes advanced by vendor, though vendor never requested payment.

9. VENDOR AND PURCHASER ⇨79—NEITHER PARTY COULD SUE ON CONTRACT WITHOUT PERFORMANCE OF CONDITIONS.

Where land contract provided for payment of purchase price within certain period and interest and taxes by purchaser and for conveyance by vendor of one or more acres upon payment of certain price per acre, neither party could maintain action thereon without first performing all the conditions previously to be performed by him.

10. VENDOR AND PURCHASER ⇨107 — EVIDENCE SHOWING NO EQUITABLE GROUND FOR RESCISSION BY VENDEE.

Where vendor, who was unable to read English language, refused to sign deed conveying certain number of acres upon payment of certain price, under contract requiring him to do so, without first consulting his attorney, and where purchaser, taking advantage of such refusal, immediately served notice to rescind and quitclaim deed upon vendor, and filed suit to rescind before vendor's attorney could return quitclaim deed, and where interest payment was soon due, and purchaser was at such time indebted to vendor for taxes, there was no equitable grounds for rescission on part of purchaser.

Appeal from Superior Court, Alameda County; T. W. Harris, Judge.

Action by Cerf Rosenthal against Joseph C. Silveira. Judgment for plaintiff, and defendant appeals. Reversed.

F. I. Lemos, of Hayward, and Rose & Silverstein and Fitzgerald, Abbott & Beardsley, all of Oakland, for appellant.

A. C. Aiken, of San Francisco, for respondent.

WASTE, P. J. Appeal from a judgment, rendered in favor of plaintiff and respondent, for the sum of \$8,257.75, together with costs and disbursements, ordering that plaintiff have a lien upon the real property involved in the action to the amount of the judgment, and canceling and annulling a contract,

wherein plaintiff agreed to purchase from defendant, and defendant agreed to sell, the real property described in the pleadings. The judgment of the court below is for the return of the payments made by plaintiff on the purchase price of the land, and interest, on the theory that there was a rescission of the contract.

Plaintiff in the case is an experienced real estate operator and engineer by profession. He bought the property for subdivision purposes. He understands perfectly the English language. Defendant is a Portuguese farmer, unable at all to read or write the English language, and understanding it at best but imperfectly.

The property in question was part of the farm owned and cultivated by the defendant. The contract provided for the sale of the property for the sum of \$30,000, \$5,000 of which amount was paid on execution of the contract. The balance of \$25,000 was payable at any time within four years from date. The contract also provided that all taxes on the property, which became due after June 30, 1913, were to be paid by plaintiff, who was also obligated to pay interest on the deferred payments at 6 per cent., net, per annum, payable semiannually; the contract not stating whether such interest payments were to be paid in advance or otherwise. Under the terms of the agreement, plaintiff was given the right to a conveyance of one or more acres of the land, upon the payment of \$300, or \$500, per acre, according to the location of the property; but no definite time was stated when or under what conditions such conveyances should be made. Time was made the essence of the contract.

Plaintiff took possession of the property, built roads therein, destroying some of the fruit trees in so doing, and platted out the property for subdivision purposes.

The tract, being part of defendant's entire acreage, was assessed in one amount for 1913-14. Rather than allow the tax to go delinquent, and after his attention had been called to the matter by the tax collector, he paid taxes on the whole tract for the year 1913 when they became due. After settlement as to the amount due, plaintiff repaid to defendant his pro rata share, as required by the agreement. Plaintiff also paid all installments of interest to and including July 2, 1914. Taxes for the year 1914-15 became due October, 1914, and were again paid by the defendant. No adjustment or pro rata payment by the plaintiff had been had when the purported rescission took place, on December 29, 1914, nor had the interest on the contract been paid, subsequent to July 2 of that year.

After entering into possession of the tract, plaintiff, on February 6, 1914, made a quitclaim deed of the property to the Clarabelle

Realty Company, and this deed was recorded. Plaintiff also entered into a contract, without the knowledge of defendant, to sell $2\frac{1}{2}$ acres of the tract to a German, whose name was unknown to defendant. No money was paid on this contract, and the purchaser appears to have never entered into possession. The plaintiff, through the realty company, entered into a written agreement, in escrow, with S. G. and Clara F. Brown, for the purchase of five acres of the real property. Brown entered into possession. No money was paid to defendant under either the contract with the unknown purchaser, or with Brown, and neither contract was recorded.

On December 29, 1914, in the evening, after defendant was in bed, plaintiff, accompanied by a Mr. Athol, called upon the defendant at his residence, near Hayward, and requested defendant to sign a deed conveying 16 $\frac{1}{2}$ acres of the premises, explaining to defendant that it was in consideration of the \$5,000 theretofore paid and credited on the purchase price at the time of the execution of the contract. Defendant refused to execute the deed. Thereupon plaintiff tendered to defendant the further sum of \$300 and demanded that he sign a conveyance of a certain one acre of the land to the party Athol, as provided in the contract. Defendant also refused to accept the \$300 or to execute the conveyance demanded.

The evidence is conflicting as to just what occurred at this meeting. The plaintiff testified that the defendant positively refused to execute any further deeds until the remainder of the purchase price, amounting to \$25,000, had been paid. The defendant testified that he merely explained to the plaintiff that he did not understand the matter, and requested that the execution of the deeds be postponed until the next day, when he could consult his attorney; that his only refusal to comply with plaintiff's demand occurred when he was pressed by plaintiff to sign the deeds, and finally said, "No, I sign nothing to-night, until I see my lawyer." While the trial court, with the witnesses before it, was satisfied with, and accepted, plaintiff's version of the occurrence, and what subsequently transpired, and found that defendant's conduct amounted to a rescission of the contract, we cannot but feel that there is much in the whole line of action of the plaintiff on the occasion of that visit, and immediately thereafter, which lends vivid color to the contention of the appellant that—

"The purpose of this visit by Rosenthal and Athol was to inveigle Mr. Silveira into some sort of a technical default, so as to enable plaintiff and his successors in interest to evade carrying out of the contract of purchase."

On the very next day following the visit to defendant, at Hayward, plaintiff signed, and sent by a messenger to defendant, who

personally received it, a notice of rescission and cancellation of the contract of sale, based on the alleged refusal of defendant to execute deeds for certain portions of the tract, and for false statements and alleged misrepresentations to various prospective purchasers. We pause here to note that nowhere in the record does it appear that any false statements, or misrepresentations, were ever made by defendant, or by any one in his behalf, in the premises. The notice was accompanied by a quitclaim, executed by the plaintiff and his wife to defendant and his wife, which deed released and quitclaimed the entire tract. It contained a recital that it was "made for the purpose of releasing all interests of the" makers "by reason of" the contract of sale between the parties. The plaintiff did not in this notice, or at any other time, offer to pay, or tender, to defendant the taxes accrued on the property, and paid by defendant, for the year 1914, or the interest on the contract which accrued after July 2d of that year.

Defendant could not read the documents thus served on him, but within a day and a half, or two days, he handed them to his attorney. The latter, acting for defendant, as quickly as he could ascertain the proper address, returned the quitclaim deed to plaintiff. This was on January 4, 1915, and but five days after its receipt by defendant. In a letter accompanying the returned deed, defendant, through his attorney, denied refusing to execute any deeds, and the making of any false statements concerning the matters at issue, and stated his willingness to comply with the terms, covenants, and conditions mentioned in the contract of sale, and demanded payment of the unpaid interest, amounting to \$750, and settlement for the taxes as therein provided. He offered further to make a deed to plaintiff of all the property covered by the contract upon being paid the full amount of the purchase price. Plaintiff had, however, immediately after executing the quitclaim deed, brought this action for rescission, and return of the amounts paid, alleging the delivery of the deed to defendant, of which fact his attorney notified the attorney for defendant, inclosing the deed, and refusing to entertain its return to plaintiff. Defendant's attorney offered in reply to hold the quitclaim deed for Rosenthal, but that offer was refused, plaintiff's counsel stating that the return was absolute and that the action would be tried as the facts existed at the time it was filed. There the matter rested.

[1] On the foregoing facts we cannot find warrant for accepting the trial court's finding that the defendant "accepted" the quitclaim deed. It is true there was a manual delivery of the document to Silveira, who was unable, by reason of his illiteracy, to read it. He promptly handed the document

to his lawyer, who returned it to Rosenthal, only to learn that that party had, with precipitous haste, filed an action based on the alleged delivery of the deed, and would stand upon whatever advantage he had gained thereby. We are unable to find acceptance or acquiescence in this line of action. Neither do we share the view of appellant that on the foregoing facts defendant must be held to have made no objection to the tender of the quitclaim deed by plaintiff.

[2] The lower court found that—

"Neither the Browns, nor Clarabelle Realty Company, nor any other person, other than plaintiff, had any right or title in or to said contract of sale, or to possession of said tract, or any portion thereof on December 30, 1914, when it was offered back to defendant, and the contract released to him by the quitclaim deed."

This finding is contrary to the evidence. The contract between the realty company and the Browns, for the purchase of five acres of the tract, was entered into in May, 1914, and the papers were placed in escrow in the Farmers' & Merchants' Bank in Oakland. The sum of \$500, and a deed to a certain lot, as part of the purchase price for the acreage, were handed to the bank with written escrow instructions, signed by the Clarabelle Realty Company and by the Browns. The latter went into immediate possession, and, according to the evidence, as we read the uncontradicted record, were in possession at the date of the attempted rescission by plaintiff. They apparently had no thought of abandoning their contract until the plaintiff in person went to them and asked to be released from the contract. In spite of the effort of the plaintiff, in the lower court, to fix the date of the alleged surrender of possession by the Browns as being prior to December 30th, the record fails to substantiate the finding of the court. On the contrary, the record does show that it was not until January 15th, following the filing of the action, that the escrow was ended. On that day, under written instructions bearing the same date, and signed by the Clarabelle Realty Company by its proper officers, the bank redelivered to Mrs. Brown the \$500 theretofore paid and the deed, given as part of the same purchase price for the five-acre tract. Furthermore, the Browns left their furniture in a building on the tract and some of it was still there at the time of the trial. No quitclaim deed from the Browns, or any release by them of plaintiff, or the Clarabelle Realty Company, other than the receipt for the \$500, and "all papers in connection with above escrow," appear in the record.

Again, there is nothing in the record by which it may be determined that the party, whose name is unknown, but referred to as the "German," had no right or title in the

property, as vendee of the Clarabelle Realty Company.

[3] As before stated, on February 6, 1914, plaintiff made a quitclaim deed of the property in question to the Clarabelle Realty Company, which deed was duly recorded in the office of the county recorder of Alameda county. While this deed, by some inadvertence, possibly, does not appear to have been actually admitted in evidence, its existence and the fact of its execution appear to have been considered before the court by all parties. Its substance, and the date and book and page of its recordation, were read into the record by counsel during the trial. On this statement of counsel the court made its finding. Plaintiff is therefore estopped from objecting to the deed now being considered in evidence. *Baker v. Eilers Music Co.*, 175 Cal. 652, 166 Pac. 1006. It was under this quitclaim deed and right of ownership in the contract of sale thereby conveyed that the contracts between the realty company and the Browns, and the unnamed German, were made. No reconveyance of the property was ever made by the realty company to plaintiff or defendant until during the trial, two years, and more, after the filing of the action. The lower court's finding in that regard is as follows:

"Defendant at the time of the tender and receipt by him of the quitclaim deed, executed by plaintiff, did not state any objection to the form or substance of such tender, nor until at the trial, when the fact of the record of the deed to the Clarabelle Realty Company was raised. Plaintiff thereupon tendered to defendant a duly executed and acknowledged deed of said Clarabelle Realty Company, dated January 18, 1916, conveying to plaintiff the said record title, which defendant thereupon refused to accept."

[4] It thus appears from the evidence, and from the court's finding, that, when Rosenthal and wife quitclaimed to defendant and wife the property covered by the contract of sale, the quitclaim deed, so tendered, conveyed nothing to defendant. "A quitclaim deed * * * purports to convey and does convey, no more than the present interest of the grantor, and does not operate to pass an interest after acquired." *Ann. Cas. 1913C, 368*. Rosenthal had already conveyed to the Clarabelle Realty Company, by deed of record, all his interest and right in the property. His quitclaim deed to defendant, therefore, did not revest the defendant with the title to the property freed from the cloud created by the contract of sale. The right to whatever claim or demand might be asserted thereunder was legally vested in the realty company, at the time the action was commenced. The finding of the court last quoted, therefore, is contrary to, and inconsistent with, its earlier recital that the Clarabelle Realty Com-

pany had no right or title in the contract of sale, or possession of the land, when plaintiff offered it back to defendant, and the contract was released to him by the quitclaim deed of Rosenthal and wife, on December 30, 1914.

[5, 6] The contract of sale between plaintiff and defendant was a divisible and separable one. It was such a contract that full performance of one part might be made by both parties without affecting the subsequent performance, or right of performance, as to the remainder. The cash payment of \$5,000, made by plaintiff to defendant upon the execution and delivery of the agreement of sale, was nothing more than "a general payment on the price of the tract as an entirety, required in order to provide a margin sufficient to safeguard the seller against loss, from the conveyance of one or more lots upon the subsequent payment" of the required amount per acre. *San Diego Construction Co. v. Mannix*, 175 Cal. 548, 166 Pac. 325. A reading of the plain terms of the contract forbids any other construction. The defendant was therefore right in his refusal to execute the deed for the 16 $\frac{3}{4}$ acres of land, first demanded by the plaintiff on the occasion of the visit to Hayward on the evening of December 29th.

[7] The agreement was to convey the entire tract for the total sum of \$30,000. Five thousand dollars was paid as the initial payment, the balance to be paid at any time, at the option of the plaintiff (the vendee), within four years, together with interest and taxes. At the time of the attempted rescission by plaintiff, and even at the date of the trial, the time of payment of the balance of the purchase price had not yet elapsed. There could not, therefore, have been any default as to the entire contract without the exercise by plaintiff of his option, and the tender or payment by him of the balance of the unpaid purchase price, interest, and taxes. There was not, therefore, any abandonment by defendant of the whole contract, but at most a refusal on his part to carry out that portion of the agreement which provided for the conveyance of a single acre, or more, on payment of \$300 for each acre so conveyed. Plaintiff was therefore not entitled to recover any part of the initial payment of \$5,000, which the lower court included in its judgment. *San Diego Construction Co. v. Mannix*, supra. In that respect, therefore, the judgment was erroneous.

[8] We are of the further opinion, also, that plaintiff was not entitled to any judgment. The lower court found that—

"At all times plaintiff has performed each and every obligation agreed by him to be performed in and by the terms of the said agreement of sale."

This finding is not supported by the evidence. Plaintiff was by the terms of the contract required to pay the taxes on the property he agreed to purchase, from the date of June 30, 1913. The part sold to plaintiff was a part of the larger tract owned by defendant. When the taxes for the fiscal year 1913-14 were levied on the tract in question, they were included in the tax of the larger parcel. Plaintiff did not pay his proportionate share, and rather than have the tax go delinquent, with added penalties to pay, defendant paid the whole amount. It was not until much time elapsed, and considerable correspondence on behalf of defendant through his banker, that he was able to collect the amount from plaintiff. The following year the same procedure was followed by the county assessor in regard to the levy of the tax on the property in question. Defendant was again compelled to pay the tax on the property. At the time of the alleged rescission on December 30, 1914, plaintiff had not repaid his proportionate amount thereof to defendant. He never paid the amount, and never tendered or offered to pay it. Even if it be true, as found by the lower court, in that connection, on the sharply conflicting evidence, that, at the time of the settlement between the parties for the 1913-14 taxes paid by defendant, it was agreed between them "that on the succeeding year of 1914-15, said Silveira should pay the total taxes in similar manner, and that the parties should thereafter meet and arrive at a pro rata adjustment of the amount between themselves, and that, pursuant to said agreement, said Silveira paid the said total taxes for 1914-15, but said parties never met to apportion the amount to be paid by each, and that Silveira never requested repayment of the amount so paid by him," the fact remains that plaintiff, at the time he was seeking to put defendant in technical default in the matter, was indebted to him for the amount of the taxes so advanced. He never repaid or offered to repay the amount, and the court's finding in the matter does not present any legal or equitable ground for his refusing so to do.

In yet another particular the finding of the court, as to full performance of the contract by the plaintiff, is not sustained. As the contract did not provide when the semi-annual payment of interest should be made, it was payable at the end of each semiannual rest. Plaintiff paid his interest in full to July 2, 1914. Consequently, when, on December 30th of that year, he served his notice of rescission and cancellation and the quitclaim deed, interest on the contract had accrued for the entire period of six months, less four days. When the action to recover the amount of the purchase price paid, and to rescind the contract, was commenced, the

interest for the six months last preceding, amounting to the sum of \$750, was due.

[9] Respondent seeks to avoid the issue of failure to pay, or tender the amount of the taxes, and interest, by reliance upon the fact that when he produced and tendered the \$300 for the Athol deed, defendant made no objection, either to the amount of the tender, or to the form of the offer, and that no objection was made to the quitclaim deed, or to the offer of rescission. As defendant very promptly returned the deed (although it was remailed to his attorney after suit brought), and as promptly made a counter demand for the payment of the unpaid taxes and interest, we are not impressed with plaintiff's argument. Under the agreement between plaintiff and defendant, neither could maintain an action thereon against the other without having performed all the conditions previously to be performed by him. Concurring opinion of Mr. Justice Harrison in *Glock v. Howard*, 123 Cal. 19, 55 Pac. 713, 43 L. R. A. 199, 69 Am. St. Rep. 17.

[10] We see nothing in the record of this case which will warrant us in holding that plaintiff was in any manner excused, or released, from the full performance of the obligations imposed on him by the terms of the severable contract of sale. The effort of plaintiff to rescind the contract just before the semiannual payment of interest became due, and after his pro rata of taxes was past due, coupled with his personal activity in securing from the Browns a release from their contract on which they had paid a considerable amount, and with which they do not appear to have been dissatisfied, taken in connection with all the facts and circumstances surrounding the attempt to secure the execution by the illiterate defendant of the two deeds on the evening of December 30th, followed, as it was, by the precipitous haste in tendering the quitclaim deed and the immediate filing of the action in rescission—all these matters are to us indicia that defendant's characterization of plaintiff's action was correct, and that he is not in court with hands so clean, or intention so far removed from guile, as to entitle him, on the showing made, to the judgment he has secured. We find nothing in the record indicating a rescission of the contract of sale by mutual consent of the parties, and the plaintiff has not shown equitable grounds entitling him to such right in equity. *Glock v. Howard*, supra.

Other matters are called to our attention on this appeal; but, in view of the conclusion reached, we do not deem them worthy of consideration.

The judgment is reversed.

We concur: RICHARDS, J.; KERRIGAN, J.

(76 Okl. 94.)

CITIZENS' NAT. BANK OF BROKEN ARROW v. STATE ex rel. FREELING, Atty. Gen. (No. 9710.)

(Supreme Court of Oklahoma. June 17, 1919.
Rehearing Denied Oct. 7, 1919.)

(Syllabus by the Court.)

1. BANKS AND BANKING ⇐15—LIABILITY OF BANK UNDER DEPOSITORS' GUARANTY FUND DETERMINED.

Section 3, chapter 81, Session Laws 1910-11, providing for a depositors' guaranty fund, for the payment of depositors of failed state banks, does not impose upon state banks a present indebtedness of 5 per centum upon their average daily deposits during their continuance in business as state banks, but does provide for annual payments; the bank being liable only for such of these payments as mature or are payable while it is doing business as a state bank.

2. BANKS AND BANKING ⇐66—CONVERSION OF STATE INTO NATIONAL BANK DOES NOT MAKE PAYMENTS TO DEPOSITORS' GUARANTY FUND PAYABLE.

The conversion of a state into a national bank does not mature, or make payable, these payments.

3. BANKS AND BANKING ⇐15—STATE BANK CONTINUING AS SUCH NOT SUBJECT TO FIVE PER CENT. LIABILITY TO DEPOSITORS' GUARANTY FUND.

The fact that a state bank continued to do business as a state bank after this law went into effect did not impose this 5 per centum as a liability on the bank, nor did the bank thereby assume or agree to pay it.

Rainey, J., and Garrett, Special Judge, dissenting.

Error from District Court, Tulsa County; N. E. McNeill, Judge.

Action by the State of Oklahoma, on the relation of S. P. Freeling, Attorney General, against the Citizens' National Bank of Broken Arrow. Judgment for plaintiff, and defendant brings error. Reversed and remanded, with direction to dismiss the action.

Ames, Chambers, Lowe & Richardson, of Oklahoma City, for plaintiff in error.

S. P. Freeling, Atty. Gen., Wm. H. Zwick, Asst. Atty. Gen., and Stuart & Cruce, of Oklahoma City, for defendant in error.

KING, Special Judge. This was an action by the state, on the relation of the Attorney General, against the Citizens' National Bank of Broken Arrow, Okl., to recover a balance of \$1,975.42 claimed to be due from it to the bank depositors' guaranty fund, as the successor of the First State Bank of Broken Arrow, Okl., on the theory that the 5 per cent. assessment, levied by the state against all state banks to provide this fund for the security of depositors in state banks, created a present indebtedness, and, notwithstanding

the First State Bank paid all parts of this assessment as they matured, up to the time it was converted into this national bank, still this national bank was liable for the whole of this 5 per cent. assessment. The trial court, in accordance with the previous decision of this court, by a divided court in *State ex rel. West, Attorney General, v. Farmers' National Bank of Oushing*, 47 Okl. 667, 150 Pac. 212, sustained this claim of the state of a present indebtedness of the full 5 per cent. levy, but limited the recovery in this particular action to the parts of the assessment maturing between the time of this conversion and the filing of the petition; and the bank appeals.

While the amount involved in this particular case is small, it is stated in the briefs and on the argument that more than 100 national banks are in a similar situation, and the amount involved to the fund more than \$600,000. The facts are not disputed, and the case turns on the construction of the statute creating this fund, section 3, c. 31, Session Laws 1910-11.

[1] It is contended by the bank that it was liable only for such parts of this assessment as matured while it was doing business as a state bank. It is contended by the state that this statute created a present existing indebtedness of 5 per cent. of the average daily deposits of this and every other bank, during their continuance in business as state banks, and further, by continuing to do business under the law, the bank assumed and agreed to pay the same—a contractual liability. If this is true, then this bank, which paid all these maturing assessments up to the time it nationalized, must continue to pay for some 15 years these remaining assessments, during which time neither it, nor its depositors, will have any benefit from these payments, nor from this fund—a plain act of injustice, and this on the ground of logic. It may be the logic of my Lord Coke. It certainly is not the justice of my Lord Chancellor, and, when logic and justice part company, so much the worse for logic. Not that the judge may decide cases according to his particular ideas of justice, for it must never be forgotten that this is a government of law and not of men. No doubt Nero and Ivan the Terrible administered justice according to their ideas of justice; and the Roman or Russian citizen had a sportsman's chance of guessing how Nero or Ivan would act under particular circumstances. But even that poor privilege would be denied an American citizen, for he cannot know in advance what particular judge will decide his case. Justice, and not logic, is the object of the law. The Giver of all real law gave us a much better guide to the interpretation of the law than all the logicians, when he said: "By the fruit ye shall know the tree." It must be presumed that the Legislature did not intend by this act an actual

injustice. Such a motive should not be lightly attributed to such a body; for the law, rightly enacted and rightly interpreted, follows along the moral, rather than the logical, lines.

It is contended that this act made a levy in present, a present indebtedness, against all the banks operating under the law; and, as this bank did business for more than a year under this law, it is liable for the full 5 per cent. of this assessment. Both the premise and the conclusion of this proposition are unsound. The parent and the child are alike discredited. Let us examine this act. It provides (section 3, c. 31, Session Laws 1910-11):

"There is hereby levied an assessment against the capital stock of each and every bank and trust company organized or existing under the laws of this state, for the purpose of creating a depositors' guaranty fund, equal to five per centum of its average daily deposits during its continuance in business as a banking corporation."

Now does this last clause, "during its continuance in business," refer to the "five per centum of its average daily deposits," or to the "assessment"? If the fund is to be "equal to five per centum of its average daily deposits during its continuance in business as a banking corporation," no man can tell what the amount of this fund will be until every state bank goes out of business or this law is repealed, maybe more than 100 years; and unless the levy is to be unnecessarily excessive, some depositors may have to wait a long time for their money, from a very easy collector. That this clause does not refer to "its average daily deposits during its continuance in business" is made plain by the next sentence:

"Said assessment shall be payable one-fifth during the first year of existence of said bank or trust company, and one-twentieth during each year thereafter until the total amount of said five per centum assessment shall have been fully paid."

This would be impossible, if the average daily deposits of the bank during its continuance in business was the basis for computing the amount of the assessment. There must be some other basis, and it is accordingly given in the third sentence, as follows:

"The average daily deposit of each bank during the preceding year prior to the passage and approval of this act shall be taken as the basis for computing the amount of the first payment on the levy hereby made."

Not the average for the existence of the bank. The fourth sentence provides:

"One year after the passage and approval of this act, and annually thereafter, each bank and trust company, doing business under the laws of this state, shall report to the bank commissioner the amount of its average daily deposits for the preceding year, and, if such deposits

are in excess of the amount upon which the first or subsequent payment of the levy hereby made is computed, each bank and trust company, having such increased deposits, shall immediately pay into the depositors' guaranty fund a sum sufficient to pay any deficiency on said first or subsequent payment, as shown by such increased deposits, by giving credit to the depositors' guaranty fund and issuing a special certificate of deposit, payable to the bank commissioner, bearing four per centum interest per annum."

Evidently using the first year's average as the basis for computing the amount of each subsequent payment until there is an increase, and then using that. By the fifth sentence it is provided:

"After the five per centum assessment, hereby levied, shall have been fully paid, no additional assessment shall be levied or collected against the capital stock of any bank or trust company, except emergency assessments, hereinafter provided for, to pay the depositors of failed banks, and except assessments that may be necessary by reason of increased deposits to maintain such funds at five per centum of the aggregate of all deposits in such banks and trust companies, doing business under the laws of this state."

Evidently this statute contemplates the raising of this fund in 17 annual payments, and when the seventeenth is paid in the 5 per cent. fund is paid in, or, to use the language of the statute, "the five per centum assessment hereby levied shall have been fully paid." So that it is clear that the basis of computation is the preceding year's deposits, and not the average daily deposits during the continuance of the bank in business. It is evident, therefore, that these words, "during its continuance in business as a banking corporation," have no reference to the preceding clause, "equal to five per centum of its average daily deposits." The only other part of this sentence to which they could possibly refer is the assessment, and by reason of the succeeding sentences of the section a necessary reference. So that the meaning of the sentence is, and its words might properly be rearranged so as to read:

"There is hereby levied against the capital stock of each and every bank and trust company, organized or existing under the laws of this state, an assessment, during its continuance in business as a banking corporation, for the purpose of creating a depositors' guaranty fund, equal to five per centum of its average daily deposits."

Now, while this first sentence does not divide this 5 per centum into annual assessments, the succeeding sentences plainly do; and the meaning of this statute is just as though it was written into this first sentence that this 5 per centum is divided into 17 different annual assessments, maturing and payable annually, by each and every bank, "during its continuance in business." That is, if any of these annual assessments was not payable "during its [the bank's] con-

tinuance in business," it was not and never could become a liability of the bank. Besides, when the bank went out of business there was no means of ascertaining the amount of these future assessments; and it is impossible to pay that which cannot be ascertained, and it is not fair to attribute this to the Legislature as an oversight. Unless this is the meaning of this statute, the words "during its continuance in business" have no meaning. The object of the law was to secure the payment of current deposits, not deposits existing at the time of the completed payment of this 5 per centum, or when the bank had gone out of business, but during all the time these assessments were maturing, as well as after.

[2] When the bank went out of business as a state bank, and its liabilities settled, there were no deposits to be guaranteed, so far as it was concerned, and there was no consideration for any future payments. There was nothing for the law to act upon; and when the reason of the law ceases, then the law itself ceases. The payments of these assessments are conditioned on the bank going on with, not stopping, business. Evidently the Legislature so intended it, for by the act of 1913 (Session Laws 1913, p. 31) it is provided:

"Whenever any state bank shall liquidate, or cease to operate under the banking laws of this state, it shall be liable for its pro rata share of any existing indebtedness against the said depositors' guaranty fund or any unpaid assessments."

Thus furnishing the rule of thumb for the interpretation of the law, and not the law itself. And so the Supreme Court of the United States understood this law, for in the case of *Noble State Bank v. Haskell*, 219 U. S. 575, 81 Sup. Ct. 299, 55 L. Ed. 341, in sustaining the constitutionality of this law, that court says: "For in this case there is no out and out unconditional taking at all. The payment can be avoided by going out of the banking business, and is required only as a condition for keeping on, from corporations created by the state."

[3] But it is contended that the bank, by continuing to do business under the act, assumed and agreed to pay this full 5 per cent.—a contractual liability. It will be remembered that the constitutionality of this law was sustained by the Supreme Court of the United States, in the *Noble State Bank Case*, supra, as a valid exercise of the police power of the state. In the opinion of the writer this particular law might also be sustained as a valid exercise of the taxing power; the purpose being a public purpose—that is, taxation by assessment, as in drainage or paving districts. It has many of the features of a tax law, and in the opinion of the writer such it is, and should be so construed.

But whether we regard it as the exercise of the police power, or the taxing power, or

of both, clearly this cannot be a contractual liability. Nor can it be enforced on the ground of estoppel. The estoppel might, in a particular instance, render a statute enforceable; but it does not, and cannot, substitute a contract for the statute. It is true that we have what are known as implied contracts. But this is where the party contracts by his acts. A man can contract by his acts, as well as by his tongue, or his pen; for they are but different means of expressing his assent, and acts speak louder and more sincerely than either the tongue or the pen. But surely the man in the street—this man well beloved of the law; in the last analysis, the only really great lawyer—would not feel that he was agreeing to pay this involuntary exaction merely because he did not quit business, any more than the colonies felt they were bound to pay the taxes imposed by the British Parliament merely because they continued to exist as colonies.

Evidently the Legislature did not regard this assessment as contractual in its nature. The act of 1907-08 (Laws 1907-08, c. 8, art. 2) provided for a fund of 1 per cent. The 1909 act (Laws 1909, c. 5, art. 2) raised this to 5 per cent. The act of 1913 substituted a fund of 2 per cent. The act of May, 1908, amended the law, so as to make it applicable to trust companies; and the act of 1911 changed the law, so as to exclude trust companies. It may repeal the law, and thus relieve all the banks from the payment of these future assessments. This law did not require or permit any act on the part of the bank for its enforcement. The bank's assent or dissent, was absolutely immaterial. Its agreement, express or implied, was equally so. The Legislature was proceeding under a power which required none of these. It was an enforced involuntary charge, as all taxes and all impositions under the taxing and police power are, in invitum, willing or unwilling, and is to be so construed; and, speaking only with reference to the exercise of these powers, an assessment is not a contract, and, if a contract, it is not an assessment.

This law is therefore to be regarded as the lawfully expressed determination and purpose of the Legislature to impose these assessments as they became payable upon the banks as a condition of going on, and not of stopping business. If a bank is doing business when one of these assessments becomes payable, it is liable; if not, it is not. The consideration which this law gives for these assessments is the securing of current deposits, and thereby securing the banks; and when the consideration for the assessment fails, evidently the assessment itself fails.

The writer is aware that there are many decisions, state and federal, imposing taxes under the form of contract; taxation by presumption, taxation by inference—logic, if you please; each presumption, and each inference, more hazy and nebulous than the other, until

the most powerful legal telescopes and microscopes fail to discover any foundation for the tax. This is to impose taxes without any known rule of law to support them. It is to ignore and set at naught the beneficent and restrictive provisions of the Constitution, and the fundamental law, like equality, uniformity, classification, popular vote, notice, opportunity to be heard, public purpose, etc. The American and English people, through hard and harsh experience, have hedged about the levy of taxes and other exactions with many beneficent provisions and restrictions; and to substitute contracts or other devices for the tax is to ignore these provisions, and leave the exaction to the mere whim of the official, or the exercises of the logician in his favorite sport.

Besides, the courts have neither the means nor the machinery to impose, collect, or apply taxes. Their forms of procedure, including the judgment, which latter so largely determines their jurisdiction, were never intended, and are wholly inadequate and unsuited, to impose, collect, or apply taxes; and the writer sincerely hopes that the Supreme Court of the United States will early have occasion to review these decisions, fundamentally, and he firmly believes, when it does so, it will judicially condemn to death this false doctrine, as it was denounced in the Magna Charta and the declaration of American Independence, and as it was in fact shot to death at Bunker Hill and at Yorktown; for, no matter how often one head of this hydra-headed monster is cut off, another springs up in its place. The power to tax has been wisely withheld from the courts by the people. The case at bar is a good example of this. If this court can imply a contract to pay this assessment, neither this bank, nor its depositors, will probably receive any benefit from them. Yet the state bank that remains in business for more than 20 years will only have to pay 3 per cent., instead of 5 per cent., and it, and its depositors, get the benefit of this fund during all those years.

It is also true that there are a number of decisions which enforce the payment of what are in reality taxes under the form of contract. But on investigation it will be generally found that the basis of these decisions is an express contract with the taxpayer, by express legislative authority, in lieu of the ordinary property tax, like the payment of a certain per cent. of its gross revenue by a railroad company, in consideration of its release from the ordinary property tax, or the payment of a large license or charter fee for a similar consideration. But in these instances it is the Legislature, and not the court, which imposes the tax; sometimes doing indirectly that which it cannot do directly, and generally owing to the unfortunate wording of some constitutional provision, and often aided by a too literal construction. For

example, to take one of many, the Eastern states omit in their Constitutions any important restrictions upon the taxing power of the Legislature, thus permitting the Legislature to adjust the taxing system of the state to the ever-changing conditions of society. Unfortunately the constitutional convention of Ohio, in its early Constitution, provided for the taxation of property by uniform rule, without any provision for the classification of property for the purpose of taxation. This was copied by the other states in their Constitutions, from the Alleghenies to the Pacific—at the time a perfectly proper provision, for all property was tangible. But as conditions changed it was soon found that the poor man working in the street with his single team was paying more taxes than the rich corporation with its intangible property; and too often this was assisted by a too literal construction, for classification is uniformity, and uniformity is classification, and, while there are no new principles in constitution making, the ever-changing conditions of an enterprising and progressive people make amendment and re-statement in Constitutions a never-ending and ever-pressing necessity. As the ocean keeps itself pure by constant agitation, so the state must keep itself efficient by constant progress in law-making; and as to this particular question this has been largely done by amendment in some of the states, and by the original in others, so that generally there is no necessity to resort to these substitutes and subterfuges in the imposition of taxes. That which is a contract should stand on its own bottom as a contract, and that which is a tax as a tax, in order that the citizen and the state may have the protection of the beneficent provisions of the Constitution and the fundamental law; and the courts should, as they generally do, lend a sympathetic ear to discover the purpose of the law and the intent of the Legislature, in order that they may recognize the one and give effect to the other.

We have no professional lawmakers. It is not right to construe these laws, fundamental or statutory, as though they sprang full-fledged and full-armed from the head of some professional constitution-making Jove. We have no professional class of constitution makers or legislators; and we must not forget that the constitution maker and the legislator have troubles and difficulties of their own. The paucity of language, the absence of time-tried, tested, and applied legislation, the ever-changing conditions of an enterprising and progressive people, the limitations of human foresight, and the difficulty, the impossibility, of covering a world of single instances, make this hard and fast rule impossible. As intimated above, the writer is of the opinion that this statute is of the nature and should be construed as a tax measure. He cannot see any constitutional restriction,

preventing the Legislature from forming the whole state into one banking district and applying the principle of taxation by assessment, to raising the necessary fund to secure the payment of these deposits, as is done in the formation of drainage districts and paving districts. The fact that these involve real estate is only because real estate is most commonly benefited. But there can be no difference in principle between real estate and personal property; and manifestly the capital stock of these banks is benefited by this fund. The fact that a paving district or a drainage district is but a small part of the state does not militate against this, as it happens that only those parts are sufficiently benefited to warrant the exercise of the power. No doubt the entire state could be formed into one road district, or one school district, and the state itself collect the revenue, and regulate and maintain the highways and schools. This is a mere matter of apportionment.

Nor, if we consider that this statute is sustained, and sustained only, by the police power, does this prevent the Legislature from introducing into it certain features of the more beneficent taxing or other powers. The police power is not a mere arbitrary, cruel power; it is as kindly as the people from whom it springs, and yields in proper cases to the more beneficial taxing power, as well as other powers, as the good policeman yields to the sympathetic, kindly hand of the parent to stay the wayward youth. The authority to form drainage districts and paving districts, as we know them, is entirely statutory, though the germ may be found in the old charters and statutes. For instance we read in the Magna Charta:

"23—Neither a town nor any tenant shall be distrained to make bridges or banks, unless that anciently and of right they are bound to do."

Truly out of the old fields "cometh the new corn." A reading of the old statutes and decisions would indicate that originally the formation of drainage districts was done principally under the police power—the right of the state in the interest of the public health and sanitation, to drain swamps and overflowed lands; and this is still indicated in our statute, and the statutes of other states. Yet this did not prevent the Legislature from introducing into it taxation by assessment, and making it a real benefit to the land and the landowner; and this although the police power may proceed without being limited by benefit to the person or property affected. The hand of the Legislature should be left free to give as much return to the banks for this fund as it may; to make it in reality the property of the banks, subject to the management and application by the state as provided. Throw around it the constitutional guarantees of equality, uniformity, classification, public purpose, etc., and impose the tax by that authority which alone can impose taxes,

the people's representatives. By basing the fund on the taxing power, you give it the very highest security; that power which makes the bonds of the United States and the states the very best security. And by giving this security it removes the fear of loss, the fear of panic, and permits the very largest use of the bank's funds in the business of the community. It prevents the arbitrary exaction of the official, and the disastrous consequences of hasty and ill-considered action. It gives to those who have to bear the burden an opportunity to be heard, and an assurance of the necessity for, and the proper application of, the fund; and it enlists the hearty co-operation of those whose duty it was, and whose interest it now is, to protect their depositors.

The case of *State ex rel. West, Attorney General, v. Farmers' National Bank of Cushing*, 47 Okl. 667, 150 Pac. 212, is overruled. The judgment is reversed, and the case remanded, with directions to dismiss the action.

HARRISON and McNEILL, JJ., certifying their disqualification, **J. F. KING** and **A. R. GARRETT** were regularly appointed Special Justices.

OWEN, C. J., and **PITCHFORD** and **JOHNSON, JJ.**, concur.

KANE and **SHARP, JJ.**, concur in the conclusion.

HIGGINS, J., did not participate.

RAINEY, J. (dissenting). I dissent, as I am in thorough accord with the views expressed by this court in *State ex rel. West, Attorney General, v. Farmers' National Bank of Cushing*, 47 Okl. 667, 150 Pac. 212, which is overruled by the majority opinion.

GARRETT, Special Judge (dissenting). The contention in this case arises from the construction of section 3, chapter 31, Session Laws 1910-11, particularly that portion of said section which reads as follows:

"There is hereby levied an assessment against the capital stock of each and every bank and trust company organized or existing under the laws of this state, for the purpose of creating a depositors' guaranty fund, equal to five per centum of its average daily deposits during its continuance in business as a banking corporation."

The contention of the state is that the language used by the Legislature created what is termed a levy or existing liability in presenti. The court in its opinion has placed a different construction upon this sentence of section 3, and in doing so transposes the language in the sentence to read as follows:

"There is hereby levied against the capital stock of each and every bank and trust company organized or existing under the laws of this state, an assessment during its continuance in business as a banking corporation for the purpose of creating a depositors' guaranty fund

equal to five per centum of its average daily deposits."

By what rule of statutory construction has this court authority to interpolate into a statute words or a transposition of the language in order to support the court's construction? The very fact that the court has found it necessary to transpose the language is sufficient condemnation of its opinion. There is no disposition upon the writer's part to criticize the defendant bank for seeking to escape the judgment in this case if there is no liability, but to undertake to escape through the claim that it is unjust and unfair is to beg the question. This court has nothing to do with the justness or unjustness of the law, if the law is clear and plain as to what is meant. We could cite numerous instances of what is apparently unfair and unjust in our tax laws. Take, for instance, the mortgage tax law of real estate, which fixes a registration fee of 10 cents upon \$100 expressed in the mortgage, where the mortgage runs for five years or more, an exceedingly nominal sum which the mortgagee pays on his investment, while the mortgagor must pay on the full valuation of the real estate given as security in the mortgage on an ad valorem basis. Yet this court would hardly say that the Legislature did not have the authority to pass the law because of its unjustness or apparent unfairness. Again, we have the gross production tax on oil. All other business must pay on an ad valorem basis. Now, if the gross production tax is fair, then why not make it the same basis of taxation for other property. We have in this state a license system, licensing automobiles, which is merely a form of taxation, and the right is fixed according to a mechanical definition of the horse power developed by the engine in the automobile, a "tin lizzie" costing \$500, because of the fact that its engine develops a higher rate of horse power than a car that cost \$2,500, under this automobile license law must pay as much or a higher rate for the privilege of running upon the highways of this state as the car that cost five times as much, and yet, were this question before this court, the court no doubt would go into details as to the beneficent effect and purposes of the automobile license fund, which is to build up the highways of the state, and would certainly hold that the Legislature had authority to pass the law and that it was valid. Our tax system is so constructed that injustice must of necessity follow until we have learned some other method that would be fair alike to all.

Let me suggest, further: Is it fair to the poor widow woman to pay the same rate of tax on her one milk cow, on which she makes no profit, other than supplying her orphan children with an allowance of milk and butter, as the man who keeps his hundreds and thousands for profit and gain alone. We

could cite so many instances of what to our mind is unjust and unfair in our tax system that the reference would be entirely too lengthy. But why base this opinion in this case upon the proposition that it is unfair to require a liquidating bank to pay its liabilities before it can surrender its certificate and cease to do business under the banking laws of the state. It is its duty to pay its liabilities. The state did not require the defendant bank to discontinue as a state bank. The state does require, as a condition precedent to ceasing to do business as a banking corporation, that it discharge all its liabilities. The defendant, while doing business as a state bank, had the pledged security behind its deposits of a levy of 5 per cent. against the capital stock of every bank doing business under the state banking laws, based upon its average daily deposits. This was worth a great deal to the bank in the way of securing business and in assuring its customers that their deposits were absolutely safe.

It is suggested in the court's opinion that something like \$800,000 is involved in the result of this suit. It is true this is quite a large sum, but what has this to do with the question at issue. Briefly stated, the contention of the state is that the first sentence in section 3, chapter 31, Session Laws 1910-11, created a levy in present, as held by this court in the case of *State ex rel. West, Attorney General, v. Farmers' National Bank of Cushing*, 47 Okl. 667, 150 Pac. 212; that the defendant contends that said sentence does not create a present liability. Judge Galbraith, in his opinion in the case, *supra*, uses this language:

"If the Legislature had intended to levy an assessment against state banks and trust companies equal to 5 per centum of their average daily deposits for the purpose of creating a depositors' guaranty fund, and to provide that such assessment should only be upon the average daily deposits during the existence of the bank or trust company as a banking corporation, and intended such assessment to be a present and existing liability, language more clearly expressing such intention could not have been employed. The fact that it was provided that only 1 per cent. of this obligation should be paid during the first year and extended the time of payment of the remaining 4 per cent. over a period of 16 years does not lessen the purpose and intent to make the obligation of the entire amount a fixed and present liability. It was necessary to make it a present obligation against the banks in order to accomplish the purpose and object of the Legislature in creating the depositors' guaranty fund, namely, to establish confidence in state banks and to offer an absolute guaranty to the depositors against loss. The purpose of the Legislature was evidenced to make this burden on the banks as light as possible, and for that reason the time of paying the assessment was extended over a number of years; but it was necessary to fix liability for all of the assessments at once, in order to create and establish a guaranty fund in fact as well as in name."

The court, however, has tried to apply the rule of statutory construction, by declaring it would be unjust and unfair to the Legislature to claim that the language used created a levy in present, and that it would be taking from the defendant bank when it was receiving no benefits from the depositors' guaranty fund. The Legislature that passed that law was composed of as intelligent men as the average man; they knew the real import of the language used and the purposes for which this fund was created. The Legislature of 1913 also knew just what the language meant in section 3, chapter 31, Session Laws 1910-11, and proceeded to change the law, so as to accomplish just what the court in this opinion is accomplishing in this act. This change occurs in this language (Session Laws 1913, p. 81):

"Whenever any state bank shall liquidate, or cease to operate under the banking laws of this state, it shall be liable for its pro rata share of any existing indebtedness against the said depositors' guaranty fund or any unpaid assessments."

The learned judge, speaking for the court in his opinion in this case, says that this furnishes the rule of "thumb" for the interpretation of the law, and not the law itself. Now, just what is meant by not being the law itself is difficult to discern—another instance where the language used is plain and an attempt is made to confuse the meaning. This amendment of 1913 clearly shows that the Legislature understood well the clear import of the law of 1911, and provided that a bank should be liable, when it ceased to do business under the state law, only for the pro rata amount of the assessment to be paid at the time of liquidating. The defendant bank having gone out of business prior to 1913, so far as a state bank is concerned, the law of 1913 does not apply to it. The Legislature had the power to make a levy in present. It did it. It had a right to say upon what basis the 5 per centum assessment so levied should be determined. It did that. It had a right to say into how many payments these assessments which it levied should be divided. It did that. The language following the first sentence in said section 3 in no way or manner modifies, explains, or affects the language in the first sentence, and no rule of statutory construction will justify this court in reading into this sentence any other term or terms, in order to transpose the language so as to make it have a different meaning.

The general rule of statutory construction, as laid down by Sutherland on Statutory Construction, in section 589, vol. 2, is as follows:

"A statute extends no further than it expresses the legislative will; when it is held to embrace a case which is within its spirit, though not within its letter, it is not meant that the courts have authority to extend a statute to cases

which it does not by its words provide, or beyond the sense of its language. A statute is a written law, and cannot be construed to have a sense and spirit not deducible from its provisions. It is a general rule that the courts must find the intent of the Legislature in the statute itself. Unless some grounds can be found in the statute for restricting or enlarging the meaning of its general words, they must receive a general construction; courts cannot arbitrarily subtract from or add thereto."

And also in section 520, same authority, at page 963, we find this language:

"The intention of the Legislature is to be collected from the words they employ. When there is no ambiguity in the words, there is no room for construction."

The courts are not in the habit of transposing the clauses and phrases for the purpose of finding the meaning of the Legislature, unless the clause or phrase in the position in which it is placed by the Legislature is meaningless and absurd, or conflicts in some way with the fundamental law. The Supreme Court of the United States, in *Board of County Commissioners v. Rollins*, 130 U. S. 670, 9 Sup. Ct. 652, 32 L. Ed. 1060, uses the following language:

"We are unable to adopt the constructive interpolations ingeniously offered by counsel for defendant in error. Why not assume that the framers of the Constitution, and the people who voted it into existence, meant exactly what it says? At the first glance, its reading produces no impression of doubt as to the meaning. It seems all sufficiently plain; and in such case there is a well-settled rule which we must observe. The object of construction, applied to a Constitution, is to give effect to the intent of its framers, and of the people in adopting it. This intent is to be found in the instrument itself; and when the text of a constitutional provision is not ambiguous, the courts, in giving construction thereto, are not at liberty to search for its meaning beyond the instrument.

"To get at the thought or meaning expressed in a statute, a contract, or a Constitution, the first resort, in all cases, is to the natural signification of the words, in the order of grammatical arrangement in which the framers of the instrument have placed them. If the words convey a definite meaning, which involves no absurdity, nor any contradiction of other parts of the instrument, then that meaning, apparent on the face of the instrument, must be accepted, and neither the courts nor the Legislature have the right to add to it or take from it. * * *

"Words are the common sign that mankind

make use of to declare their intention to one another; and when the words of a man express his meaning, plainly, distinctly, and perfectly, we have no occasion to have recourse to any other means of interpretation."

The language of the statute in making the levy of 5 per cent. import an immediate levy, and not a levy in the future. In the case of *St. Joseph & Denver City Railroad Co. v. Baldwin*, 103 U. S. 426, 26 L. Ed. 578, that court, speaking by Mr. Justice Field, said:

"The language of the act here, and of nearly all the congressional acts granting lands, is in terms of a grant in present. The act is a present grant. 'There is hereby granted,' are the words used, and they import an immediate transfer of interest."

Quoting again from the opinion of Judge Galbraith, in the *Case of Farmers' National Bank of Cushing*, supra, the court says:

"There was levied against each bank and trust company, organized and doing business as a state banking corporation, an assessment equal to 5 per centum of its average daily deposits during the time of its existence as such state corporation, and that this assessment was made a present, existing obligation against each bank and trust company from the date of its organization under the law."

For the reasons herein set forth, we are compelled to dissent from the opinion of the court by Justice KING in this case. The decision in the *Case of the Farmers' National Bank*, supra, was rendered practically four years ago, being filed on June 26, 1915. It has become a rule of property in this state. Since the rendition of this opinion this court, by reason of the democracy of our institutions and the hand of death, has changed its personnel, and the personnel of the court in the course of time again will change. It has been the pride and boast of our form of government that our Supreme Court was stable, and a bulwark against the ever-changing innovations that society might suggest in our fundamental laws, the Constitutions of our states and the United States. The citizenship of a state takes pride in the firmness with which the laws of the state are interpreted by its Supreme Court. There should be no vacillating policy in the court's decisions, and we believe that the opinion of the court in this case is not the law of the case, but that the court's opinion in the *Case of the Farmers' National Bank of Cushing* is the law and should not be overruled.

(76 Okl. 102)

TULSA ST. RY. CO. v. OKLAHOMA UNION RY. CO. (No. 9629.)(Supreme Court of Oklahoma. April 15, 1919.
Rehearing Denied Oct. 7, 1919.)*(Syllabus by the Court.)***1. OKLAHOMA CORPORATION COMMISSION—CONSTITUTIONAL JURISDICTION.**

By section 18, art. 9, Williams' Constitution, the Corporation Commission is vested with the power of regulating and controlling all transportation and transmission companies doing an intrastate business in all matters relating to their public duties.

2. STREET RAILROADS §32 — CORPORATION COMMISSION MAY ORDER TRANSFER SYSTEM BETWEEN TWO STREET RAILROADS.

The statutes of this state confer power upon the Corporation Commission to investigate all complaints in reference to the physical connections and transfers at all junction points, incorporated towns, villages, and communities, and upon investigation of such complaint, or upon its own motion, may require any street railway company to make physical connection, or establish and maintain such transfer facilities as the public interests may reasonably require, and as may be reasonable and fair to the companies to be affected; and in a case where the complainant in its complaint prays for an order to be made permitting it to use jointly with another street railway its track or line and span wires, and fixing the terms of such joint use, the commission upon a hearing of such complaint, after proper notice, may make a valid order that a transfer system be installed by the two companies, designating the point of transfer and fixing the rate to be charged for joint service and providing how and when a division of such charges between the companies may be made.

3. STREET RAILROADS §32—ORDER OF CORPORATION COMMISSION PRESUMED JUST ON APPEAL.

Record examined, and it is held that this case comes within the rule that, prima facie, just reasonable, and correct, in section 22, art. 9, of the Constitution, is a presumption arising upon the finding of the Corporation Commission that the order based upon such facts is presumed on appeal in this court to be just, reasonable, and correct, subject to be overcome or rebutted by the facts in the record, as weighed and found by this court in reviewing the same.

Appeal from order of Corporation Commission.

Action before the Corporation Commission, by the Tulsa Street Railway Company, against the Oklahoma Union Railway Company. To review an order of the commission, the complainant appeals. Actions of the commission affirmed.

J. P. O'Meara, Chas. El. Bush, and A. F. Moss, all of Tulsa, for plaintiff in error.

A. J. Biddison and Harry Campbell, both of Tulsa, for defendant in error.

JOHNSON, J. This is an appeal from an order of the Corporation Commission. This appeal brings in review an order of the Corporation Commission made on the 14th day of September, 1917, in an action instituted before the Corporation Commission by the plaintiff in error, against the defendant in error (for convenience the parties will be designated as complainant and defendant as they appeared before the Corporation Commission), asking for an order to permit complainant to use jointly with the defendant the railway line on the approaches to the reinforced concrete bridge across the Arkansas river which is located within the city of Tulsa, Okl., and to permit the complainant to use jointly the span of wires now in place on said bridge approaches, for the purpose of supporting the trolley wires of the complainant, and for an order fixing the terms under which the complainant should jointly use with the defendant said tracks and span wires, and for an order covering the schedules and operation of cars over said tracks and said approaches and over the reinforced concrete bridge controlled by the county of Tulsa, Okl.; the said tracks on said approaches being of a length of 529 feet.

The essential facts involved in this case are substantially as follows:

Both plaintiff in error and defendant in error are operating street car lines in the city of Tulsa, and the defendant in error is constructing an interurban line from Tulsa, through West Tulsa and Red Fork, to Sapulpa. It has acquired the Sapulpa Electric & Interurban line from Sapulpa to Kiefer. The Tulsa street railway company was operating under an ordinance or franchise dated the 5th day of April, 1907, giving Chas. H. Bosler and his assigns the right to construct a street car line on the streets of the city of Tulsa, except certain streets. This ordinance was accepted by Bosler at that time.

Said ordinance provided as follows:

"That at the expiration of ten years from the date of acceptance of this ordinance, any or all streets herein named not in actual use by the grantees for street railroad purposes shall revert to the city of Tulsa, and said streets shall not be bound by this franchise."

In March, 1917, Tulsa county completed a new bridge across the Arkansas river between Tulsa and West Tulsa, and thereon a railway track. The defendant, Oklahoma Union Railway Company, constructed a track on the approach to each end of said bridge and entered into a contract with the county commissioners to use said bridge for the sum of \$200 per month. The length of track in the approaches to said bridge constructed by the defendant in error was between 500 and 600 feet.

After said track was laid and said contract

with the county commissioners was procured by the defendant, it commenced running its cars over said bridge to and from West Tulsa.

The plaintiff in error, Tulsa Street Railway Company, was also trying to cross the said bridge; but the defendant acquired possession of the approaches, laid its tracks thereon, connected with the track on the bridge at each end, procured a contract from the county commissioners for that purpose, and established its right to the use of the approaches and the bridge.

The complainant Tulsa Street Railway Company's amended complaint is quite lengthy, and in paragraph 3 thereof will be found allegations upon which complainant based its right of action, but the following quotation we think contains a sufficient summary thereof for the purposes of this opinion:

"Complainant further alleges that it is necessary in the operation of its said line into what is known as West Tulsa, to use about five hundred and thirty-nine (539) feet of the track of the defendant over the approaches to said bridge in order to operate its said line of street railway from the main part of Tulsa into West Tulsa, and this complainant has offered to pay to the defendant any reasonable sum for the right to use, in connection with the defendant, the street railway tracks upon the approaches to said bridge, and has offered to enter into any reasonable contract to maintain and keep in repair the tracks on said approaches, and has offered to install any and all reasonable safety devices necessary for the protection of the defendant and the public at the junctions or connections on said line, and has offered to pay any reasonable sum to the defendant for the use of the span of wires on said bridge and approaches which are erected for the purpose of sustaining the trolley wires over and across said bridge and approaches.

"Complainant further alleges that the joint use of said tracks on said approaches would not interfere with the schedules of the defendant in the operation of its said line of railway, but would be a great benefit to the public who are compelled to go to and from West Tulsa from the main portion of Tulsa.

"Complainant further avers that there is no other bridge or highway over which the plaintiff can cross the Arkansas river except the bridge mentioned herein.

"Wherefore, this complainant prays that the aforesaid defendant be required to answer the charges herein, and after due hearing and investigation, that an order be made permitting this complainant to use jointly with the defendant the railway line on each approach to the said reinforced concrete bridge across said Arkansas river, and to use jointly the span of wires now in place on said bridge and approaches for the purpose of supporting the trolley wires of this complainant, and for an order fixing the terms under which this complainant shall jointly use said track and span of wires, and for a further order covering schedules and operation of cars over said track on said approaches and over said reinforced concrete bridge, and for such other and further order as this commission may deem necessary and just."

On July 24, 1917, a hearing was had by the commission, at which time the following conclusions and order were made:

"Order.

"The pleadings, the transcript and the briefs in this case have all been reviewed and considered by the commission, but at this time expression of opinion upon the merits of the case is deferred.

"The commission finds that if both the lines under consideration should extend their service to West Tulsa such act upon the part of the line, which is not at present operating in West Tulsa, would, as a matter of course, supplement the present service and thus afford an added public convenience, but on this point the commission is also of the opinion that the public would be equally as well served and the public convenience thus promoted if some arrangement or agreement could be reached by the two companies whereby the patrons of the Tulsa Street Railway Company could reach West Tulsa without being subject to excessive toll for the payment of double fare.

"The commission for the reason stated, has decided to defer further consideration of the case and the rendition of opinion and final order therein until the parties have been afforded the opportunity of carrying out the suggestion above made; and hence the commission issues this order.

"Wherefore, the premises considered and the commission being fully advised, it is ordered that a copy of this paper be served on both parties hereto; that thereafter they both forthwith confer with each other and thereupon appear before this commission at its office in the State House at Oklahoma City, Oklahoma, on the 6th day of August, 1917.

"The said parties are hereby advised that the matter of proper fare or charge for transportation or service between Tulsa and West Tulsa or between West Tulsa and Tulsa will be considered and that the matter of requiring transfer tickets by one company good over the line of the other company when used in trips between the places aforesaid, will also be considered.

"And it is so ordered.

"Done at Oklahoma City, Oklahoma, in the regular order of business on this the 24th day of July, 1917."

Following this, the parties filed their respective statements and objections, and on September 14, 1917, a final hearing was had by the commission, at which time the commission made its final statement, findings of fact, and order, which were as follows:

"The parties are public service corporations operating street cars in Tulsa, Okla. The Tulsa Street Railway Company asks for a connection with the Oklahoma Union Railway Company's rails and other facilities except trolley wire on the approaches of the Arkansas river bridge between Tulsa and West Tulsa. The Oklahoma Union Railway Company has a single track railroad on the approaches to said bridge. Tulsa county owns a bridge with a single track thereon connecting the aforesaid track on the approaches.

"The north approach is 2.5 per cent. descend.

ing grade, and the connection desired by the complainant is 300 feet north of the bridge. The connection desired on the south approach is 240 feet from the end of the bridge and is 1.5 per cent. descending grade. The bridge proper is 1,470 feet long. The complainant proposes to bear the expenses of making connection with the defendant and to install its own trolley wire on supports owned by Tulsa county and the defendants, and, in addition, to pay defendant rent for the use of its rails and fixtures and rent to Tulsa county for the use of the bridge and track thereon.

"The embankments or approaches and bridge were built by Tulsa county. The county leased the use of track over the bridge to the Oklahoma Union Railway Company, which company operates cars between Tulsa and West Tulsa.

"The complainant showed that it was operating about 10 miles of street railway in Tulsa and that it had laid 3,000 feet of track in West Tulsa. And it proposes to install a 15-minute service between Tulsa and West Tulsa if it can obtain access to the bridge.

"The said bridge has a 30-foot roadway with car track in center. The Oklahoma Union Railway Company is now operating a street car system in Tulsa, and, as above stated, it operates between Tulsa and West Tulsa, and its interurban line extends from Tulsa to Red Fork while it has 12 miles of line in operation between Kiefer and Sapulpa. When these lines are connected defendant will have 31 miles of railroad. All the interurbans will operate over the Arkansas river bridge.

"The defendant expects to install a 30-minute service between Red Fork and Tulsa and hourly service between Sapulpa and Tulsa. It will then have seven cars each way or 14 cars in all passing over said bridge every hour.

"The defendant is now carrying from 4,000 to 5,000 passengers a day across the bridge. It requires two minutes to cross the bridge proper, while considerable more time is needed in passing over the bridge and approaches or between the proposed points of connection between the complainant and defendant.

"Business on said bridge is already congested, and the indications are that in the near future the public will require the entire use of said bridge and the railways will have to abandon the use thereof.

"The commission after considering the testimony heard at the first hearing was of the opinion that in consideration of the heavy traffic over said bridge the joint use of the same by the railway companies is impractical. The complainant testified that its cars could follow the cars of the defendant company over the bridge and that schedules could be so arranged that both companies could operate thereon, but, as indicated, the commission does not consider this feasible nor advisable. The commission is of the opinion that the public had better have a safe and satisfactory service by one company than unsafe and unsatisfactory service by two companies in the matter of transportation between Tulsa and West Tulsa.

"The order above set out was issued, and pursuant thereto the cause came on for hearing and was finally submitted on August 13, 1917. It was agreed that A. I. Thompson, Esq., engineer of the commission, should proceed to Tulsa and investigate and report on the propriety of installing a transfer system between the compa-

nies in Tulsa. The said engineer had, prior to the original hearing, visited the bridge and had taken notice of traffic conditions, and he testified as a witness in the case. Upon returning to Tulsa and reviewing the lines of the companies and the bridge, he made a report, a copy of which was served on both companies, the original being filed as a part of the papers in this case.

"Mr. Thompson's report defines the location of the different street car systems in Tulsa noting the length of lines and streets traversed. At present the Tulsa Street Railway Company and the Sand Springs Interurban Railway Company (the latter being not involved herein) use a transfer at Third and Maple streets which is on the basis of a five-cent fare, each company receiving 2.5 cents on transfers collected by the other company. Under this arrangement one can ride 7.7 miles for one five-cent fare.

"The transfer system is used in Oklahoma City and in said city one can ride 10.76 miles for one five-cent fare.

"There is an immense amount of street car traffic between Tulsa and West Tulsa. In the latter place a great many industrial concerns are located employing many hundreds of laborers who reside in Tulsa, some along the lines of one company and some along the lines of the other company. At the present time those residing along the lines of the complainant company have to pay a double street car fare in going to and from their work at West Tulsa.

"The engineer of the commission suggests a point of transfer at Fourth and Main streets, Tulsa, and the commission finds that this is the logical point for transfer between the lines of the two companies. The defendant company suggested a point of transfer which is not practical, the lines of the companies being too far apart, the street being unpaved, and the track in each instance not being visible to a party at the other track. If the point of transfer be at Fourth and Main streets, the longest distance a passenger could be carried for one fare is 5.5 miles, of which 3.5 miles would be on the Tulsa Street Railway Company and 2 miles on the Oklahoma Union Railway Company. Most of the traffic, however, will be for a much shorter distance and will involve, to a great extent, the transportation of the many hundreds of laborers working in the industrial concerns at West Tulsa. A great advantage to the public will accrue if the transfer system is installed, the point of transfer being Fourth and Main streets, the basis of transfer being the five-cent fare, the same being voluntary rate of the defendant company heretofore charged, and now in effect.

"Wherefore, the premises considered and the commission being fully advised, it is ordered that a transfer system be installed by the two companies on or before October 1, 1917; that the point of transfer be Fourth and Main streets in Tulsa, Okl. (at the present time there is no use of designating a point of transfer on West Tulsa side, because the complainant is not in readiness to operate over its tracks in West Tulsa, and when it completes its West Tulsa trackage a point of transfer can be designated); that the basis of transfer be the five-cent fare; that the division of the fare be one-half to each company; that settlements be made monthly not later than the 10th day of the calendar.

"Now as both companies will be receiving ben-

efits from the Tulsa county bridge, and as the Oklahoma Union Railway Company is now paying Tulsa county \$200 per month as rental for the use of the bridge for street and interurban railway purposes, the Tulsa Street Railway Company should bear a portion of this rental to equalize the indirect benefits received.

"The amount of rental to be paid by the Tulsa Street Railway Company to the Oklahoma Union Railway Company should be the ratio of passengers transferred to the total number of passengers carried over the bridge. Necessary statements and settlements should be made and effected monthly on or before the 10th day of the calendar."

On the 17th day of September, 1917, the motion for new trial was overruled. Exceptions being saved, the complainant was given time to make and serve case-made and to file supersedeas bond, which was accordingly done, and the order complained of is now properly before this court on appeal from the Corporation Commission for review.

From the order made by the commission on the 4th day of September, 1917, complainant appealed to this court and assigns error as follows:

"(1) That said commission erred in overruling the plaintiff's in error motion for new trial.

"(2) Said commission erred in not rendering judgment in accordance with the prayer of the plaintiff in error, and specifically erred in finding that the public would be equally well served by a transfer system as indicated on pages 105, 106, and 107 of the case-made.

"(3) The commission erred in not finding that the plaintiff in error has as a matter of law the right to use the bridge across the Arkansas river between Tulsa and West Tulsa.

"(4) The commission erred in attempting to make an order not supported by the pleadings and not asked by either the plaintiff in error or the defendant in error.

"(5) The commission has no jurisdiction to make or render any judgment except a judgment supported by the pleadings of either the plaintiff or defendant, and the judgment is not supported by the pleadings of either party to this litigation.

"(6) The commission erred as a matter of law in finding and adjudging that a transfer system be installed by the two companies on or before October 1, 1917, from the corner of Fourth and Main streets, and that the basis of transfer be a five-cent fare, and that the division of the fare be one-half to each company, and that a settlement be made monthly not later than the 10th day of the calendar.

"(7) The decision of the Corporation Commission complained of practically confiscates and takes without process of law from the plaintiff in error all its trackage and equipment in West Tulsa, and renders the investment therein of no value.

"(8) The Corporation Commission went outside the issues raised by the pleadings and attempted to arbitrate the case between the plaintiff in error and the defendant in error, and failed and refused to decide the questions of law which were raised by the pleadings, any of the questions of law involved."

We will consider all the assignments of error under two propositions:

(1) Had the commission jurisdiction to make the order complained of?

(2) If so, was the order reasonable and just?

[1, 2] Section 18, art. 9, of the Constitution, provides:

"The commission shall have the power and authority and be charged with the duty of supervising, regulating and controlling all transportation and transmission companies doing business in this state, in all matters relating to the performance of their public duties and their charges therefor, and of correcting abuses and preventing unjust discrimination and extortion by such companies; and to that end the commission shall from time to time, prescribe and enforce against such companies, in the manner herein-after authorized, such rate, charges, classifications, of traffic, and rules and regulations, and shall require them to establish and maintain all such public service, facilities, and conveniences as may be reasonable and just, which said rates, charges, classifications, rules, regulations, and requirements, the commission may, from time to time, alter or amend."

R. L. 1910, § 1190, also provides:

"The Corporation Commission shall have full power, and it shall be the duty of said commission, to investigate all complaints in reference to the physical connections, transfers, depots and switching facilities at all junction points and incorporated towns, villages and communities, and upon investigation of such complaint or upon its own motion, the said commission may require any railroad companies to make such physical connections or to establish and maintain union depots, transfer and switching facilities as the public interests may require."

S. L. 1913, c. 130, § 1, also provides:

"The Corporation Commission shall have the power and authority to prescribe and enforce against any railroad or transportation company, operated in whole or in part within this state, such rates and charges for the transportation of passengers between points within this state as may be found to be reasonable and just after due notice and hearing, as now provided by the Constitution for prescribing freight rates and regulations."

This court in construing the section of the Constitution quoted supra, in the case of *A. T. & S. F. Ry. Co. v. State et al.*, 23 Okl. 217, 100 Pac. 13, 21 L. R. A. (N. S.) 908, in an opinion by Mr. Justice Williams, said:

"There can be no question but that the Legislature of the state, unless otherwise in the organic charter thereof restricted, has the power to require railroad companies, in the carrying on of their business as common carriers, to afford every reasonable facility and convenience for the transaction of such business with the patronizing public. The only limitation upon such power is that the duty imposed must relate to the matter which is within the domain and a proper subject of police regulation, and that it is reasonable."

Again, in the case of St. L. & S. F. Ry. Co., v. Williams et al., 25 Okl. 665, 666, 107 Pac. 430, the same learned Justice said:

"The Corporation Commission, by virtue of the provisions of article 9 of the Constitution, is invested with extraordinary powers, being authorized to exercise not only legislative, but also executive, administrative, and judicial powers. * * * Though it may be necessary for the commission to make and preserve a record, it does not follow that a strict or narrow rule as to procedure shall prevail as in trials at common law. Interstate Commerce Com. v. Baird, 194 U. S. 25, 24 Sup. Ct. 563, 48 L. Ed. 860. The fact that the petition may have asked for the regulation of interstate commerce, yet if the order of the Corporation Commission made thereon did not interfere with interstate commerce, the commission had jurisdiction to enter same. Its jurisdiction does not depend upon any special form of pleading, the test being, not the relief prayed for, but that granted. In fact, it is not essential for any petition to be filed, but that notice shall be had."

The same rule is announced by this court in St. L. & S. F. Ry. Co. v. Zalondek et al., 28 Okl. 746, 115 Pac. 867; M. O. & G. Ry. Co. v. State, 53 Okl. 341, 156 Pac. 1155. A very exhaustive discussion of the questions involved will be found in State of Florida v. Atl. Coast Line Ry. Co., 32 L. R. A. (N. S.) 639 (56 Fla. 617, 47 South. 969).

[3] We have examined the entire record, including the testimony of the witnesses and the report of the engineer, which is very full and complete, covering every detail of the physical facts surrounding the situation of the properties of the parties as well as the bridge and the approaches thereof, the number of passengers handled by each of the parties in a given period, the number of transfers and the revenue derived therefrom by each, the amount of travel over the bridge, the congested condition thereof during the daytime and nighttime, the time required to make the crossing of the bridge by the cars, and the number of cars that are now required by the defendant to handle the traffic and maintain an adequate schedule for the convenience of the public and would be required if the joint operation were installed, and in concluding his report said:

"I deem it what the people require is service, and contend that one company can operate over the single track between Tulsa and West Tulsa and give better service than two companies. It is immaterial what kind of a block system was installed; two systems would be bound to cause delay in operating over bridge. If the commission ordered connection on the east approach of the Arkansas river bridge as prayed for by the Tulsa Street Railway Company, they would still be unable to operate until they had permanent injunction dissolved which forbids them to operate from Twelfth street to desired connection. I think the proper solution is to give the public equal transportation facilities between Tulsa and West Tulsa, and a transfer system at Fourth and Main between the Tulsa Street Railway Company and the Oklahoma Union

Railway Company, would do this. The Tulsa Street Railway Company transfer would be good for continuous passage on the lines of the Oklahoma Union Railway from Fourth and Main to Center avenue in West Tulsa. The Oklahoma Union Railway transfer would be good for a continuous passage from Fourth and Main on any line of the Tulsa Street Railway. The Tulsa Street Railway and the Oklahoma Union Railway are charging a five-cent fare. About the longest route on the Tulsa Street Railway is 5 miles, and on the Oklahoma Union Railway $4\frac{1}{2}$ miles. A passenger can now get on the Tulsa Street Railway at Kendall College, and transfer to Sand Springs Interurban at Third and Maple, and ride 7.7 miles for five cents, under the present transfer system between these companies. If a transfer between the Tulsa Street Railway Company and the Oklahoma Union Railway Company at Fourth and Main be established on the same basis the longest route a passenger could be carried is 5.5 miles, of which 3.5 miles would be on the Tulsa Street Railway and two miles on the Oklahoma Union Railway.

"Both railway systems in Tulsa are handicapped in trying to operate on a single track, and is now double-tracking. The Oklahoma Union Railway Company has submitted a proposition to the city of Tulsa to extend its track from Elwood on Fourth to its line along the Frisco. This extension, when installed, will materially assist in operating cars from Main street to Center avenue in West Tulsa. If the company would double-track from Elwood to Main on Fourth, it would benefit operating conditions.

"As I formerly stated, I think it is only a matter of time until all railroads will have to cease using the present highway bridge as the public will demand its full capacity, and that the street and interurban lines will be compelled to provide their own bridge. It would be of advantage to the Tulsa Street Railway Company to extend its line from Twelfth and Frisco to Fifteenth and construct a bridge across the Arkansas river between Fifteenth street in Tulsa and Mitchell in West Tulsa. It is going to be necessary for the Oklahoma Union Railway Company to increase its service in car capacity and in time in operating between Main and Center avenue in West Tulsa. It seems about as fast as they can operate cars over the bridge and clear it is from nine to ten minutes. This they will be unable to do to an advantage until they get their loop completed on Fourth street and double to Main, and double-track from Mitchell to Center avenue in West Tulsa. It is impossible to keep schedule and give adequate service on a single track unless same is operated on a loop. I am attaching a map to the commission's report showing location of all street and interurban lines now in operation in Tulsa, and West Tulsa.

"As I advised heretofore, I have attached to commission's report the Tulsa Street Railway and the Sand Springs Interurban transfers. I can see no reason why the same forms of transfer are not applicable between the Tulsa Street Railway Company and the Oklahoma Union Railway Company. I fail to see where there would be any difficult accounting feature in handling these transfer coupons. I do not think a transfer system as outlined heretofore is unreasonable. As noted, the longest haul on a transfer would be 5.5 miles, which you can see

from the map would be a very rare occurrence. In Oklahoma City, a passenger by using the transfer system now in vogue, can ride 10.76 miles for one five-cent fare.

"If this transfer system is installed, both companies will be receiving benefits from the Tulsa highway bridge, and as the Oklahoma Union Railway Company is now paying Tulsa county \$200 a month rental for the use of the bridge for street and interurban railway purposes, I believe it should be reimbursed by the Tulsa Street Railway Company for a portion of this rental to equalize the indirect benefits received by the Tulsa Street Railway Company. A fair amount of this rental to be paid by the Tulsa Street Railway Company to the Oklahoma Union Railway Company would be the ratio the transfer tickets collected by the Oklahoma Union Railway Company bears to the total number of passengers carried over the bridge. This settlement should be made not later than five days after the last day of each calendar month."

We think that the authorities cited are conclusive upon the two propositions under consideration—had the commission jurisdiction to make the order, and was the order reasonable and just—and that both questions must be answered in the affirmative, which are the only questions involved in this appeal, or at least are the ones that should and must control.

That the commission was legally authorized and empowered to hear and determine this case we think there can be no doubt. Then was its order sustained by the evidence in the record supported by its prima facie presumption to such an extent that we cannot say that it is unjust and unreasonable? After a careful reading of the record, we must answer in the affirmative.

The actions of the commission are in all things affirmed.

(76 Okl. 51)

FREEMAN v. BRYANT. (No. 10506.)

(Supreme Court of Oklahoma. Sept. 9, 1919.
Rehearing Denied Oct. 14, 1919.)

(Syllabus by the Court.)

1. COURTS ¶488(1) — ON TRANSFER FROM ONE COURT TO ANOTHER JURISDICTION OF LATTER COURT ATTACHES.

Where an order of removal of a cause from one court to another is made, the former court is thereby divested of jurisdiction, and the jurisdiction of the latter court attaches, and the cause proceeds as if originally instituted there.

2. COURTS ¶37(3), 488(1) — NOTICE OF TRANSFER OF CAUSE FROM ONE COURT TO ANOTHER WAIVED.

Where a case has been transferred from one court to another, the parties are bound to take notice of the transfer and the subsequent proceedings had therein by the court to which said transfer is made; and when any of such parties goes to trial in the court to which the transfer is made, or indulges in any conduct incon-

sistent with an intention to insist upon any impropriety of such transfer, said parties waive any objection to the propriety of the transfer, and are also estopped to deny that the court to which the case is transferred has jurisdiction to try the cause.

3. JUDGMENT ¶342(2) — MOTION TO SET ASIDE IN COURT TO WHICH ACTION WAS TRANSFERRED IMPROPERLY GRANTED.

Where a suit has been filed in the superior court, and where such court on application ordered that said cause be transferred to the district court of the county, in accordance with the provisions of section 15, c. 20, Session Laws of Oklahoma of 1915, jurisdiction of said cause is thereby divested out of such superior court and vested in the district court, and the latter becomes fully vested with power to proceed with the trial of said cause to a final determination thereof in said court; and where it appears that the district court took jurisdiction of said case, ordered that the lost records in said case be substituted, that said substitution was made by the parties, and said case proceeded to a trial thereof upon the merits, and final orders, judgments and decrees rendered therein by said court, and that said court thereafter adjourned for the term, and that no appeal was taken from such final judgments, orders, and decrees, but that more than four months after the adjournment of said term, and during a subsequent term of said court, and when a different judge was presiding, attorneys for the losing party presented an unverified motion to vacate, dismiss, set aside, and hold for naught the proceedings theretofore had in said case, for the reason that the court acquired no jurisdiction over the person or subject-matter involved in said suit, stating that there had been no such case pending in the district court within the county, and for the further reasons, to wit: Said action was begun in the superior court, that transfer was ordered therein, but no transfer of the files, records, and proceedings had in the superior court was ever lodged or filed with the clerk of the district court; (2) said files having never been supplied or substituted as required by law; (3) that under the conditions of the record as it now stands it would be impossible for the defendant in said case to make or serve case-made therein, or to prosecute an appeal to the Supreme Court from the judgment rendered herein, there being no records in the district clerk's office of any of the proceedings had in the superior court, either original or substituted, and no proper certification of the proceedings in the superior clerk's office or the superior court showing that any such proceedings had ever been had in the superior court—and said court over the objections of the adverse party proceeded to take testimony in support of said motion, and at the conclusion of such hearing sustained said motion, giving as his reason therefor that the court finds and holds that the order of the superior court transferring said cause and directing the clerk to make up the record and certify same to this court was never complied with, that the records were lost in the superior court and were never supplied, either in that court or the district court, and that therefore the court had no jurisdiction to hear and determine the cause, *held*, such procedure is not a compliance with, or

authorized by, Revised Laws of Oklahoma 1910, §§ 5267, 5268, 5269, 5270, and 5271.

4. JUDGMENT ~~342~~(2)—VACATION OR MODIFICATION AT SUBSEQUENT TERM ERRONEOUS WITHOUT COMPLIANCE WITH STATUTE.

While great discretion is allowed the trial court in the control of its judgments and orders, and in the exercise of its power to vacate or modify the same at the term at which the same was rendered or made, yet the court is without jurisdiction, at a subsequent term, to take any steps toward vacating or modifying a judgment or order of the court, unless there is a substantial compliance with the terms of the statute.

Error from District Court, Tulsa County; Conn Linn, Judge.

Action by Anna Freeman, administratrix of the estate of Mahalia J. Mitchell, deceased, against E. Norris Bryant. Judgment for plaintiff, defendant's motion to vacate and set aside the judgment sustained, and judgment set aside and cause dismissed, and plaintiff brings error. Reversed and cause remanded, with directions.

I. H. Spears, of Tulsa, for plaintiff in error.
Poe & Lundy, of Tulsa, for defendant in error.

JOHNSON, J. Mahalia J. Mitchell, deceased, had before her death contracted with the Berry-Hart Real Estate Company, agents for T. E. Smiley, trustee, for the purchase of lots 1 and 2, block 7, Fairview addition to Tulsa, Okl. The consideration was payable in monthly installments. After paying all of said consideration except a balance of \$48.50, her circumstances became such that for the time being she was unable to meet the payments, and she thereupon turned said contract over to E. Norris Bryant, who, it was alleged in the petition held himself out to the public as being one who would take up contracts of poor people who were behind in their payments on property.

The record discloses that said E. Norris Bryant paid the balance due on the property, \$48.50, and took the deed from T. E. Smiley, trustee, in his own name, and proceeded to collect the rents from said property. The jury found (1) that said deed was not intended to sell and convey; (2) but was made to secure money advanced, and was to be considered as a mortgage; and (3) that no consideration whatever had been advanced by E. Norris Bryant to said Mahalia J. Mitchell. The jury further found that said E. Norris Bryant had received in rents from said premises the sum of \$192. The court in its judgment adopted the findings of the jury, made other and further findings, and ordered the title and possession of said property forever quieted in the heirs at law of Mahalia J. Mitchell, and directed said E. Norris Bryant to make and execute a deed to same in favor of said heirs.

Originally this case was filed in the superior court of Tulsa county, but, application having been made to transfer same to the district court, same was ordered transferred to the district court. Journal entry of the order of transfer was filed July 19, 1917, and on August 7, 1917, notation was made on the appearance docket of the superior court to the effect that the case had been transferred to the district court. The files in the case were completely lost, and on October 12, 1917, application was made to the district court to supply lost files, and an order was made authorizing plaintiff to supply the pleadings. This was done, and the defendant on February 2, 1918, filed an amended answer and cross-petition, in which he asked affirmative relief against the plaintiff. Thereafter the trial was had as aforesaid, and judgment rendered June 27, 1918. On December 9, 1918, defendant filed motion to vacate, dismiss, and set aside said judgment, on the ground that the court had acquired no jurisdiction over the person or subject-matter involved in said suit, and on the same day the court sustained the motion, on the ground that the court was without jurisdiction to try and determine the issues of fact and law in said action, and therefore ordered said judgment set aside and vacated, and the cause dismissed.

It is from this judgment of the court, in which defendant's motion to vacate and set aside the former judgment was sustained, that this appeal has been prosecuted. While there are eight assignments of error urged in this appeal, there are but two important questions presented. It will readily be seen that one issue involved and before this court is the question of jurisdiction of the district court to render the former judgment. That was the question decided by the district court in its judgment subsequently entered, and it is around this question that the arguments in the briefs of the parties are centered. Therefore we will discuss that proposition first.

[1] Section 15, chapter 20, Session Laws of Oklahoma 1915, provides, among other things:

"The superior court, or judge thereof, may, at any time, in his discretion, transfer to the district court of said county any cause pending and undetermined therein which may be within the jurisdiction of the district court. * * * Upon such transfer being made, such cause shall stand for trial in the court to which it has been so transferred as if it had been originally filed therein, and in such cases the court clerk shall transfer the original files to the court to which said cause has been so transferred."

Besides granting the power and authority of transfer, two things are evident under this statute: (1) That the cause, when so transferred, stands for trial in the court to which it has been transferred as if it had been

originally filed therein; and (2) it is the clerk's duty to see that the files are properly transferred from one court to the other. In the case at bar the court clerk was acting in the double capacity of clerk to both courts, the superior court and the district court. Yet he failed to do his duty, in this instance, as an officer of either court.

That the order of transfer was made by the superior court is uncontroverted. This order divested the superior court of jurisdiction, and the jurisdiction of the district court attached, and the cause proceeded as if originally instituted there. 15 C. J. 1150, § 625; *Ex parte Copeland*, 5 Okl. Cr. 551, 115 Pac. 627. And the parties were bound to take notice of the transfer and subsequent proceedings. 15 C. J. 1151, § 626; *Phelps v. Stewart*, 17 Md. 231. This the defendant, E. Norris Bryant, did, and especially so when, on February 2, 1918, pursuant to a permission by the court to file out of time, he filed in said cause his amended answer denying the allegations in plaintiff's petition, and praying the court that the plaintiff's bill be dismissed. Therefore, as disclosed by the record, it appears that defendant took notice of this transfer of the cause, followed same into the district court, filed therein his further pleading, sought relief against the plaintiff, participated in the trial without making any objections, lost the cause, and failed to prosecute an appeal.

[2] Can this defendant now deny the jurisdiction of the district court? We think not. A party who goes to trial in the court to which the transfer is made waives any objection to the propriety of such transfer, a waiver which may result from any conduct inconsistent with an intention to insist upon the impropriety. See 15 C. J. 1151, 1152, and cases cited; *Railroad Co. v. Gregg*, 181 Ind. 42, 102 N. E. 961; *Grant v. Grant*, 38 Nev. 185, 147 Pac. 451; *Wells v. Scofield*, 157 App. Div. 8, 141 N. Y. Supp. 657; *Trocon v. Railway Co.*, 91 Kan. 887, 139 Pac. 357; *Dean v. Smith*, 146 Ill. App. 382; *Telephone Co. v. Buckner*, 160 Ky. 604, 169 S. W. 1000; *Parker v. Hamilton*, 49 Okl. 693, 154 Pac. 65; *State ex rel. Strong et al. v. Superior Court Pott. Co.*, 38 Okl. 366, 132 Pac. 1077; *Price v. Peeples*, 168 Pac. 191.

[3] We believe that the contention of the defendant in error that the district court was wholly without power or authority to make an order authorizing plaintiff in error to supply lost files is untenable and without merit. This contention of the defendant in error is based upon the fact that the files were lost, and, because the files had not been properly transmitted, the district court was wholly without jurisdiction. For the purpose of giving the district court complete control over the case, it was not necessary that the papers should have been actually transmitted from the one court to the other. The order for the removal transferred the

jurisdiction, and from that moment, in legal contemplation, the case was in the district court. "If this were not the true view of the subject, the proceedings might be suspended for an indefinite time between the two courts, a condition of things never contemplated by the Constitution and laws." *William Brown v. Robert Gilmore's Ex'rs et al.*, 8 Md. 322. The district court had the authority and full jurisdiction to make the order to supply files, or to have made any other order that the county court might have made before the cause was ordered transferred. *Hawes & Duncan, Ex'rs, v. B. H. Foote et al.*, 64 Tex. 22. This is on the principle that it was the original jurisdiction of the district court that attached, and the cause proceeded as if originally instituted there. Such jurisdiction is original and not appellate, and "it matters not whether or not the county court had cognizance of the cause, so it falls within the original jurisdiction of the district court." *W. D. Cleveland v. J. W. Tufts*, 69 Tex. 580, 7 S. W. 72. And see *G. C. & S. F. R. Co. v. Kerfoot*, 3 Willson Civ. Cas. Ct. App. § 452.

In *Smith Brothers v. J. T. Hardin*, 68 Tex. 120, 3 S. W. 453, an order was taken in the county court transferring the cause to the district court, and thereafter plaintiffs, in vacation, filed an amended petition setting up nothing materially different from the allegations of the original petition. The court said in discussing same:

"It mattered not that the petition claimed to have been filed by leave of the court. Such a recital as this, or any other, was unnecessary and could not vitiate. The petition showed on its face that it was a proper proceeding in a proper court."

In *A. H. Boyden, Ex'r, v. Joseph Williams*, 84 N. C. 608, it was said in the syllabus:

"It is error for a court to which a cause has been removed for trial to send it back because the transcript of the record does not show 'that it was transferred according to law.' The order of removal itself is conclusive, and the court should have proceeded with the case, unless it positively appeared that the order was made contrary to law."

In this case the Supreme Court of North Carolina, speaking through Justice Ruffin, said:

"It was a mistake to have supposed at all that the transcript should disclose the reasons why the removal was asked for or ordered, and still more that their sufficiency could be made the subject of inquiry in the court to which the cause was sent. These were all matters concluded by the order itself, and that they should be so concluded must be apparent to every one after slight reflection upon the inconvenience which might result from holding them to be otherwise. Suppose the court in *Rowan* had declined to take back the action when the court in *Iredell* ordered it to be restored to it, we should then have had the singular spectacle of

a cause suspended between two courts—both disclaiming it and refusing to take a single step towards its trial—and all the while the parties helpless, for until one or the other of the courts should take some action no appeal could be framed. Commenting upon the possibility of such an inconvenient state of things, in the case of *State v. Seaborn*, 4 Dev. [15 N. C.] 305, this court declared that it was indispensable that there should be some method for a court, to which a cause is removed, to determine whether it has the power and is bound to try it, and that the only way to accomplish this with certainty was to treat the order of removal as entered of record as conclusive, and the case of *Rex v. Harris*, 1 Bla. Rep. 375, is cited to show that such was the construction given by the courts in England to a statute similar to our own providing for the removal of causes in certain contingencies. And since *Seaborn's Case*, as was said in the case of *State v. Barfield*, 8 Ired. [30 N. C.] 344, it has been considered as settled that the assignment of the grounds for the removal need not appear in the record but only the order of the court. We can see nothing in the case, then, to cause us to doubt that the cause was effectually removed to the court of Iredell county, and are at a loss to know why that court refused to entertain it."

This question was passed upon by this court in the case of *In re Nichols' Will*, *Phibus et al. v. Vinson et al.* (decided July 10, 1917) 166 Pac. 1087, where, in the third paragraph of the syllabus, it was said:

"After a cause has been legally transferred from a superior to a district court, the jurisdiction of the superior court over the cause is lost, and any further proceeding had therein is a nullity. (a) On an appeal to the superior court from the judgment of a county court admitting a will to probate, the superior court made an order transferring the cause to the district court of the county. During the following week a part of the records in the case were filed in the district court; thereupon the proponents of the will entered a special appearance in the district court and moved to remand the case to the superior court. After the case had been transferred to the district court, and its jurisdiction thereof had attached, the proponents, upon hearing had in the superior court at a succeeding term, procured to be made an order vacating and setting aside the order of transfer and dismissing the appeal for want of jurisdiction, which order or judgment they subsequently set up in bar of further proceedings in the district court. Held that, the district court having acquired jurisdiction of the cause by reason of the transfer to it from the superior court, the latter court was without jurisdiction to vacate and set aside its former order, and that the proceedings had in said court at such subsequent term were *coram non jure*."

The following is an extract from the opinion of Sharp, C. J., in the above case:

"It is a rule widely recognized that jurisdiction will be presumed as to courts of general jurisdiction, such as the district courts in this state, unless the contrary appears of record. 11 Cyc. 691, 692. Also it will be presumed that

every step necessary to give jurisdiction has been taken, although this presumption may be rebutted by extrinsic evidence, as when the jurisdiction may be inquired into. *Applegate v. Lexington & Carter Co. Min. Co.*, 117 U. S. 255, 6 Sup. Ct. 742, 29 L. Ed. 892; *Voorhees v. Jackson*, 10 Pet. 449, 9 L. Ed. 490. Acts or admissions affecting the validity of the proceedings must be affirmatively shown. The manner of the transfer of the files to the district court was irregular, as best we can gather from the record. Indeed, it seems that a part of the files from the county and superior courts were not lodged with the district court until in the month of June, prior to the trial in July. This omission, while an irregularity, did not affect the jurisdiction previously acquired by the district court. * * * We think that by the appeal from the county court the jurisdiction of the superior court attached, and, the cause having been transferred to the district court, and that court having acquired jurisdiction, the superior court was divested of all further jurisdiction over the proceedings. *Simpkins v. Parsons* [50 Okl. 786], 151 Pac. 558. This we held in *State ex rel. Nichols et al. v. Johnson*, County Judge [58 Okl. 239] 158 Pac. 1129, which action arose out of the final judgment of Judge Watts, made July 30, 1915, in the will contest proceedings under consideration, and in which it was said that the order of the superior court was made after the transfer of the cause to the district court. Jurisdiction generally could not, at the same time, be both in the superior and district courts. By the transfer to the district court, the superior court lost jurisdiction. *State v. Reid*, 18 N. C. 377, 28 Am. Dec. 572; *Two Rivers Mfg. Co. v. Beyer*, 74 Wis. 210, 42 N. W. 232, 17 Am. St. Rep. 131; *State ex rel. Nichols et al. v. Johnson*, Co. Judge, *supra* [58 Okl. 239] 158 Pac. 1129; 7 R. C. L. 1067; 11 Cyc. 690. And the fact that a part of the files, either from the county or superior court, were not with other files lodged with the district court, will not serve to defeat the jurisdiction of the latter court."

In the case just quoted from, it was alleged in the supplemental petition that on "the 2d day of January, 1915, said papers and files in said cause were taken from the office of the clerk of the superior court and lodged and filed in the district court by F. H. Reilly, one of the attorneys for the objectors." In the case at bar there were no files transferred, but that was due to the failure in duty and neglect of the court clerk. The court clerk was the clerk for both the superior and district courts, and the transfer by him was in that respect in the nature of a fiction of law. But that point need not be discussed here; for our purposes it is sufficient that the order of removal transferred the jurisdiction, and from that moment, in legal contemplation, the case was in the district court. We believe the authorities cited, *supra*, fully sustain this view.

The question is analogous to the attaching of jurisdiction in the appellate court upon the filing and approval of supersedeas bond. *Keyser et al. v. Farr*, 105 U. S. 265, 26 L. Ed. 1025; *Goddard v. Ordway*, 101 U. S. 745, 25

L. Ed. 1040; *Draper v. Davis*, 102 U. S. 370, 26 L. Ed. 121; *Jerome v. McCarter*, 21 Wall. (88 U. S.) 17, 22 L. Ed. 515. It is a settled doctrine that the court on appeal acquires jurisdiction on the filing and approval of the appeal bond. *Dillard v. Wilson* (Tex. Civ. App.) 137 S. W. 152; *Merrifield v. Western Cottage Piano & Organ Co.*, 238 Ill. 526, 87 N. E. 879, 128 Am. St. Rep. 148; *Reynolds v. Perry*, 11 Ill. 534; *Owens v. McKethe*, 5 Gilman, 79; *Simpson v. Alexander*, 5 Gilman, 260.

The other important issue presented in the prosecution of this appeal is set out in the first and second assignments of error, which are as follows:

"(1) Said court was without jurisdiction to render said judgment against the plaintiff in error on the 9th day of December, 1918, same being a term of court subsequent to the term in which a final judgment had been rendered against the defendant in error, and in favor of plaintiff in error, respecting the same subject-matter, and from which no appeal had been taken.

"(2) The court committed error in hearing said cause, on the unverified motion of defendant in error to set aside, vacate, dismiss, and hold for naught all proceeding theretofore had in said cause, in violation of the statutes of the state of Oklahoma in such cases made and provided."

[4] We think that these assignments of error are well taken. The trial was had and the findings of the jury made on February 27, 1918, and the journal entry of judgment was filed June 27, 1918. The judgment appealed from in this case was made and entered December 9, 1918, setting aside the former judgment. This was about six months after the judgment sought to be set aside was rendered, from which judgment no appeal had been made. The question of jurisdiction was one which could have been raised at the trial had February 27, 1918, and the doctrine of *res judicata* applies to all matters which existed at the time of the giving of the judgment, and which the party had an opportunity of bringing before the court. *Newoyton v. Levy*, Law Rep. 7 C. P. 180; *Wisconsin v. Louis E. Torinus*, 28 Minn. 175, 9 N. W. 725. We are aware of the rule that a void judgment may be vacated at any time, and the fact that the term of court at which the judgment was rendered had expired does not serve to give a void judgment any standing. But, the district court having had full jurisdiction and control over this case from the time the order of transfer was made, its judgment subsequently rendered

is far from being a void judgment; and, that being the case, such court did not possess the authority to vacate or set aside its final judgment after the expiration of the term. After the term expired the judgment had passed beyond its control. 23 Cyc. 902; *Johnson v. Jones*, 58 Kan. 745, 51 Pac. 224. As said in the syllabus of *Continental Gin Co. v. Arnold*, 167 Pac. 613 (L. R. A. 1918B, 511):

"While great discretion is allowed the trial court in the control of its judgments and orders, and in the exercise of its power to vacate or modify the same at the term at which the same was rendered or made, yet the court is without jurisdiction, at a subsequent term, to take any steps toward vacating or modifying a judgment or order of the court, unless there is a substantial compliance with the terms of the statute."

The motion to set aside the judgment was an unverified motion. Said motion was filed December 9, 1918, the hearing had, and the judgment sustaining same entered on the same day. Section 5267 of the Revised Laws of Oklahoma 1910, provides the methods to be employed and the reason for which a district court shall have power to vacate or modify its own judgments or orders, at or after the term at which such judgment or order was made. Sections 5269, 5270, and 5271 of said statutes govern the formal proceedings by petition, the trial of the ground of review, and what defense or valid cause of action must be shown. The only semblance of authority for the proceeding in the instant case would be section 5268 of said statutes, providing that such proceedings to vacate or modify for the purpose of correcting mistakes or omissions of the clerk, or irregularity in obtaining a judgment or order, might be by motion, upon reasonable notice to the adverse party or his attorney in the action, and that such motion can be made only in the first three days of the succeeding term. Considering the entire procedure had in this case, we reach the conclusion that same is not a substantial compliance with, or even authorized by, sections 5267, 5268, 5269, 5270, and 5271 of the Revised Laws of Oklahoma 1910.

The judgment of the trial court, rendered December 9, 1918, sustaining defendant's motion, is therefore reversed, and the cause remanded, and the district court is hereby directed to further proceed with said cause in accordance with the views herein expressed.

OWEN, C. J., and HARRISON, PITCHFORD, and HIGGINS, JJ., concur.

(76 Okl. 161)

TRACY v. TRACY et al. (No. 8853.)

(Supreme Court of Oklahoma. March 25, 1919.
Rehearing Denied Oct. 14, 1919.)*(Syllabus by the Court.)*1. JUDGMENT ~~§~~443(1) — MOTION ~~§~~59(1) —
DISTRICT COURTS CAN VACATE JUDGMENTS OF
OTHER COURTS FOR FRAUD.

The district courts of this state, in exercising their equity jurisdiction, have the power to vacate and annul orders or judgments of other courts, in a proceeding brought for that purpose, for fraud, inducing and entering into such order or judgment, where such fraud is extraneous to the issues in the proceeding attacked, and especially where the court has been imposed upon by such fraud.

2. PARTITION ~~§~~107 — IN SUIT TO VACATE
JUDGMENT AND DEED, EVIDENCE OF INTENT
TO DEFRAUD MINOR ADMISSIBLE.

In an action in the district court to set aside certain deeds and conveyances and orders, and judgments of other courts, based upon the ground of fraud, and where the plaintiff offers in evidence in support of said petition, facts to show that the guardian and other parties entered into an agreement that proceedings should be started and the land appraised and sold for a certain amount and the money derived from the sale should be used in paying off claims not chargeable against the minor's estate, and the proceedings were instituted for the purpose of cheating and defrauding minor out of his land, *held*, it was error for the trial court to sustain an objection to such evidence.

Appeal from District Court, Murray County; F. B. Swank, Judge.

Action by Calvin B. Tracy, by his next friend, N. E. Tracy, against Mark Tracy and others. Demurrer to plaintiff's evidence sustained, and he appeals. Reversed and remanded, with direction to grant plaintiff a new trial.

H. A. Ledbetter, of Ardmore, and T. N. Robnett and E. W. Fagan, both of Sulphur, for plaintiff in error.

W. E. Latimer, of Oklahoma City, and H. W. Fielding, of Sulphur, for defendant in error Frame.

Embry, Crockett & Johnson, of Oklahoma City, for defendant in error Dean.

McNEILL, J. This was an action commenced in the district court of Murray county wherein Calvin B. Tracy, by his next friend, N. E. Tracy, was plaintiff; Mark Tracy and Thomas Frame and others were defendants. The object of the suit was to set aside certain deeds to a certain piece of property inherited by the plaintiff, said deeds and conveyances being obtained through the county court and district court of Murray county.

The grounds alleged in the petition for setting aside said conveyance was upon the grounds of fraud. The plaintiff alleged that

his father, Mark W. Tracy, had entered into a conspiracy with Thomas W. Frame, whereby Mark W. Tracy was to bring an action for partition of said land, and that Thomas W. Frame was to be appointed guardian, and the force and effect of said conspiracy was that they were to cheat and defraud plaintiff out of his property. There were numerous transfers of said property and numerous mortgages made and executed upon the same. At the trial of the case after the introducing of the records and transfers effecting said land, the plaintiff offered certain evidence to which the court sustained an objection.

The only question necessary for this court to determine is whether the lower court committed error in sustaining the objection to the evidence offered on behalf of the plaintiff. The plaintiff called Mark Tracy as a witness and asked several questions to which an objection was sustained, and the plaintiff then dictated in the record and offered to prove a certain state of facts, the substance of which is as follows: That it was agreed between Mark W. Tracy and Thomas W. Frame that Mark W. Tracy should file a partition suit and that Thomas W. Frame was to be appointed and act as guardian for the plaintiff. That at the time of the institution of said suit Mark W. Tracy was indebted to Thomas W. Frame in the sum of \$800, and that the land should be appraised and sold for \$900, and that said Thomas W. Frame should take the \$900 obtained from the sale of plaintiff's property and pay the indebtedness of said Mark W. Tracy to said Thomas W. Frame, or in fact that the land should be sold and the title taken out of said plaintiff, and that plaintiff was to receive no consideration therefor. The plaintiff also offered to prove that, at the time plaintiff's one-fourth interest was appraised at \$900, the land was reasonably worth the sum of \$75 per acre, or a total of \$14,000. The court having sustained an objection to plaintiff's offer to prove said facts, the plaintiff being unable to introduce any evidence except the record, the court sustained a demurrer to his evidence. The sustaining an objection to the tender of this evidence is assigned as error.

[1] The district courts of this state, in exercising their equity jurisdiction, have the power to vacate and annul orders or judgments of other courts, in a proceeding brought for that purpose, for fraud, inducing and entering into such order or judgment, where such fraud is extraneous to the issues in the proceeding attacked, and especially where the court has been imposed upon by such fraud. *Eaves v. Mullen*, 25 Okl. 679, 107 Pac. 433; *Steele et al. v. Kelley et al.*, 32 Okl. 547, 122 Pac. 934; *Continental Gin Co. v. De Bord*, 34 Okl. 66, 123 Pac. 159; *Brown et al. v. Trent et al.*, 36 Okl. 239, 128 Pac. 895; *Johnson v. Filtsch*, 37 Okl. 510, 138 Pac. 165;

Sockey et al. v. Winstock, 43 Okl. 758, 144 Pac. 372; Griffin v. Culp, 174 Pac. 495.

[2] The evidence was competent, and, if true, was a fraud upon the court and upon the rights of this plaintiff, and the court committed reversible error in sustaining the objection to said evidence. It is unnecessary for us to deal with any of the other issues in the case, as the sustaining of the objection to this evidence is such an error that without this evidence in the record it would be impossible to pass upon the merits of the case upon the other points.

It therefore follows that the judgment of the court should be reversed and remanded, with instruction to grant the plaintiff in error a new trial.

All the Justices concur.

(80 Okl. 136)

SMITH et al. v. SMITH et al. (No. 8871.)

(Supreme Court of Oklahoma. Feb. 25, 1919.
Rehearing Denied Oct. 7, 1919.)

(Syllabus by the Court.)

**1. APPEAL AND ERROR — 213 — JURY — 28(4)
— JURY MAY BE WAIVED WITHOUT WRITTEN
STIPULATION.**

A jury may be waived without a written stipulation, where the parties to an action make no request for a jury at any stage of the trial or prior to the commencement thereof, and submit their testimony to the court without a jury, no question of a jury trial having been raised upon the trial of the cause, it is too late for the first time to object in this court that such consent had not been made, and where no request for a jury appears of record, the jury will be considered waived.

2. TRIAL — 394(2) — RIGHT TO GENERAL FINDINGS AND SPECIAL CONCLUSIONS WAIVED BY WANT OF TIMELY REQUEST.

Under the provisions of section 5017, Rev. Laws 1910, either party may require a special finding of facts and separate conclusions of law by making timely request therefor. Where no request is made until after the court has announced general findings and conclusions, the right will be deemed to have been waived.

3. ATTORNEY AND CLIENT — 192(2) — EVIDENCE IN SUIT TO RECOVER FEES AUTHORIZED LIEN ON LAND RECOVERED FOR PLAINTIFF.

Where an unrestricted Creek freedman, while a minor over 18 years of age, through his guardian, made a contract with an attorney to bring suit to recover his allotment, then held adversely by his former attorney under a pretended deed previously made to him by said minor, and by virtue of said contract of employment his said attorney brought suit in behalf of said minor in the district court, and rendered valuable services and procured a judgment in favor of said minor canceling the pretended deed given to his former attorney, from which his former attorney appeals to the Su-

preme Court of this state, and while said appeal was pending and after said minor had attained his majority, he made a new contract with his attorney, agreeing to pay him a fee of an amount of not less than one-third and not more than one-half of the recovery, to be fixed by the district court, in consideration of services already rendered and to be thereafter rendered by his said attorney, and granting to his said attorney a lien upon the land recovered to secure such fee, and of which contract his former attorney was charged with notice, and he thereafter procured a deed from said minor for a recited consideration of \$400, and thereafter dismissed his appeal, in a suit by said attorney to recover his fee and to have the amount recovered to be declared a lien upon the land, *held*, the trial court committed no error in rendering judgment in favor of the attorney for \$1,200, and declaring the same to be a first lien upon the land in controversy.

4. MORTGAGES — 258, 275 — ONE HOLDING UNMATURED NEGOTIABLE NOTES AS SECURITY FOR DEBT "HOLDER IN DUE COURSE."

One who has deposited with him by the payee certain promissory notes negotiable in form, and before the maturity thereof, as collateral security for a debt or debts owed by the payee in said notes to the holder thereof, which notes are secured by mortgage on land, such holder is a "holder in due course," and on default in the payment of his debt, owed by the payee in said notes, is entitled to sue upon the same, and for a foreclosure of the mortgages given to secure the notes, in the absence of notice of any infirmity that may exist in said notes and mortgage; and this is true where the legal title to the land covered by the mortgage is in another, provided such other purchased the land with notice, actual or constructive, of the existence of such mortgage.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Holder in Due Course.]

5. MORTGAGES — 275 — PURCHASER OF LAND MORTGAGED CANNOT SET UP FRAUD IN EXECUTION OF NOTES SECURED IN HAND OF BONA FIDE HOLDER.

Where notes are regular upon their face and negotiable in form, and mortgages given to secure the same upon land are duly recorded as required by law, and the same are by the payee and mortgagee, and before maturity of the notes, assigned to his creditor as collateral security for his indebtedness to such creditor, and thereafter a third party purchases the land covered by the mortgages, *held* that, in a suit by the holder upon the notes and to foreclose the mortgages upon the land, such purchaser will not be permitted to urge as a defense the question of fraud in the execution of said notes and mortgages; that the trial court was in error in sustaining such defense.

Error from District Court, Okmulgee County; L. L. Cowley, Special Judge.

Suit to enforce an attorney's lien by Herbert E. Smith against Crittenden Smith, R. M. Pratt, C. W. Holbrook, Fred M. Carter, G. B. Cassity, and Theodore Grayson, with peti-

tions in intervention by M. F. Graham, Crittenden Smith, and another. Judgment for plaintiff against defendant Grayson, declared to be a first lien on land in controversy, title to which was adjudged to be in defendant Holbrook, and judgment for defendants Carter and Cassity, and for defendant Smith and for Graham on notes executed by defendant Grayson. Motions for new trial denied, and Crittenden Smith and Graham bring error, and seek a reversal of the judgment, and defendant Holbrook seeks a reversal of the judgment as to plaintiff Smith. Affirmed in part, and reversed in part.

Charles A. Dickson, C. B. McCrory, and Cochran & Ellison, all of Okmulgee, for plaintiffs in error.

H. E. Smith, G. E. Cassity, and F. M. Carter, all of Okmulgee, for defendants in error.

JOHNSON, J. This suit was instituted in the district court of Okmulgee county, Okl., on July 25, 1913, by Herbert E. Smith, an attorney at law, plaintiff, against Crittenden Smith, R. M. Pratt, C. W. Holbrook, Fred M. Carter, G. E. Cassity, and Theodore Grayson, defendants, to enforce an alleged attorney's lien based upon attorney's fees contract executed to him and C. B. McCrory, an attorney, by the guardian of a minor Creek freedman citizen, approved by the proper probate court, and signed by said minor, against 120 acres of land in Okmulgee county, Okl. M. F. Graham and Crittenden Smith and Bank of Commerce of Okmulgee, Okl., later filed their petitions of intervention. We will designate the parties as they appear in the court below.

The record discloses that Herbert E. Smith, the plaintiff in the court below, recovered judgment for \$1,200 against the defendant below, Theodore Grayson, which was declared to be a first and prior lien upon the land in controversy, the legal title to which was by said judgment decreed to the defendant below, Carleton Holbrook. The records further disclose that the land involved herein was the surplus allotment of Theodore Grayson, a Creek freedman citizen, enrolled as such opposite No. 769 upon the Freedman rolls in the name of "Fred Bruner," who arrived at his majority during the month of August, 1912, and was of full legal age on August 31, 1912, all of which is admitted by all parties herein.

The defendant in error Carleton W. Holbrook, an attorney with offices at Okmulgee, Okl., was desirous of acquiring title to said surplus lands of Theodore Grayson, alias Fred Bruner, together with his homestead allotment, and while said Grayson was a minor, less than 18 years of age, under the guardianship of his father John Grayson, with the said Holbrook as his attorney, on or about the 10th day of September, 1908, in order to execute such desire, a marriage license was procured from the county court of Tulsa county, Okl., for the marriage of said Gray-

son to one Ida Johnson, which marriage ceremony, under such license, was consummated at Muskogee, Muskogee county, Okl., and thereafter, at said place and on said date, a warranty deed was taken from said Grayson and wife in favor of said Holbrook, covering said surplus and homestead lands of Grayson, for an alleged cash consideration of \$4,000. After the making of said deed, said Holbrook executed a mortgage to one W. W. Fuller on October 5, 1908, for \$2,500, covering said premises, and again, on December 10, 1908, procured another and further warranty deed in his favor to be executed by said Grayson at Tulsa, Okl., for a recited cash consideration of \$4,000, and on January 9, 1909, said Holbrook executed a deed in favor of one Walter W. Morton, for a recited cash consideration of \$2,000, to the N. $\frac{1}{2}$ of said N. W. $\frac{1}{4}$ section 12—13—12.

During the fall of 1909, the conditions above stated becoming known to the father and guardian of said minor, John Grayson, for the conservation and protection of the right of said minor to his said allotments then claimed by said minor's former attorney, Holbrook, by virtue of said instruments, and in order to reduce said premises to his possession as such guardian, the said Holbrook then being in possession and claiming the right thereto, and wholly denying the right of said minor to said premises, filed in the county court of Okmulgee county, on or about September 30, 1909, his petition asking the court to make an order authorizing him, as such guardian for said minor, to employ counsel to file suit to cancel said instruments above stated and to reduce said premises to his possession, and on said date said court granted the prayer of said petition and made its order authorizing John Grayson, as guardian of Theodore, to employ counsel to said ends. Thereafter the defendant in error H. E. Smith was employed, and thereafter, about October 2, 1909, he filed in the district court of Okmulgee county a petition in favor of John Grayson, guardian of Theodore Grayson, a minor, against Holbrook et al., No. 1446.

The above case being dismissed, and John Grayson being absent, and his whereabouts being unknown, said Theodore Grayson, while a minor over 18 years of age, on July 14 1910, entered into a contract employing the defendant in error H. E. Smith sole attorney for the purpose of filing said suit to cancel said instruments held as aforesaid and to recover the possession of said land for him, wherein he agreed to pay for said services, in case of success, an undivided one-half interest in the recovery made, which contract was timely recorded in the office of the register of deeds of Okmulgee county.

Carrying out said agreement, and for the purpose aforesaid, and the said Theodore Grayson having selected one Charles F. Dunbar as his next friend to represent him in

said action, the defendant in error H. E. Smith, on or about August 4, 1910, filed in said district court in behalf of said Theodore Grayson against Holbrook et al. a petition seeking the cancellation of said instruments and possession of said premises, which was numbered in said court No. 1711, and the defendant in error, at the time of the filing of said petition, had indorsed thereon over his name the words, "Lien claimed." After No. 1711 had been filed, on March 21, 1911, for the proper protection of Theodore Grayson, said county court appointed Charles F. Dunbar guardian of the person and estate of said minor, in whose favor said suit had been instituted by the defendant in error as aforesaid and was pending, who on said date filed in said county court his petition, asking leave to employ counsel for the continuance of said suit instituted by him as said next friend of Theodore Grayson.

By virtue of said petition said county court on said date made its order approving the verbal agreement of said guardian, which was on August 3, 1911, reduced to writing as follows:

"That the instruments and representations made in said petition are true, and that the agreement made with the attorneys mentioned therein, to wit, Herbert E. Smith and Charles B. McCrory, was and is a reasonable and fair contract. Therefore it is hereby ordered, adjudged, and decreed that said agreement be and the same is hereby approved and confirmed."

Thereafter, on August 8, 1911, said guardian and minor filed in said county court their petition, wherein they represented to it:

"Represents that all of the property of said minor involved in litigation, as heretofore, on March 25, 1911, represented by this guardian of this court, and as set forth by the recitals in a contract, a duplicate of which is hereby attached; that to recover and preserve the property and estate of said ward it has been and is absolutely necessary for this guardian to employ counsel to represent the interests of said minor as heretofore represented, the petitioner prays that the contract, a copy of which is annexed and by virtue of which said guardian retained said attorneys, be considered, and in all respects approved." (This petition was signed by Theodore Grayson.)

Attached to said petition was a duplicate of said contract, signed by Dunbar, as guardian, and Smith and McCrory, and was duly acknowledged before the county judge, and signed and sworn to by Theodore Grayson, then near 20 years of age, and which was duly approved by said court on August 3, 1911, and thereafter recorded in Book M 48, at page 592, in the office of the register of deeds of Okmulgee county. On August 3, 1911, said county court made its order upon said petition and contract, in which, among other things, it appears:

"And the court having examined said petition, heard evidence, and considered said con-

tract and all the terms thereof, finds that it is necessary for the recovery and preservation of said ward's estate and property that counsel be employed as per the terms of said contract, and that the terms thereof are reasonable and fair, therefore it is hereby ordered and adjudged that the action of the guardian, Charles F. Dunbar, in entering into the said contract with Herbert E. Smith and Charles B. McCrory, was and is proper and necessary, and said contract is in all respects approved by this court."

During all of said time, as shown by the record herein, the defendant in error was actively engaged in behalf of said Theodore Grayson and his estate in an earnest endeavor to preserve his rights and interests in and to said lands, the possession and the title of which was claimed tenaciously by Holbrook, and was the sole and entire estate of said then minor, Grayson, which undeniably continued until Theodore Grayson arrived at his majority on or before August 31, 1912, and after attaining his majority, on, to wit, December 11, 1912, the said Theodore Grayson entered into a contract in writing affirming his contract as made with the defendant in error H. E. Smith, and for an attorney's lien upon said lands therefor.

Claims of R. M. Pratt, F. M. Carter, and G. E. Cassity.

The note of \$3,000 sued upon herein by R. M. Pratt, and the note of \$1,000 sued upon herein by Carter and Cassity, and the mortgage to secure the same bear date December 11, 1912, and were executed in favor of the respective parties by Theodore Grayson. This same note for \$3,000 and various other notes in small amounts, with mortgages to secure the same, all given by Theodore Grayson to R. M. Pratt, and by Pratt delivered to the plaintiffs in error Crittenden Smith and M. F. Graham, were by them declared upon in their cross-petition filed herein, alleging that they were the holders thereof in due course, the same having been placed with them as collateral security by the said R. M. Pratt to secure his indebtedness to them, and the judgment of the court below held that the note for \$3,000 given by Grayson to Pratt on December 11, 1912, was void, together with the mortgage securing the same, except that portion of the mortgage given to secure the note for \$1,000 executed by Grayson to defendants Carter and Cassity, and held that the defendants Carter and Cassity should recover on said note, and were decreed a second lien upon the premises to secure the same, amounting, principal and interest, to the sum of \$1,359.45, and further holding that the amount due on the small notes executed by Grayson since December 11, 1912, amounting in the aggregate, principal, interest, and attorney's fee, to \$863.73, was a valid claim against Theodore Grayson, and judgment was rendered accordingly for the same in favor of the defendants Graham and

Smith, except the attorney's fee of \$76.22, which amount was in favor of Carter and Cassity, and decreed to be a third lien upon the premises in controversy, and it is from such judgment that the plaintiffs in error, Crittenden Smith, M. F. Graham, and Carleton W. Holbrook, have prosecuted this appeal.

The defendants Bank of Commerce of Okmulgee, Okl., and Theodore Grayson, did not appeal from the judgment below, and are making no opposition to the judgment in favor of the defendant in error H. E. Smith, but the same is final and conclusive as to it and him, as well as to Carter. Cassity and Pratt are in like status, which leaves Crittenden Smith, M. F. Graham, and Carleton W. Holbrook alone asking for a reversal of the judgment below, and only Holbrook seeking a reversal of the judgment below as to the defendant in error H. E. Smith.

The defendant Holbrook filed his motion for new trial, alleging:

- (1) Irregularities in the proceedings of the court by which this defendant was prevented from having a fair trial.
- (2) Accident and surprise which ordinary prudence could not have guarded against.
- (3) The decision, judgment, and decree of the court as against the defendant or the land in controversy is not sustained by sufficient evidence and is contrary to law.
- (4) Errors of law occurring at the trial and excepted to by said defendant at the time.
- (5) That the decision and decree of the court, allowing and decreeing a lien in favor of G. E. Cassity and Fred M. Carter to the amount of \$1,000 and interest, is not sustained by sufficient evidence and is contrary to law.
- (6) That the decision and decree of the court allowing and decreeing a lien in the property in controversy in favor of the plaintiff Herbert E. Smith in the sum of \$1,200 is not sustained by sufficient evidence and is contrary to law.
- (7) That the decision and decree of the court allowing and decreeing a lien on the property in controversy in favor of R. M. Pratt in the sum of \$763.21 is not sustained by sufficient evidence and is contrary to law.

Which motion was overruled and excepted to, and from which he appeals and assigns error.

The defendants Crittenden Smith and M. F. Graham filed their motion for new trial, complaining of the judgment for the following reasons:

- (1) For that the same is not sustained by sufficient evidence.
- (2) For that the same is contrary to the evidence.
- (3) For that the same is contrary to law.
- (4) For that there was error in the assessment of the amount of the recovery.
- (5) For that the court erred in the exclusion of evidence offered upon the part of the interveners.
- (6) For that the court erred in the admission of evidence over objection and exception of those interveners.
- (7) For errors of law occurring at the trial and excepted to by those interveners.

(8) Irregularity in the proceedings of the court by which the party was prevented from having a fair trial.

Which was overruled and excepted to, from which they appeal and assign error.

[1] We will not consider the assignments of error relied upon for a reversal by the respective parties, in their numerical order, but in what seems to us to be their logical order; therefore the first that we will consider is "that the trial court erred in trying the said case without a jury," and upon that question we first notice section 20 of article 7 of the Constitution of Oklahoma, which provides that—

"In all issues of fact joined in any court, all parties may waive the right to have the same determined by jury, in which case the finding of the judge upon the facts shall have the force and effect of a verdict by jury."

And section 5016, R. L. 1910, reads as follows:

"The trial by jury may be waived by the parties, in actions arising on contract, and with the assent of the court, in other actions, in the following manner: By the consent of the party appearing, when the other party fails to appear at the trial by himself or attorney. By written consent, in person or by attorney, filed with the clerk. By oral consent, in open court, entered on the journal."

The provisions quoted provide that, in a civil action, the right to a trial by jury may be waived by the conduct of the parties, and where the parties to any civil action fail to make a timely request for a jury trial, and the cause is set for trial by the court for a day certain, and the parties appear in person and by attorneys, and submit their testimony to the court without a jury, and the record in the trial court is silent upon the question of a jury trial, this is tantamount to an express waiver of a trial by jury, and an objection thereto and demand for a jury thereafter will not be considered by this court. We cite in support of this holding the decisions of this court in *Farmers' National Bank of Tecumseh v. McCall et al.*, 25 Okl. 600, 106 Pac. 886, 28 L. R. A. (N. S.) 217, and *Landrum v. Landrum*, 50 Okl. 752, 151 Pac. 481. In the opinion of this court in the latter case it was said:

"The right to a trial by jury is regarded as something sacred, of which no person should be deprived without his consent. The waiver of jury need not, however, be by written stipulation, and as a matter of fact is rarely ever done in that manner. The parties usually express themselves on the subject in open court when the case is called, and the court sets the case down for trial, either with or without jury, in accordance with such announcements. While in this case the record does not show that counsel for either party expressly announced a waiver of jury, yet the court evidently understood that they both desired to waive a jury, and so stated to them both in open court, and

they could not have failed to understand that he intended to try the case on its merits."

We have searched the record carefully, and find that no demand or request for a jury in this case was ever at any time made by any party thereto, but that the record is silent upon that question. We therefore hold that, in view of the actions of the parties in the court below as disclosed by the record, and in failing to make timely request for a jury trial, they waived a jury in the court below, and that they cannot now be heard to complain at the action of the trial court in proceeding with the trial of the cause upon its merits without calling a jury.

It is also urged by the plaintiffs in error Crittenden Smith and M. F. Graham that the court erred in refusing a request for special findings of fact and conclusions of law. It appears from the record that after the evidence was offered, and argument of counsel had been had, the court announced his view upon the entire case as to his conclusions found.

[2] Counsel for these complainants then asked the court to make a special finding of fact and conclusions of law, which was denied, because the request had not been made until after the court had announced his conclusions. This is urged as prejudicial error. Section 5017, R. L. 1910, provides:

"Upon the trial of questions of fact by the court, it shall not be necessary for the court to state its findings, except generally, * * * unless one of the parties request it, with the view of excepting to the decision of the court upon the questions of law involved in the trial."

In the case of German State Bank of Elk City v. Ptachet et al., 169 Pac. 1096, this court, in an opinion by Mr. Justice Owen, said:

"The purpose of the statute is to enable the party to save his exception to the questions of law decided, where there might be a different conclusion depending upon the facts found."

After discussing the facts in the case, and continuing, he said:

"But, aside from this, the request came too late. A general finding of facts being conclusive against the losing party as to every fact in controversy, he may not defer his request for a special finding until after taking his chance on winning, then by making the request have all the benefits that he might have received from a special finding. The statute clearly implies the request before the decision of the court is announced. The right is given either party to require the special finding, 'with the view of excepting to the decision of the court.' * * * When the request is not made until after the court has announced his general findings of facts and conclusions, the party will be deemed to have waived the right to have the special findings."

[3, 4] The defendants Crittenden Smith and M. F. Graham's assignments of error Nos.

1, 2, 3, 4, 5, 6, and 15 will be considered together, and in this connection we will say that from a careful examination of the entire record it is disclosed that the defendant Theodore Grayson attained his majority on August 31, 1912, and that the note of \$3,000 payable to R. M. Pratt, and the mortgage to secure the same upon the land in controversy, were executed by Theodore Grayson on December 11, 1912, and that said mortgage was filed for record with the register of deeds on said day at 10 o'clock a. m. and that the note was made due and payable June 11, 1913, and that the same was delivered by Pratt to the defendants Crittenden Smith and M. F. Graham as collateral security for his indebtedness to them on or about the 3d day of May, 1913, and that the note for \$1,000 given by Theodore Grayson was delivered on the same day, and matured upon the same date of the said \$3,000 note, and was secured by the same mortgage, and that the same was indorsed by Pratt to the defendants Cassity and Carter, and that the said Theodore Grayson executed to the said defendant Pratt various negotiable promissory notes and mortgages covering the said land, which were sued upon by the defendants Crittenden Smith and M. F. Graham herein, one of which, for \$61, was dated the 21st day of December, 1912, and due on the 21st day of June, 1913, providing for \$25 additional as attorney's fee, and 11 other notes, dated at various times during the interval between the 12th day of January, 1913, and the 16th day of June, 1913, aggregating, at the time of filing the defendants Crittenden Smith and M. F. Graham's petition of intervention, the sum of \$689.31, and \$123.52 as attorney's fee, all of said notes bearing interest from date at the rate of 10 per cent. per annum, and that the mortgages covering the land involved herein were executed by the said Theodore Grayson and placed of record prior to the 13th day of June, 1913, and that said described notes were delivered to the defendants Crittenden Smith and M. F. Graham, by the said defendant Pratt, on or about the 3d day of May, 1913, as collateral security for the said Pratt's indebtedness to the said Smith and Graham, and that on February 28, 1916, the date of filing their petition of intervention, there was due upon the said notes so held by them as collateral security the sum of \$3,958.23 as principal and interest, and the sum of \$395.83, as attorney's fee, with 10 per cent. interest per annum from said date, and that said notes and mortgages, described as aforesaid, are the identical notes and mortgages sued upon herein, in cross-petition of the defendant R. M. Pratt.

It is further disclosed by the record that the deed executed by the defendant Theodore Grayson to the defendant Carleton W. Holbrook was dated June 27, 1913, which covers the land in controversy herein.

Upon the trial hereof in the court below,

the defendant R. M. Pratt testified to the execution of the notes and mortgages by Theodore Grayson, that he (Pratt) delivered the above-described notes declared upon herein by the defendants Crittenden Smith and M. F. Graham as collateral security for his indebtedness to them, but that he was unable to state the date upon which the same were so delivered. The defendant M. F. Graham testified that the same were so delivered on or about May 3, 1913. The defendant M. F. Graham testified to the facts stated upon his direct examination concerning same. The defendant R. M. Pratt testified, upon recross-examination by Mr. Ellison, as follows:

"Q. You were talking this morning to Mr. McCrory about this case in this room, a few minutes ago; do you remember that conversation? A. About this case?

"Q. Yes, sir. A. Yes.

"Q. What was that conversation? A. He asked me who I gave this money to, and I told him.

"Q. Is Mr. McCrory your attorney? A. No, sir.

"Q. Whose attorney is he? A. I presume he is Mr. Holbrook's attorney.

"Q. Mr. Holbrook and you—are your interests identical in this case? A. I don't see it that way.

"Q. His are against you? A. Yes, sir. * * *

"Q. Are you still interested in procuring a judgment for the foreclosure of the mortgage in this suit? A. I most certainly am.

"Q. In the amount of something like \$4,000? A. Yes, sir.

"Q. You have, however, assigned all your interest in that money over to the interveners Smith and Graham, or to the Bank of Commerce? A. Yes, sir; that is to apply on my indebtedness.

"Q. So that, in any event, whatever you might recover in this case will go to one of the interveners? A. Yes, sir.

"By Mr. Ellison: That is all."

Recross-examination by Judge McCrory:

"Q. To apply on your indebtedness relating only to the assignment to the Bank of Commerce; you don't owe Smith and Graham do you? A. That requires an explanation; no further than the money we have put into this deal.

"Q. Your proportion? A. My proportion.

"Q. And the assignment made to the Bank of Commerce was to apply on your indebtedness to the bank? A. On my indebtedness."

Defendants Crittenden Smith and M. F. Graham insisted that the defendant in error Holbrook was not entitled to contest the notes, or oppose a foreclosure of the mortgages upon the lands purchased by him, for the reason and upon the ground that upon June 27, 1913, which was at a time subsequent to the execution and recording of the mortgages sought to be foreclosed, said defendant in error purchased the land described in said mortgages, paying therefor the amount of \$400. Either the consideration

of this deed was so grossly inadequate as to shock the conscience of a court of equity, as to prevent said plaintiff in error from evoking equitable principles on his behalf, or it was understood that he purchased said lands subject to the liens of the mortgages thereon, which amounted to approximately \$4,000. No witness testified that the lands at the time of the purchase by him were worth less than \$3,400 and a majority of the witnesses fixed their value thereon at from \$7,000 to \$8,000.

[5] At the time of the purchase Holbrook was charged with knowledge of the existence of these mortgages by reason of their having been recorded, and no doubt had personal knowledge of their existence. But, aside from this consideration, Holbrook is in no position to urge the question of fraud in the execution of said notes and mortgages. They were made by Theodore Grayson, were payable to Pratt, and the amount thereof undoubtedly entered into the consideration for the purchase of said lands by Holbrook. He did not acquire title until after their execution and delivery. Therefore the title he acquired was subject to the amount thereof. No representations were made to him by Pratt concerning the subject-matter of the notes and mortgages at the time of the purchase, nor did he rely upon the representations made to Grayson, nor alter his position to his prejudice in the matter by reason of any representations made by Pratt to Grayson. Not having been deceived in any way, nor defrauded by reason of any matter entering into and forming a part of the consideration for the notes and mortgages, but having purchased the premises subject to the liens created by said mortgages, he is not in a position to complain of the fraud, if any, practiced by Pratt upon Grayson. 12 R. O. L. pp. 324, 355; 20 Cyc. p. 80; Hamilton v. Mills, 92 Wash. 675, 159 Pac. 887; 1 Elliott on Cont. p. 126.

Our recording statute (section 1155, R. L. 1910) reads as follows:

"Every conveyance of real property acknowledged or approved, certified and recorded as prescribed by law from the time it is filed with the register of deeds for record, is constructive notice of the contents thereof to subsequent purchasers, mortgagees, incumbrancers or creditors."

This statute applies to real estate mortgages. 27 Cyc. 1155, note 14, and cases cited. In the case of Cornish v. Woolverton, 32 Mont. 456, 81 Pac. 4, 108 Am. St. Rep. 598, it was held that a mortgage was a conveyance within the meaning of recording laws, and that—

"Where, after the assignment of a mortgage had been recorded, a purchaser from the mortgagor paid the debt to the assignor, which executed a release, a subsequent purchaser from the person who paid the mortgage was charged with notice that the assignor had no power to

execute the release, and hence was not a purchaser for value free from incumbrances."

In the case of *Stark et al. v. Kirkly et al.*, 129 Mo. App. 353, 108 S. W. 625, it was said:

"Under Rev. St. 1899, § 924, providing that written instruments affecting land, when certified and recorded as thereinbefore prescribed, shall, from the time of filing for record, impart notice to all persons of the contents, and that subsequent purchasers shall be deemed to purchase with notice, plaintiffs, in an action to enforce equitable mortgages against the mortgagor's purchasers, proved that the purchase was made with knowledge of their rights by showing that the contracts sued on had been signed, acknowledged, and recorded before defendants' purchase."

We think that the cases cited are in point, and that the principles announced are applicable to the situation disclosed by the record in this case. We have examined the evidence, and we find that the judgment of the trial court, holding that the note of \$3,000 and the mortgage to secure the same were void as to the defendants Crittenden Smith and M. F. Graham was clearly against the weight of the evidence and the law.

We find that the defendants Crittenden Smith and M. F. Graham were holders in due course of the note for \$3,000 and entitled to have the mortgage given to secure the same foreclosed, and as such were entitled to a judgment against Theodore Grayson for the amount due upon said note including attorney's fee, and to have the mortgage foreclosed upon the land held by Holbrook, subject to the liens of Herbert E. Smith and Carter and Cassity, and that the honorable trial court was in error in holding said note and mortgage void.

We have carefully examined the records in this case, and the assignments of error by the defendant Holbrook, and fail to find wherein he was deprived of any substantial right by the actions of the trial court; but upon the other hand it clearly appears from the record before us that he was the prime mover of and put in motion the condition that gave rise to all the litigation over the estate of the defendant Theodore Grayson, disclosed by this record, and that somehow, which is not fully shown, he was enabled to secure the legal title to the land in controversy, but, however it may have been accomplished, it is unfortunate, to say the least.

By his deed of June 27, 1913, he took the same subject to all the rights and equities of the plaintiff, Herbert E. Smith, and the defendants Carter and Cassity, and Crittenden Smith and M. F. Graham, including the right to have their respective liens foreclosed upon the land in controversy, for the respective amounts due each, including the \$3,000 note claimed by Crittenden Smith and M. F. Graham.

The judgment of the trial court as to the plaintiff, Herbert E. Smith, should not be disturbed, as he was clearly entitled to recover as to all the relief granted therein, and the same is likewise true as to the defendants Carter and Cassity.

The judgment and decree awarding to Crittenden Smith and M. F. Graham the sum of \$787.51, and Carter and Cassity the sum of \$76.22, as attorney's fees, and a third lien upon the land will not be disturbed, and all the foregoing judgments and decrees as rendered will be affirmed.

The defendant Theodore Grayson answered by general denial, which was verified, but upon the trial offered no testimony. It was testified to by R. M. Pratt, Carter, and Cassity that the note for \$3,000 in favor of Pratt, and the mortgage securing the same, were both signed by Theodore Grayson. That part of the judgment of the trial court declaring that the note executed by said allottee to the defendant Pratt, for \$3,000, on December 11, 1912, is void, together with the mortgage securing the same, will be reversed, and this cause remanded, with directions to the trial court to render judgment in favor of Crittenden Smith and M. F. Graham for the amount due upon said note, principal and interest, and attorney's fees, and declaring the same to be a third lien upon the land in controversy, and for foreclosure of the mortgage.

(74 Okl. 308)

PRIOR v. WESTERN PAVING CO. et al.
(No. 6222.)

(Supreme Court of Oklahoma. July 15, 1919.
Second Petition for Rehearing Denied
Oct. 7, 1919.)

(Syllabus by the Court.)

1. CONSTITUTIONAL LAW §251—"DUE PROCESS OF LAW" DEFINED.

By "due process of law" is meant an orderly proceeding, adapted to the nature of the case, before a tribunal having jurisdiction, which proceeds upon notice, with an opportunity to be heard, with full power to grant relief.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Due Process of Law.]

2. CONSTITUTIONAL LAW §204, 209, 251 —
FOURTEENTH AMENDMENT NOT LIMITATION
ON POLITICAL AND LEGISLATIVE RIGHTS OF
STATES.

The Fourteenth Amendment to the federal Constitution is not a limitation upon the rights of the several states exercising such powers as are political and legislative in their nature, and does not control the procedure affecting the rights of citizens, so long as the fundamental principles which inhere in due process of law are observed.

3. MUNICIPAL CORPORATIONS **§294(2)—DETERMINATION OF NECESSITY TO PAVE STREET DOES NOT REQUIRE NOTICE TO ABUTTING OWNERS.**

The powers conferred upon the city officials by section 7, art. 10, of the Constitution of this state, and section 723, Snyder's Comp. Laws 1909, to determine whether a certain street shall be paved, being political and legislative in its nature, a citizen whose property rights are affected thereby is not entitled to a notice and hearing before determining to make the improvement on the question of whether his property will be benefited thereby.

4. CONSTITUTIONAL LAW **§289—MUNICIPAL CORPORATIONS** **§290 — WHERE PROTEST FILED TO DETERMINATION TO PAVE STREET, NOTICE OF HEARING NECESSARY.**

Section 723, Snyder's Comp. Laws 1909, providing for a notice and hearing before the city officials, with full power to grant relief, meets all the fundamental requirements inhering in due process of law; and where a protest and objection is filed as therein provided for, it is the duty of the city officials to hear and determine the same, and not act arbitrarily and capriciously.

5. MUNICIPAL CORPORATIONS **§297 — PROTEST TO PAVEMENT OF STREET, THAT OWNER'S PROPERTY NOT BENEFITED, INSUFFICIENT.**

An objection filed with the city officials upon the ground the property of the objector is not benefited is not such as is contemplated by the statute; that question being peculiarly the prerogative of the city officials under the law.

6. MUNICIPAL CORPORATIONS **§488, 489(10) —ABUTTING OWNER NOT MAKING PROTEST TO PAVING ASSUMED TO HAVE ACCEPTED BENEFITS.**

A person with knowledge that paving is being done with the intention of levying a special tax upon his property abutting thereon to pay for the same, and knowingly receiving the benefits, without making proper protest to the city officials, will be deemed to have ratified and accepted such benefits, and is estopped to deny the same, except he may invoke equitable relief, where there has been irregularity extending to jurisdiction.

7. MUNICIPAL CORPORATIONS **§513(7)—PETITION TO ENJOIN EXCESSIVE PAVING ASSESSMENT, NOT TENDERING PROPER TAX, INSUFFICIENT.**

A petition for injunction against an excessive assessment for paving, which fails to allege the amount of benefit and confessing a willingness to pay for the same, if any part of the assessment against the owner's land is valid, fails to state a cause of action calling for injunctive relief.

Commissioners' Opinion, Division No. 3.
Error from District Court, Oklahoma County; W. R. Taylor, Judge.

Suit by D. C. Pryor against the Western Paving Company and others. Judgment for defendants, and plaintiff brings error. Affirmed.

Everest & Campbell and S. A. Horton, all of Oklahoma City, for plaintiff in error.

B. D. Shear, A. T. Boys, and G. A. Paul, all of Oklahoma City, for defendants in error.

SPRINGER, C. The parties, occupying the same relative position in this court as in the court below, will be referred to as plaintiff and defendant. The plaintiff instituted this action against the defendants to enjoin the city from issuing street improvement bonds and certifying a special assessment tax to the county treasurer of Oklahoma county for paving Robinson avenue, from Ash street to Avenue G, in Oklahoma City, and to quiet his title to the land described in his petition. The effect of the suit is to enjoin the collection of assessments levied for the improvement of the street.

[1] It is claimed by the plaintiff that the acts of the city officials are illegal and void, because the authority they assumed to exercise under the law amounts to a confiscation of his property without due process of law, and therefore the statute, by virtue of which the city took action, is void. It has been said that the term "due process of law" is difficult, if not impossible, to define, so as to be full, complete, accurate, appropriate, and comprehensive under all circumstances; and our investigation of this subject has committed us irrevocably to the conclusion that a definition of the phrase comprehending every permissible exertion of power, affecting private rights and excluding such as are forbidden, may never be given. In the case of *Charles A. Wilhite et al. v. Lee Cruce et al.*, No. 8814, 172 Pac. 962 (not yet officially reported), this court defined due process of law to be:

"By due process of law is meant the enforcement of right or prevention of wrong, before a legally constituted tribunal having jurisdiction over the class of cases to which the one in question belongs, with notice to the party upon whom the law exhausts itself, or upon whose property rights it operates, with an opportunity to appear and be heard in his own defense."

This definition however, is not sufficiently comprehensive to embrace within its scope all cases, because the definition in each case depends not so much upon the quality of the act as upon the relation of the particular law authorizing it to the fundamental law which limits the power of the law-making body. Due process of law must be understood to mean law in the regular course of administration through tribunals, according to those rules and forms which have been established for the protection of private rights and the prevention of injustice and wrong. *Kennard v. Louisiana*, 92 U. S. 480, 23 L. Ed. 478. It also means such an exercise of the powers of government as the settled maxims of the law permit and sanction, and under such safeguards for the protection of private

rights as these maxims prescribe for the class of cases to which the one in question belongs. *Wulzen v. Board of Supervisors of San Francisco*, 101 Cal. 15, 35 Pac. 353, 40 Am. St. Rep. 17; *Water Com'rs of Norwich v. Johnson*, 86 Conn. 151, 84 Atl. 727, 41 L. R. A. (N. S.) 1024.

[2] The plaintiff invokes the constitutional limitations of this state and also the Fifth and Fourteenth Amendments to the Constitution of the United States, and on general principle every citizen is entitled to the protection afforded by these fundamental provisions of liberty and justice which lie at the base of all our civil and political institutions. The Constitution makes no provision for the application of principles for the purpose of determining whether there has been due process of law in a particular case; but there are certain immutable principles which inhere in the very idea of free government, which no state can ignore. The term "due process of law" includes all the steps essential to deprive a person of life, liberty, or property. It includes all the forms and acts essential to its application and to give effect to it, and in determining whether the requirement has been observed regard must be had rather to the substance than the form. But in its most accepted and best understood application, due process of law simply means a general and public law operating equally on all persons in like circumstances. It does not mean a partial law operating upon the rights of a particular person, or exhausting itself upon his life, liberty, or property in a way in which the same rights of all persons in like circumstances are not affected. The law must embrace and affect the rights of all persons in like circumstances equally, and the law must be just and reasonable, and not arbitrary and capricious. It is a denial of due process of law to single out an individual of a particular class and hamper him with the imposition of restraint, not borne by all members of the same class or community at large. A law operating and exhausting itself upon the rights of a particular person, denying him rights that are enjoyed by other persons in the community as a whole, must fall, as it denies equal protection of the law. The indispensable elements of due process of law are an investigating tribunal, with full power to hear and determine the subject-matter of the controversy, notice to appear, and an opportunity to be heard respecting the matters in dispute. A law which requires notice to be given, and affords the right to be heard, with ample opportunity to present all the evidence and argument which the parties deem important before judgment, is all that can be adjudged vital under due process of law.

Having paused to consider the principal elements of due process of law, we shall next proceed to a determination of their

application. The phrase "due process of law" did not originate in the American system of constitutional law, but was contained in Magna Charta as a part of the ancient English liberties. Chapter 39, of that document of human rights, confirmed on the 19th day of June, 1215, declared that—

"No free man shall be taken, or imprisoned, or disseized, or outlawed, or exiled, or anywise destroyed; nor shall we go upon him, nor send upon him, but by the lawful judgment of his peers or by the law of the land."

It is evident the provision was intended to secure the subject against the arbitrary action of the crown. This principle came from England, and being not unsuited to our personal, political, and civil rights, was ingrafted into the Constitution of the United States by the Fifth Amendment, and was intended as a limitation upon the powers of Congress, and the Fourteenth Amendment was intended as a limitation upon the powers of the several states by legislative enactment to encroach upon the acknowledged rights of citizens. So in giving effect and application to the phrase "due process of law," which is held to be equivalent to the phrase "the law of the land," the courts of last resort of this country have looked to the English decisions for enlightenment and understanding. *Dent v. West Virginia*, 129 U. S. 114, 9 Sup. Ct. 231, 32 L. Ed. 623; *Murray v. Hoboken L. & I. Co.*, 18 How. 272, 15 L. Ed. 372; *Davidson v. New Orleans*, 96 U. S. 97, 24 L. Ed. 616. Our courts have held it to mean the general body of the law, common the statutory enactment, that was in existence at the time the Constitution took effect. *Martin v. Dix*, 52 Miss. 53, 24 Am. Rep. 661; *State v. Loomis*, 115 Mo. 307, 22 S. W. 350. 20 L. R. A. 789. The law of the land means the law of the state in which the proceeding is instituted.

The prohibition of the federal Constitution does not mean that a state must observe the due process of law of another state over which it has no control. The guaranty of due process of law does not of itself necessarily require a trial by jury in all cases. It is not denied simply because no appeal is provided for; one hearing being deemed sufficient to meet its requirements. *Pittsburg, etc., v. Backus*, 154 U. S. 421, 14 Sup. Ct. 1114, 38 L. Ed. 1031; *Reetz v. Michigan*, 188 U. S. 505, 32 Sup. Ct. 390, 47 L. Ed. 563. It is not denied simply because actual personal notice is not given in all cases; except where judgment purely in personam is sought, constructive service being held sufficient. *Hagar v. Reclamation Dist. No. 108*, 111 U. S. 701, 4 Sup. Ct. 663, 28 L. Ed. 569; *Lent v. Tillson*, 140 U. S. 316, 11 Sup. Ct. 825, 35 L. Ed. 419; *Paulsen v. Portland*, 149 U. S. 30, 13 Sup. Ct. 750, 37 L. Ed. 673. The constitutional right to a hearing does not exist in all classes of cases, where rights

of individuals are affected or interfered with by official action or procedure. All questions which are political in their nature and lie within the legislative province may be determined without notice or hearing. The power to exercise the right of eminent domain, and all questions of taxation, and the question whether a particular work shall be done, or improvements of a public nature shall be made, or particular property taken by the duly constituted authorities, furnish splendid illustrations of cases in which the owner is not entitled to a hearing as a matter of right. Board of Water Com'rs of Norwich, v. Johnson, 86 Conn. 151, 84 Atl. 727, 41 L. R. A. (N. S.) 1024; Wulzen v. Board of Supervisors, 101 Cal. 15, 35 Pac. 353, 40 Am. St. Rep. 17, and cases therein cited.

While ordinarily the constitutional requirement as to due process of law implies a formal judicial proceeding, it is, however, well settled that this is not indispensable to such a proceeding. It is not a denial of due process of law for commissioners and boards to exercise administrative powers when executing statutory enactment affecting the rights of citizens, so long as they observe the fundamental principles which inhere in due process of law. Palmer v. McMahon, 133 U. S. 660, 10 Sup. Ct. 324, 33 L. Ed. 772; Public Clearinghouse v. Coyne, 194 U. S. 497, 24 Sup. Ct. 789, 48 L. Ed. 1092; Japanese Immigrant Case, 189 U. S. 86, 23 Sup. Ct. 611, 47 L. Ed. 721.

In determining what is due process of law, we must observe the object of the taking, and as to whether the right is exercised under the taxing power, or of eminent domain, or the power of making assessments for local improvements. If the proceeding is found to be suitable or permissible in the special case, it must be adjudged to be due process of law. Davidson v. New Orleans, supra, Wulzen v. Board of Supervisors, supra, and cases therein cited.

We have already observed that the Fifth Amendment to the federal Constitution was adopted as a limitation upon the powers of Congress, and that the Fourteenth Amendment was adopted as a limitation upon the powers of the several states; but that provision does not control mere forms of procedure in state courts or regulate practice therein, nor is it designed to regulate errors in the administration of the law not involving jurisdiction of the subject-matter of the controversy or of the parties. Hagar v. Reclamation Dist. No. 108, supra; Dent v. West Virginia, 129 U. S. 114, 9 Sup. Ct. 231, 32 L. Ed. 623; Marchant v. Pa. R. Co., 153 U. S. 380, 14 Sup. Ct. 894, 38 L. Ed. 751; Japanese Immigration Case, supra.

[3-6] Having noticed the fundamental principles and their application of due process of law, we shall next proceed to the inquiry: Is the statute under which the city author-

ities proceeded void because by exercising the powers therein conferred the plaintiff's property was taken without due process of law, because, forsooth, the cost of the paving amounts to \$13,467, and the property was not worth to exceed \$7,500, and because the statute does not require property to be assessed according to benefits, and does not provide for time, place, or tribunal to hear, pass on, and determine benefits. By section 723, Snyder's Comp. Laws, 1909, the Legislature conferred upon the city officials the power to determine whether the paving should be done, and by conferring such functions upon the city officials the Legislature was exercising its undoubted political and legislative powers, and therefore the prudence or imprudence of resolving upon and determining to order the paving can have no controlling influence here, so long as the necessary requirements of the statutes are observed. Wulzen v. Board of Supervisors, supra, and cases above cited. This same section provides for the publication of the resolution, which was done, and no protest was filed, which a majority of the parties, whose property was affected, had a right to do. Section 724 provides that land fronting or abutting upon the improvement shall be charged with the cost thereof. Section 725 provides for an estimate of the cost to be made by the engineer and letting the contract. Section 726 provides for the appointment of the board of appraisers to appraise and apportion the benefits to the several lots and tracts of land, and provides:

" * * * When said report shall have been so returned, the mayor and council shall appoint a time for holding a session on some day to be fixed by them to hear any complaints or objections that may be made concerning the appraisal and apportionment as to any of such lots or tracts of land, and notice of such session shall be published by the city clerk in five successive issues of a daily newspaper or two issues of a weekly newspaper published and of general circulation in said city and the time fixed for said hearing shall not be less than five, nor more than ten days from the last publication. The mayor and council at said session shall have the power to review, and correct said appraisal and apportionment and to raise or lower the same, as to any lots or tracts of land as they shall deem just, and shall, by resolution, confirm the same as so revised and corrected by them * * * "

Thus it is seen that the statute does make provision for fixing a time, the giving of notice, and the hearing of complaints by the city officials, with full power to grant relief. But it is urged that no provision is made for a hearing upon the question of benefit before or after the contract is let. Under the authorities above cited, this is quite beside the question; the Legislature, in the exercise of its political and legislative powers, having left that question to the city authorities for their determination. French et

al. v. Barber Asphalt Pav. Co., 181 U. S. 324, 21 Sup. Ct. 625, 45 L. Ed. 879; L. & N. R. Co. v. Pav. Co., 197 U. S. 430, 25 Sup. Ct. 466, 49 L. Ed. 819; Okl. R. Co. v. Severns Pav. Co. et al., 170 Pac. 216.

After the appraisers have appraised and apportioned the benefits and filed their report, the city authorities are required to appoint a time for holding a session, and publish notice thereof, at which time they shall hear any complaints or objections that may be made concerning the appraisal and apportionment as to any of the lots or tracts of land.

The city authorities are given full power to correct any appraisal or apportionment, by raising or lowering the same, as the facts may justify. Such proceeding meets all the requirements of due process of law. Of course, the city authorities cannot act arbitrarily or capriciously in revising the appraisal and apportionment. Every requirement of the statute was strictly followed in this case. The plaintiff never filed such complaint or objection as is contemplated by the statute. The objection was based upon the ground that his property was not benefited in any manner, when he could complain and object only to the appraisal and apportionment of the benefits. Weaver v. City of Chickasha, 36 Okl. 226, 128 Pac. 305. But the plaintiff is in no position to now object to paying for the paving. This record discloses that at the time he made his first objection the work was practically done. He made no effort and took no step to prevent the work until after completion thereof, and it is no longer an open question in this jurisdiction that one who stands by and permits work of a public nature to be done, which benefits his property, is estopped from asserting any irregularity in the proceedings and denying that his property was benefited thereby. Kerker v. Bocher, 20 Okl. 729, 95 Pac. 981; Weaver v. Chickasha, 36 Okl. 226, 128 Pac. 305.

[7] No allegation is made that the assessment is void because of a failure by the city authorities to observe the necessary requirements of the statute. It is obvious that the plaintiff received some benefit, and, while under the recent holding by this court in the case of Durant et al. v. Stanfield et al. (No. 9039) 186 Pac. 939, (not yet officially reported), it was not necessary for the plaintiff to offer to do equity before invoking the aid of equity, it was, nevertheless, necessary for him to allege and confess a willingness to pay the amount that was legal and just before he could state a cause of action. If any part of the assessment against his land was valid, he was not entitled to the relief sought until he had paid or offered to pay such part as is valid. Jenkins v. Oklahoma City, 27 Okl. 230, 111 Pac. 941.

We have noticed the contention of the

plaintiff that by provision of section 817, Snyder's Comp. Laws, tracts of land in excess of 40 acres shall not be subject to city taxes. It is a sufficient answer to this contention to say that assessments for special benefits conferred upon land is not a city tax within the contemplation of the statute.

It is claimed that the street running through the plaintiff's land was originally dedicated for a county highway, and therefore, when the property was taken into the city, the purpose for which the road was dedicated ceased, and it reverted to the plaintiff, and it became necessary for the city authorities to take the property by condemnation proceedings. This contention is not tenable. When the property of the plaintiff was taken into the city, all dedicated roads and highways through it became the streets of the city.

We find no error in the record prejudicial to the rights of the plaintiff, and the judgment of the lower court is therefore affirmed.

PER CURIAM. Adopted in whole.

(76 Okl. 154)

WESTERN SILO CO. v. COUSINS.
(No. 9292.)

(Supreme Court of Oklahoma. Sept. 9, 1919.
Rehearing Denied Oct. 14, 1919.)

(Syllabus by the Court.)

1. SALES \S 439, 442(2)—MEASURE OF DAMAGES FOR BREACH OF WARRANTY AS TO QUALITY.

In a suit on a note for the purchase price of personal property where the maker of the note pleads as a defense a breach of warranty as to quality, the measure of damages for the breach is the difference between the value of the article as it was warranted to be and its actual value, and in such case the burden is upon the defendant to prove the breach of warranty and the amount of the damages.

2. APPEAL AND ERROR \S 171(3)—THEORY OF DEFENSE OF BREACH OF WARRANTY NOT TO BE CHANGED ON APPEAL.

Where plaintiff sues upon a promissory note, and the defendant's answer admits the execution of the note, and sets up as a defense thereto a breach of a contemporaneous parol agreement of a warranty of fitness, and prays that plaintiff take nothing and that the defendant recover damages and costs, and the case proceeds to trial upon the issues thus joined, and the court submits the cause to the jury, authorizing a recovery by the defendant upon the theory of a breach by the plaintiff of an implied warranty only of the thing sold by the plaintiff, and the jury returns a verdict in favor of the defendant, held, that the defendant will not be permitted to urge in this court that the defense of the defendant was one for rescission under Rev. Laws Okl. 1910, $\S\S$ 984, 986, and where the answer of the defendant contains

no allegation that there was an offer to rescind promptly and to restore to the plaintiff within a reasonable time the property in question.

3. SALES ⇐287(3) — OFFER TO RETURN ON BREACH OF WARRANTY OF QUALITY AFTER TWO YEARS TOO LATE.

Where a person kept and used personal property for about 2½ years, and then offered to return it, because it was not as represented, the offer to return was too late, and the delay in offering to return was unreasonable as a matter of law.

4. SALES ⇐442(6, 7)—ON DEFENSE OF BREACH OF WARRANTY OF FITNESS INSTRUCTION ON TOTAL FAILURE OF CONSIDERATION ERROR.

Under sections 2900, 2901, Comp. Laws 1909 (sections 2865, 2866, Rev. Laws 1910), the detriment caused by a breach of warranty of the fitness of personal property for a particular purpose is deemed to be the excess, if any, of the value which the personal property would have had at the time to which the warranty referred, if it had been complied with, over its actual value at that time, together with a fair compensation for the loss incurred by an effort in good faith to use it for such purpose.

5. APPEAL AND ERROR ⇐1064(1), 1066 — FAILURE TO INSTRUCT ON PROPER MEASURE OF DAMAGE PREJUDICIAL ERROR.

Instructions examined, and held to be prejudicial to the rights of the defendant, in that they authorized the jury to find that there had been a total failure of consideration for the notes sued upon, and that the proper measure of defendant's damages was not correctly stated in the instructions.

Error from District Court, Greer County; T. P. Clay, Judge.

Action by the Western Silo Company, a copartnership, against L. G. Cousins. Verdict for defendant, and judgment thereon, motion for new trial overruled, and plaintiff brings error. Reversed and remanded for a new trial.

Wylie Snow, of Coalgate, F. J. Leasure, of El Dorado, Kan., and J. D. Morse and J. C. Willingham, both of Oklahoma City, for plaintiff in error.

H. D. Henry, of Mangum, for defendant in error.

JOHNSON, J. This is an appeal from the district court of Greer county; T. P. Clay, Judge. This action was brought by the Western Silo Company, a copartnership composed of Sid R. Clift and Keller J. Bell, as plaintiff, against L. G. Cousins as defendant. A petition was filed on the 24th day of October, 1914, in two counts, alleging in substance as follows: (1) That on the 27th day of August, 1912, defendant, L. G. Cousins entered into a written contract for the purchase of a silo and cutter. (2) That, pursuant to said contract, defendant on the 6th day of September, 1912, executed two promissory notes, for \$335 and \$155, respectively,

which notes were past due and unpaid. Prayer: Plaintiff prays judgment for \$582, together with interest from the 6th day of December, 1914, at 8 per cent. per annum, and for \$58.21 attorney fees.

The answer of the defendant was filed on the 12th day of January, 1915, denying generally all the allegations of the petitions not specifically admitted, and setting out two affirmative defenses to each count of the petition:

"(1) For the first affirmative defense to plaintiff's first cause of action, defendant admitted the execution of the contract and notes as set out in the petition and alleged the breach of a parol agreement on the part of the plaintiff to erect the silo and consequent damage to the defendant, and further alleged that defendant had the silo erected at his own expense in a good and workmanlike manner, and that the said silo so erected was not suited to the purposes for which it was intended, and that in the winter of 1913 and 1914 it fell down; that by reason thereof there had been a failure of consideration and damage to the defendant.

"(2) As a second ground of defense to plaintiff's first cause of action, defendant adopted all the allegations of his first ground of defense, and alleged that the silo as assembled and constructed by him in good and workmanlike manner, fell down in the winter of 1913 and 1914, and was useless and unsuitable for the purposes for which purchased, and that the falling down of said silo was due to defective material.

"(3) Defendant for a first ground of defense to plaintiff's second cause of action alleged that the note set out in the second count of the petition was given for the purchase price of a cutter to accompany the silo; that said cutter was purchased for the purpose of cutting ensilage and blowing same into the silo; that there was a parol agreement between the defendant and plaintiff that the cutter and pipe should be shipped in time to put up a certain feed crop in 1912; that plaintiff had failed to comply with its parol agreement, and that defendant had been damaged thereby to the extent of \$350, for which he prayed damages.

"(4) As a second defense to the second cause of the plaintiff, defendant adopted all of the allegations of first defense and further alleged that plaintiff had guaranteed the cutter to be operated by an 8 horse power engine, and that it failed to perform the work for which it was purchased and was worthless for those purposes, and by his pleading tendered same to the plaintiff."

On the 19th day of May, 1915, by consent of counsel, plaintiff filed an amended reply, denying generally all the allegations in the answer, and pleading that all the agreements of the parties were specifically set up in the written contract, and that the defendant was estopped to set up collateral agreements.

The case came on for trial on the 10th day of January, 1917, and was tried to a jury. The jury returned a verdict for the defendant, and judgment was accordingly

rendered thereon on the 10th day of January, 1917. Plaintiff's motion for a new trial was overruled to which the plaintiff excepted, and duly lodged their appeal by writ of error in this court on July 10, 1917. The errors complained of in the petition filed herein are as follows:

(1) The court erred in overruling motion for judgment on the pleadings.

(2) The court erred in admitting testimony of L. G. Cousins appearing at page 47 of the record.

(3) The court erred in admitting testimony of L. G. Cousins concerning the value of ensilage.

(4) The court erred in admitting testimony of C. A. Stubbs concerning the Remmer silo.

(5) The court erred in admitting testimony of S. R. Good concerning the capacity of cutter.

(6) The court erred in admitting the testimony of J. M. Remmer concerning the Remmer silo.

(7) The court erred in refusing to admit the testimony of Keller J. Bell concerning money paid by the plaintiff as commission.

(8) The court erred in refusing to give specially requested instruction No. 1.

(9) The court erred in giving general instructions Nos. 3, 3½, and 4.

(10) The court erred in overruling plaintiff's motion for new trial.

Counsel for plaintiffs in their brief say:

"The errors of which we complain go to the sufficiency of the pleadings, the admission of evidence, and the instructions to the jury. They can scarcely be grouped under any well-defined legal heads, and we feel that they can best be presented by treating the assignments of error separately."

We have carefully examined the entire record in this case, also briefs of counsel, and will consider the assignments of error together, in so far as we deem it necessary to a proper determination of this appeal.

The plaintiffs brought their action to recover upon two promissory notes executed on the 6th day of September, 1912, one for the principal sum of \$335, constituting the plaintiff's first cause of action, and the other for \$155, constituting the plaintiff's second cause of action. Copies of each were attached to the petition and marked Exhibit B and Exhibit C, respectively. The defendant in his answer admitted the execution of the notes, and as a defense to the plaintiff's first cause of action the defendant alleged by way of defense that there was a failure of consideration as to the note, in that the plaintiff failed to furnish a skilled mechanic acquainted with the construction of silos to go to defendant's farm and construct and erect the silo, and that the defendant was compelled to and did employ competent carpenters at an expense of \$25 for their labor and board, who did erect the silo in a good and workmanlike manner, and that the same was worthless on account of defective material furnished to the plaintiff, and prayed that the plaintiff take nothing, and defendant

have judgment for \$25 and costs; and by way of defense to the plaintiff's second cause of action the defendant alleged a breach of warranty as to fitness of the thing sold, delay in delivery thereof in time, in that it was understood that the cutter should be shipped in time to arrive and be set up, so as to enable the defendant to preserve his feed crop for the year 1912, and that the cutter failed to arrive until October 26, 1912, and after a frost had come and ruined his crop, and that the cutter was defective and unfit for the intended use for which it was sold and warranted, and that he was damaged by loss to his feed crop in the sum of \$350, for which sum he prayed judgment, and for costs.

The defendant testified: That he did not sign the notes until after he received the silo and cutter. That he kept and used both for the season of 1912, and the silo for the season of 1913. That he filled the silo with ensilage for the season of 1913, made by a cutter belonging to a Mr. Goode, a neighbor, and fed the ensilage out, and that next spring, after the silo was emptied, it collapsed. That he stacked the material on the premises, and that the same, together with the cutter, were upon his premises at the time of the trial. He made a tender back in his answer of both the silo and the cutter, and was willing that plaintiff should have them. That he told the collector that came to see him that he would not pay the notes on account of the worthlessness of the silo and the cutter. This was after the notes were due. That he wrote the plaintiffs of the defects in the silo and cutter, but could fix no date as to such letters, all of which was contradicted by witnesses of the plaintiff.

The issues were joined by the petition of the plaintiff, the answer of the defendant, and the reply thereto of the plaintiff, as hereinbefore referred to, without any preliminary pleadings of any kind or character being interposed by either party, after which the plaintiff moved for judgment upon the pleadings, which was overruled by the court and excepted to by the plaintiff.

[1, 2] Counsel for defendant argue in their brief as follows:

"Answering the first assignment of error of the plaintiff, we contend that defendant's answer states a good cause of action; that while we admit the execution of the notes sued upon, the answer was duly verified, and that placed in issue the question of want of consideration for the making and giving the two notes sued upon, to the end that the silo and cutter were worthless and of no value, and that we in our answer tendered them to the plaintiff, and by said tender we are within sections 984 and 986, Laws of Oklahoma of 1910, and many cases have been rendered by this court that two ways are provided in this state to rescind a contract; one is to keep the property bought and sue for damages, and the other tender the property to the seller. This rule is well settled in this

state, and it is not necessary to take the time of the court to cite cases here on this point."

The sections of the statute referred to by counsel are as follows:

"§84. *Cases When Party may Rescind.*—A party to a contract may rescind the same in the following cases only:

"First. If the consent of the party rescinding, or of any party jointly contracting with him, was given by mistake, or obtained through duress, menace, fraud, or undue influence, exercised by or with the connivance of the party as to whom he rescinds, or of any other party to the contract jointly interested with such party.

"Second. If through the fault of the party as to whom he rescinds the consideration for his obligation fails in whole or in part.

"Third. If such consideration becomes entirely void from any cause.

"Fourth. If such consideration, before it is rendered to him, fails in a material respect, from any cause; or,

"Fifth. By consent of all of the other parties."

"§86. *Duty of Party Attempting Rescission.*—Rescission, when not effected by consent, can be accomplished only by the use, on the part of the party rescinding, of reasonable diligence to comply with the following rules:

"First. He must rescind promptly, upon discovering the facts which entitle him to rescind, if he is free from duress, menace, undue influence, or disability, and is aware of his right to rescind; and,

"Second. He must restore to the other party everything of value which he has received from him under the contract; or must offer to restore the same, upon condition that such party shall do likewise, unless the latter is unable, or positively refuses to do so."

From an examination of the record we are of the opinion that counsel for defendant are not in a position to urge that the defense pleaded below was one in equity for the rescission of the contracts entered into with the plaintiff, for the reason, first, that the answer of the defendant is not capable of being construed as one for rescission, in that it contains no allegation that there was an offer to rescind promptly and to restore within a reasonable time the property in question to the plaintiff. The answer admits the execution of the contract on behalf of the defendant and that the offer to restore was first made in the answer, which was filed long after the notes sued upon became due, and after plaintiffs had filed their action to recover upon the notes. The answer by allegations shows clearly that the defense was an action for damages for breach of the contract sued upon, and that such latter defense was excluded from the jury by the court in his instructions. Instruction No. 6 was as follows:

"You are further instructed that under the law the defendant cannot recover damages of plaintiff by reason of the alleged failure of the machinery purchased by the defendant of plaintiff, to wit, the silo and cutter, to perform the

services for which they were intended and for which they were purchased, if you should find that they were not suitable and fit for such purposes, and the jury will not consider the question of such damages, if any, in arriving at their verdict."

[3] In support of the proposition that a defense of rescission of the contract was not available to defendant, we call attention to the decision of this court in the case of Spaulding Mfg. Co. v. Holiday, 32 Okl. 823, 124 Pac. 35, wherein it was said:

"The court instructed the jury, over the objections of plaintiff, as to the law governing a tender or offer to return property by a buyer endeavoring to rescind a contract of sale. It is not necessary to pass on the form of the instruction. Under the evidence in the case, no instruction on the subject of tender was proper. The evidence showed that the defendant used the buggy from the time he received it. If he offered to return it at all, it was not until he had used it nearly, or quite, a year; and he continued to use it right along. A tender or offer to return property must be made within a reasonable time. Ordinarily the question of what is a reasonable time is for the jury; but the delay may be so long as to be unreasonable as a matter of law. *Paige v. McMillan*, 41 Wis. 337; *Gammon v. Abrams*, 53 Wis. 323, 10 N. W. 479; *Kleeb v. Long-Bell Lbr. Co.*, 27 Wash. 648, 68 Pac. 202; *Viertel v. Smith*, 55 Mo. App. 617; *Metropolitan Rubber Co. v. Monarch Rubber Co.*, 74 Mo. App. 266; *Manley v. Crescent Novelty Mfg. Co.*, 103 Mo. App. 135, 77 S. W. 489; *Tilley v. Montelius Piano Co.*, 15 Colo. App. 204, 61 Pac. 483. An offer to return a buggy after it has had a year's hard usage, exposed to the weather, as the proof shows this one was, is too late. The delay is unreasonable as a matter of law. The time for rescission had passed. If there was a breach of warranty, defendant is entitled to recover damages for that, if he can make legal proof. The case should be reversed and remanded for a new trial."

[5] At the conclusion of the testimony the court charged the jury as follows:

"(3) You are instructed that where one party sells to another any manufactured article, and is informed of the use to which it is intended to be put, and the conditions it must meet in order to perform the intended service, then the party undertaking to furnish such manufactured article for such purpose impliedly warrants that it is suitable for and adequate for the purposes for which it is purchased when used under ordinary conditions.

"(3½) If you find and believe from a fair preponderance of the evidence in this case that the defendant, by a written contract, purchased of plaintiff a certain silo on or about the 27th day of August, 1912, and that plaintiff, or its duly authorized agent, was informed and knew of the use for which the said silo was intended, and thereafter shipped to plaintiff the silo for which the note in controversy was given, and that the same came in a knocked-down condition, and had to be erected in order to be of service, and that the defendant employed skilled carpenters and workmen to set up said material in a proper and workmanlike manner,

and that the same was so set up, and that thereafter the said silo came to pieces and fell down and proved wholly unsuitable for the purposes for which it was intended and purchased, through no fault or negligence on the part of the defendant, and that the defendant thereafter promptly notified the plaintiff of the unsuitable condition of said silo, then and in that event your verdict should be for the defendant as to plaintiff's cause of action No. 1, upon the promissory note, sued upon therein. Or if you should find from a fair preponderance of the evidence that the consideration for said note wholly failed by reason of the fact that plaintiff, by virtue of a written contract, purchased of defendant a silo for which the note of \$335 was given, and that plaintiff, or its duly authorized agent, was informed or knew of the uses to which the same was intended to be put, and that the said silo, through no fault or negligence on the part of the defendant, proved to be wholly worthless and useless for the purposes for which it was purchased, and that upon ascertaining that it was useless and worthless, the defendant promptly notified the plaintiff thereof, then the plaintiff could not recover on said count of plaintiff's petition, and your verdict should likewise be for the defendant.

"(4) You are further instructed that it is admitted in this case that the defendant purchased of plaintiff a certain cutter for the purpose of cutting ensilage and lifting the same into a silo, and if you find and believe from a fair preponderance of the evidence in this case that plaintiff, or its duly authorized agent, was informed and knew of the uses for which the cutter was purchased, and that thereafter plaintiff shipped said cutter to the defendant, and that the same proved to be unsuitable for the purposes for which it was intended, and wholly worthless and unfit for the purposes for which it was purchased, through no fault or negligence on the part of the defendant, and that promptly upon discovering that it was useless and unfit for the purposes for which it was purchased that the defendant promptly notified the plaintiff of the condition of said cutter, then and in that event your verdict should be for the defendant upon plaintiff's second cause of action."

Each of which were duly excepted to by the plaintiff. Counsel for plaintiffs complain of the instructions thus given by the court, wherein they say:

"Then we think that the court should not have submitted the question of the total failure of consideration to the jury, as was done in this instruction on page 116 of case-made; for this instruction was not supported by the evidence. It was the uncontradicted evidence of the defendant and his witnesses all the way through the case that this silo was partly filled during the year 1912 and was filled full during the year 1913; that the ensilage was kept in the silo for months, and after the second season's filling had been fed out, then it fell down. The use of the silo for two seasons was certainly some consideration for the note in controversy, and the courts will not question the adequacy of the consideration, where any good and valuable consideration is shown.

"Instruction No. 3½ was erroneous for the further reason that it wholly fails to mention

or allude to the statutory requirements laid upon a party who seeks to rescind his contract and rely upon failure of consideration. Section 986, Revised Statutes of 1910, lays a duty upon a party seeking to avoid a contract for failure of consideration to rescind promptly—that is, within a reasonable time—and to restore or offer to restore anything of value which he has received. These provisions are conditions precedent to the right to set up the defense. They were absolutely essential to the defense."

Counsel also urge the same objections to the court's instruction No. 4 which applied to the second cause of action. We think that counsel's objections to these instructions are well taken.

[4] We think, under the allegations of the answer of the defendant, that his defense, if any, and the measure of damages, came clearly within the provisions of Revised Laws 1910, §§ 2865, 2866, which are as follows:

"2865. *Breach of Warranty of Quality.*—The detriment caused by the breach of a warranty of the quality of personal property, is deemed to be the excess, if any, of the value which the property would have had, at the time to which the warranty referred, if it had been complied with, over its actual value at that time.

"2866. *Breach of Warranty of Fitness.*—The detriment caused by the breach of a warranty of the fitness of an article of personal property for a particular purpose, is deemed to be that which is defined in the last section, together with a fair compensation for the loss incurred by an effort in good faith to use it for such purpose."

These provisions of the statute have frequently been construed by this court and upheld. In the case of Spaulding Mfg. Co. v. Holiday, 32 Okl. 823, 124 Pac. 35, where the principles involved were almost identical as in the instant case, this court, in its opinion by Rosser, C., said:

"This is a suit by the Spaulding Manufacturing Company against S. N. Holiday upon a note given for part of the purchase price of a buggy sold by plaintiff to the defendant. The petition was in the ordinary form, and also asked the foreclosure of a lien on the buggy for the purchase price. The defendant in his answer admitted the execution of the note, but as a defense pleaded 'that at the time of the purchase of said buggy the plaintiff represented to the defendant that said buggy was of the best material to be obtained, and contained first-class material, and that the workmanship contained in said buggy was first-class in every respect, and they agreed that if said buggy was not as represented they would replace the same with the class and character of buggy so represented, which representations were wholly false and fraudulent, and plaintiff well knew them so to be.' The answer further alleged: 'That the buggy did not contain first-class material, and was not of first-class workmanship, but was very inferior, both in material and workmanship, and that after the defendant purchased said buggy the same began to go to pieces, in that it warped and the felloes shrunk, and various other defects occurred to make it wholly

unfit for the use for which the defendant purchased said buggy. That immediately upon discovering that said buggy was of defective workmanship and material and unfit for his use the defendant made demand upon the plaintiff to comply with this warranty, as herein set out. That plaintiff has failed and refused, and wholly fails and refuses, to comply with the terms of this oral warranty, as hereinbefore set out.' * * * The defendant testified that said curtains shipped were without value. The defendant testified that he offered to return the buggy to plaintiff, but did not specify the time nor the terms of the offer. On the 1st of December, 1908, he wrote the plaintiff as follows: 'Gentlemen: Do you intend to make good your contract with me—case of No. 96,170 that you have received \$40 & hold note for balance. I notice the printed form you sent me; it differs somewhat from the one I have. My contract with you is that anything short of first class you would make good to me without trouble or expense to me and I would greatly prefer you do this and I will comply with mine, as my past record in your house will show.' The defendant had some repairs made on the buggy a time or two before the trial, and paid \$13 for the repairs. He did not keep the buggy in a shed, and left it out in the weather when he was not using it. The first repairs he had done on the buggy was nearly a year after he got it."

In that case, as in the instant case, there was a general verdict for the defendant, and the case was reversed and remanded for a new trial. In the case of Spaulding Manufacturing Co. v. Cooksey, 34 Okl. 790, 127 Pac. 414, under a similar state of facts, the court, in an opinion by Robertson, C., reversed the judgment in favor of the defendant, and rendered a judgment in favor of the plaintiff for the amount of the note sued on and attorney's fees. In the case of Frick-Reid Supply Co. v. Aggers, 28 Okl. 425, 114 Pac. 622, this court, in an opinion by Turner, C. J., reversed the verdict and judgment in favor of the defendants, and remanded the case for new trial. In the case of Parsons v. Smith, 51 Okl. 495, 151 Pac. 862, opinion by Bittenhouse, C., it was said:

"This action was brought to recover a judgment for \$1,400 and interest on two promissory notes made, executed, and delivered on April 28, 1909, for the purchase price of a certain jack named 'Independence.' An answer was filed, admitting the execution of the notes and alleging a breach of an express and implied warranty. The cause was tried to a jury, * * * and resulted in a verdict for the defendant for a return of the jack and notes, in favor of the defendant for costs."

And in reversing and remanding the case the learned Commissioner said:

"What the jury attempted to do was to cancel the contract and place the parties in the condition they were in prior to the sale, giving the defendants the earnings from the services of the jack, and requiring the plaintiffs to pay the costs. Their attempt to render such a verdict

was beyond the issues, involved in the case at bar, and therefore contrary to law."

And in the syllabus of the opinion it is said:

"Under sections 2900, 2901, Comp. Laws 1909 (sections 2865, 2866, Rev. Laws 1910), the detriment caused by a breach of warranty of the fitness of an animal for a particular purpose is deemed to be the excess, if any, of the value which the animal would have had at the time to which the warranty referred, if it had been complied with, over its actual value at that time, together with a fair compensation for the loss incurred by an effort in good faith to use it for such purpose"

—citing in support thereof the decisions of this court in the cases of Burgess et al. v. Felix, 42 Okl. 193, 140 Pac. 1180, Kansas City Hay Press Co. v. Williams, 51 Okl. 6, 151 Pac. 571, Wiggins v. Jackson, 31 Okl. 292, 121 Pac. 662, 43 L. R. A. (N. S.) 153, and the Spaulding Cases, cited supra.

From the examination of the record and the instructions of the court we are of the opinion that the case was not tried and the issues submitted to the jury under the proper theory, in that the measure of the defendant's damages was not submitted to the jury within the provisions of the statute, but that the instructions given were misleading and prejudicial to the rights of the plaintiff, that the defendant's measure of damages was clearly defined by the terms of the statutes quoted, and that the jury should have been so instructed by the court.

The case is therefore reversed and remanded for a new trial.

OWEN, C. J., and HARRISON, PITCHFORD, and HIGGINS, JJ., concur.

(76 Okl. 46)

VINSON v. COOK. (No. 10111.)

(Supreme Court of Oklahoma. Sept. 9, 1919.
Rehearing Denied Oct. 14, 1919.)

(Syllabus by the Court.)

1. COURTS §200—JUDGMENT §474—RIGHT OF COLLATERAL ATTACK ON JUDGMENTS OF PROBATE COURTS.

The county courts of this state are courts of record and have original jurisdiction in probate matters. The orders and judgments of such courts, when acting within their jurisdiction, are entitled to the same favorable presumption and the same immunity from collateral attack as are accorded those of other courts of general jurisdiction.

2. DESCENT AND DISTRIBUTION §82 — ON APPROVAL OF SETTLEMENT OF HEIRSHIP, ADMINISTRATOR MAY MAKE PAYMENT.

N., residing in Pottawatomie county, Okl., died intestate. C., a resident of New Jersey, claimed to be his only surviving heir and en-

titled to his estate. Her right was contested by others. Pending the hearing, C. died testate. D. qualified as the executor of the last will and testament of C. Thereafter, upon hearing by the county court, C. was decreed the sole heir of N. Within the time for appeal, D. and the contesting claimants entered into an agreement whereby the latter, in consideration of \$3,000, agreed not to appeal from the decree so entered, and to allow the same to become final. The agreement so made was approved by the county court of Pottawatomie county, and the administrator of the estate of N. was ordered and directed to pay out of the funds of the estate of N. to the contesting heirs, \$3,000. *Held*, that the order of the county court was not void, and that V. as administrator of the estate of N. was protected by virtue of said order in making payment.

3. DESCENT AND DISTRIBUTION \Rightarrow 82—**SETTLEMENTS OF CONFLICTING CLAIMS IN NATURE OF FAMILY ARRANGEMENTS APPROVED.**

Compromises of doubtful rights are upheld by general policy as tending to prevent litigation in all enlightened systems of jurisprudence. Much more readily will courts of equity give effect to agreements of compromise of conflicting claims, especially when they partake of the nature of family arrangements.

4. EXECUTORS AND ADMINISTRATORS \Rightarrow 281—**JURISDICTION OF COUNTY COURT TO ALLOW PAYMENT BY ADMINISTRATOR OF CLAIMS AGAINST ESTATE IN ANOTHER STATE.**

N., residing in Pottawatomie county, Okl., died leaving surviving him as his sole heir C., residing in New Jersey. C. died testate prior to receiving the estate of N. *Held* that the county court of Pottawatomie county, Okl., was without jurisdiction to allow the administrator of N.'s estate credit for payment of claims against the estate of C.

Error from District Court, Pottawatomie County; Chas. B. Wilson, Jr., Judge.

Application by S. C. Vinson, administrator of Enos Nichols, deceased, for approval of a report objected to by R. W. Cook, successor of administrator. Petitioner's report was approved in part by the district court on appeal, and he brings error. Reversed in part and affirmed in part.

Maben & Pitman, of Shawnee, for plaintiff in error.

T. G. Cutlip, of Tecumseh, for defendant in error.

PITCHFORD, J. Prior to 1913, Enos Nichols, of Pottawatomie county, Okl., departed this life, leaving a large estate located in said county. Alexander Fisher was appointed administrator of the said estate, and on the 21st of November, 1913, tendered his resignation, which was accepted by the county court, and the plaintiff in error, S. C. Vinson, was designated as successor, gave bond and qualified on November 26, 1913, and continued to act as administrator until the 13th day of May, 1914, at which time he was by

order of the county court suspended and directed to file a report in said matter and did on the 25th of May, 1914, file his report as administrator aforesaid. This report was never noticed for approval, but the county court by order did approve the same, or attempted to do so; but later Mr. Vinson moved the county court to vacate the order of approval. The application to set aside was sustained, notice was given to all parties in interest to appear at the time and place named in said notice, and object to the approval of said report, and the defendant in error, as successor to S. C. Vinson, filed objections thereto. The objections to the various items were disallowed, except the items now under consideration. Both parties were dissatisfied with the judgment of the county court, and appeals were taken to the district court. In the district court, the two appeals were consolidated, and upon the hearing the district court approved all items of disbursement except the three items now in controversy. These items are as follows:

Paid Roscoe C. Arrington \$3,000.

Paid F. H. Rely \$1,835.

Paid Attorney Fees \$390.

These items were charged back to Vinson, except one-twelfth thereof, which was credited to the administrator and charged against the interest of the defendant in error. The history of the item of \$3,000 paid to Arrington is as follows:

Harriet Nichols Cook filed an application for decree of heirship, alleging that she was the nearest relative to the deceased, Enos Nichols. She died testate before the decree of heirship was determined, and J. Warren Davis was commissioned executor of her estate. Various parties claiming to be the heirs at law of the said Enos Nichols, deceased, filed their joint application to be decreed the heirs of said Enos Nichols and entitled to the estate thereof, and it was by the county court determined in favor of Mrs. Cook on November 21, 1913. The executor of her estate was represented at said hearing by James Mercer Davis and F. H. Rely. The other petitioners were represented by Roscoe C. Arrington. The court rendered a decree finding that Mrs. Cook was the sole heir at law, and that the parties represented by Mr. Arrington were decreed to have no interest in the estate of Enos Nichols, deceased.

After this decree of heirship had been rendered and entered, James Mercer Davis, acting for the executor of the Cook estate, with Richard W. Cook, addressed a letter in the nature of a proposition, to Arrington & Arrington, the attorneys for the losing petitioners, to the effect that the estate was willing to allow \$3,000 upon the express conditions that no appeal be taken by the losing petitioners, or any of them, from the decree of heirship, and to permit the judgment so ren-

dered by the county court to become final. The proposition so made was accepted by Arrington & Arrington. After the expiration of 10 days from the decree of heirship, J. Warren Davis, acting through one of his attorneys, F. H. Rely, and Roscoe Arrington, acting for himself and the losing petitioners in the heirship matter, and in conformity with the proposition of James Mercer Davis and Richard W. Cook, to Arrington & Arrington, of date November 21, 1913, filed in the county court their joint petition for the approval of the agreement between Davis and Cook on one side acting for the executor of the Cook estate, and Roscoe Arrington, attorney for Mary E. Clark and others, alleging that no appeal had been taken and none would be taken, and the decree of heirship had become final, and asking that the court approve the agreement, and for an order by the county court directing S. C. Vinson, plaintiff in error, as administrator aforesaid, to pay to Roscoe C. Arrington the sum of \$3,000 out of the funds of the Nichols estate.

On the 1st day of December, 1913, the petition came on for hearing before the county court of Pottawatomie county, and the court, being fully advised in the premises, found that it was to the best interest of the estate of Enos Nichols, deceased, and the estate of Harriet Nichols Cook, deceased, that said contract be in all things approved. It was ordered, adjudged, and decreed that the said S. C. Vinson, as administrator of the estate of Enos Nichols, deceased, pay over to Roscoe Arrington the sum of \$3,000 and take his receipt therefor and to report said payment in his annual report to the court. Soon after said order was made, plaintiff in error issued his check to Roscoe Arrington for the sum of \$3,000 as directed in said order, taking a receipt therefor. Plaintiff in error contends that he acted in good faith in making this payment, that the same was made under and by virtue of the order of a court of competent jurisdiction, and that the district court erred in holding that the same was paid without authority. The defendant in error contends that the order of the county court, authorizing this payment, was a nullity, and that, notwithstanding the order, the payment was made at the peril of the administrator, and, same not being a claim or charge against the estate of Enos Nichols, the judgment of the trial court finding the amount was paid without authority should be affirmed.

Was the order of the county court authorizing this payment void or merely voidable? If the former, then the administrator made the payment at his peril; if only voidable, the administrator was protected in making the payment. In deciding these questions, we should take into consideration all the facts surrounding this estate. Mrs. Cook, a resident of the state of New Jersey, claimed to be the sole and surviving heir of Enos

Nichols, deceased. Others denied this claim and sought to establish that they were also interested in the estate as heirs of the deceased. Considering the amount involved, the litigation promised to be protracted, bitter, and expensive. After the court had decreed Mrs. Cook to be the sole heir, the various litigants entered into what might be denominated a compromise and settlement. The only estate involved at that time and the only estate being litigated over and within the jurisdiction of the court was the Enos Nichols estate. So far as the brief discloses, no other parties had any interest in this estate or claimed to have any interest. The court found that it was to the best interest of the Enos Nichols estate that this compromise or settlement be approved, and the same was by the court approved, and the administrator was ordered to make the payment out of the Enos Nichols estate. So far as the record shows, the administrator acted in the utmost good faith, and it would appear a great hardship and a species of injustice to hold that under all the circumstances as disclosed from the record he should be required to pay this sum out of his own funds.

[1] The court had jurisdiction of the subject-matter and jurisdiction of the parties, and, while the order might have been erroneous and set aside upon appeal, yet as no appeal was taken the order became final and is not subject to a collateral attack.

In *Moffet v. Jones et al.*, 169 Pac. 652, we find the following:

"In a collateral attack upon probate proceedings in the county court, the scope of the inquiry is confined to the question whether the county court had jurisdiction of such proceedings, and its orders will not be held void for errors or irregularities occurring during the progress of the proceeding."

Under the laws of Oklahoma, orders and decrees made by the county court or the judge thereof need not recite the existence of facts or the performance of acts upon which the jurisdiction of the court or judge may depend, but it shall only be necessary that they contain the matters ordered or adjudged. Section 6489, R. L. 1910. Under section 6190, R. L. 1910, judgments of probate courts are to be construed in the same manner, and with like intendments, as proceedings of courts of general jurisdiction. See *Greer v. McNeal*, 11 Okl. 519, 69 Pac. 891; *Wilson v. McCornack*, 10 Okl. 180, 61 Pac. 1068; *Berry v. Tolleson et ux.*, 172 Pac. 630. In *Welch v. Focht*, 171 Pac. 730, L. R. A. 1918D, 1163, the court said:

"The county courts of this state are courts of record and have original general jurisdiction in probate matters. The orders and judgments of such courts, when acting within their jurisdiction, are entitled to the same favorable presumptions and the same immunity from collateral attack as are accorded those of other courts of general jurisdiction."

[2] It is claimed that the order authorizing this payment is void, because the same was ex parte; that the administrator was not a party to the same. Evidently the administrator was well informed of what was being done, as it seems that he made the payment without protest, and no other person could complain. The contesting heirs who received the \$3,000, if they were heirs, are estopped, as they have received and acknowledged the receipt of all interest they have in the estate. The executor of Harriet Nichols Cook is estopped from claiming that the payment was made without authority, for the reason that the payment was made upon the petition not only of Arrington, representing the other contesting heirs, but also by the parties representing Mrs. Cook in the contest upon the question of heirship. This was not a claim against the estate of Harriet Nichols Cook being paid out of the estate of Enos Nichols, but it was a compromise and a settlement entered into by the parties who claimed to be the only surviving heirs of Enos Nichols, deceased, and entitled to a share of his estate. The court found that Mrs. Cook was the sole and surviving heir. Would it be just under the proceedings as had in this case, after Mrs. Cook had petitioned for this order, and by that means closing the litigation against her claim as the sole heir, to now repudiate the action of her testator, and say that the administrator had made the payment of the \$3,000 without authority? While it is true the objection to the allowance of this item comes from the administrator of the Enos Nichols estate, yet as Harriet Nichols Cook, under the decree of the court, was found to be the only heir, and no other heirs, creditors, or persons interested are objecting, and for the additional reason that the entire Nichols estate, by virtue of said decree of heirship, must be passed to the Cook estate, we are of the opinion that in good conscience the plaintiff in error should have been given credit for this item.

Section 6488, R. L. 1910, provides for the declaration of heirships in estates. It is there provided that all persons appearing within the time as prescribed shall file their written appearance in person through their authorized attorney, and that thereafter such proceeding shall be had as provided by the law in cases of an ordinary civil action; that the issues of law and fact arising in the proceeding shall be disposed of in like manner as issues of law and fact are tried and disposed of in civil actions with like right to a motion for a new trial and appeal; that the party filing the petition shall in all subsequent proceedings be treated as the plaintiff therein, and the other parties so appearing shall be treated as the defendants in the proceeding; that an appeal shall be taken in the manner and to the court provided by law in cases of appeal in probate matters generally; that notice of taking depositions shall

be served only upon the parties or the attorneys of the parties so appearing in the proceeding; that the court shall determine the heirship to the deceased, the ownership of his estate, and the interest of each respective claimant thereto, or therein, and persons entitled to distribution thereof, and the final determination of the court thereupon shall be final and conclusive in the distribution of said estate, and in regard to the title to all the property belonging thereto; and that the cost of the proceedings shall be apportioned in the discretion of the court. It would appear from the foregoing section that the administrator of the estate is not a party to the proceeding to declare heirship, and it is his duty, after the court has entered a decree ascertaining who are the heirs, to comply with the orders of the court in respect thereto. He has no personal interest in the estate. It is his duty to administer the estate subject to the orders of the court having jurisdiction thereof. The parties interested in the estate personally are the parties having claims against the estate, and especially the heirs at law of the deceased. There is no contention between the creditors and the heirs in the estate for which the plaintiff in error was administrator. We are therefore unable to see, had he been notified of the presentation of the petition asking for the order directing him to pay the \$3,000, that he would have been in any position to have resisted the same.

[3] The law looks with favor upon the settlement of disputed claims, realizing that it is to the best interest of society, and that little benefit is gained by protracted litigation; and in a case like the one at bar, where there is neither fraud nor mistake alleged or shown, and a settlement entered into by the only parties claiming an interest in the estate, as was done in this instance, when approved by the county court, and the court orders the administrator to pay the sum so agreed upon and approved, and the administrator in good faith complies with the order, he should not be made to suffer by his compliance with such order.

In *Petry v. Petry*, 142 Ky. 564, 134 S. W. 922, it is said:

"A valid settlement of a pending suit, including an agreement to dismiss the same, deprives the party of the right to thereafter file an amended petition."

In *Smith v. Smith*, 36 Ga. 184, 91 Am. Dec. 761, it is said:

"Compromises of doubtful rights are upheld by general policy, as tending to prevent litigation, in all enlightened systems of jurisprudence. * * * Much more readily will courts of equity give effect to agreements of compromise of conflicting claims, especially when they partake of the nature of family arrangements. * * * An agreement entered into upon a supposition of a right or of a doubtful right, though it afterwards comes out that the right

was on the other side, shall be binding, and the right shall not prevail against the agreement of the parties. The compromise of a doubtful right is a sufficient foundation for an agreement."

In *Burnes v. Burnes*, 137 Fed. 781, 70 C. C. A. 357, it is said:

"A contract made without fraud or mistake may not be modified by a court of equity to give either party a better bargain, while he retains all the benefits of the original trade. * * * Family settlements and compromises of conflicting claims to property are encouraged by the courts. They will not be avoided for inadequacy of consideration, nor without clear proof of fraud or mistake."

[4] Relative to the \$1,835, it appears that Mr. Rely, to whom this sum was paid, was hired by Mrs. Cook, and after her death he continued in the employ of her executor. Rely presented his claim for services, not to his employer, but to the administrator of the Nichols estate, for payment. This expense was incurred by him while representing the Cook estate, and the payment is attempted to be justified as an advancement to him for the benefit of the Cook estate on the theory that under the decree of the county court all the assets belonging to the Nichols estate must later on be transferred to the Cook estate, as she was decreed to be the sole heir of the Enos Nichols estate. The administrator of the Nichols estate did not incur the expenses of Mr. Rely, nor was this expenditure for the benefit of the estate for which he was administrator, and if he had paid it at the request of Mrs. Cook, or the executor of her estate, the Nichols estate would not have been liable for this expense so incurred; but the estate of Mrs. Cook might have been, and as we have seen, the only court that had jurisdiction of her estate was the New Jersey court. It therefore follows that this item was not a charge against the Nichols estate. When the item was paid out of the Nichols estate for the assumed benefit of another estate, and in no wise incurred, or caused to be expended, by Vinson, and not itemized as required by statute, and not presented to the county court for a direction to pay, the payment by Vinson was made doubly hazardous, and he cannot complain because this item was charged back to him by the trial court. Nor can this payment in any way be construed to be an advancement to the heir.

Section 6458, art. 11, c. 64, of the statutes of 1910, provides that an heir of an estate at any time after the lapse of four months from the issuance of letters of administration may present to the county court a petition praying an order for his share of the estate, and upon the heir giving bond with security for the payment of his part of the debts of the estate, and by giving notice of such application (section 6459) personally to the administrator and all persons therein in-

terested. And section 6461 provides if, upon the hearing of such petition, it is made to appear that the estate is but little indebted, his share may be set off to him without loss to the creditors, and the court by order require the heir to execute and deliver to the administrator a bond in amount and with surety to be designated and approved by the county judge, and payable to the administrator, and conditioned for the payment when required of the heir's part of the debts due from the estate to its creditors, then the administrator shall deliver to the heir his part of the estate, or such part thereof as has been designated in the order of the court, and the cost thereof shall be chargeable against the heir. This procedure was not followed in this matter; but the administrator, without any showing whatever, or any authority from the court, or without requiring a bond, conditioned as by law provided, paid to Mr. Rely the \$1,835 and reported the item to the county court for credit. There is no contention that this item was a claim or a demand against the estate of Enos Nichols. This charge was for fees and expenses claimed by F. H. Rely, representing the Harriet Nichols Cook estate, which sum was paid by the plaintiff in error, not as a claim against the estate of which he was administrator, but as a claim against the estate of Harriet Nichols Cook. The county court of Pottawatomie county had no jurisdiction whatever over the estate of Harriet Nichols Cook. This estate was under the supervision of the orphans' court of New Jersey. It will not do to say that because the estate of Harriet Nichols Cook might finally be charged with this item, and that it would be the duty of the court in New Jersey to allow the claim against her estate, and the Enos Nichols estate would be transferred to the Harriet Nichols Cook estate, for that reason the county court of Pottawatomie county would be authorized to order the administrator of the Enos Nichols estate to pay claims due from the Harriet Nichols Cook estate. The county court of Pottawatomie county was absolutely without any jurisdiction in the premises, and when plaintiff in error, as administrator, paid this sum, the same was paid at his peril. Besides, it would appear that the plaintiff in error ignored sections 6339 and 6340, R. L. 1910; therefore the court did not commit error in holding that this item should be charged back against the administrator.

What has been said regarding the payment of the \$1,835 item will apply with equal force to the \$390 item. The same rule and the same law apply to these items equally.

We therefore hold that the judgment of the trial court as to the \$3,000 item should be reversed, and that the judgment should be affirmed as to the \$1,835 and the \$390 items, and it is so ordered.

OWEN, C. J., and HARRISON, JOHNSON, and HIGGINS, JJ., concur.

(76 Okl. 170)

SMITH v. CURREATHER'S MERCANTILE CO. et al. (No. 8084.)(Supreme Court of Oklahoma. June 24, 1919.
Rehearing Denied Oct. 14, 1919.)*(Syllabus by the Court.)***1. APPEAL AND ERROR §327(2) — PERSONS NOT INTERESTED IN RESULT NOT NECESSARY PARTIES.**

In an appeal to the Supreme Court from a determination of a district or a county court, persons not affected by or interested in the result need not be made parties.

2. APPEAL AND ERROR §327(12)—MORTGAGORS NOT NECESSARY PARTIES ON APPEAL FROM JUDGMENT BETWEEN MORTGAGEES AND INTERVENERS.

In an action by S. to foreclose a chattel mortgage given by H. and H. and to secure possession of the personal property described therein, the defendant mortgagors defaulted, whereupon C., who secured a mortgage from H. and H. upon the same property after the petition of S. had been filed, intervened, whereupon the cause proceeded between S. and C. for the sole purpose of determining their rights under their respective mortgages, final judgment being rendered in favor of C., whereupon S. appealed without making H. and H. parties. *Held*, that H. and H. were not necessary parties on appeal.

3. CHATTEL MORTGAGES §155—LIS PENDENS §3(4), 4, 22(3)—INTEREST ACQUIRED AFTER PETITION TO FORECLOSE AND LIS PENDENS FILED NOT EFFECTIVE AGAINST MORTGAGEE.

On the merits it appeared that S. failed to refile his chattel mortgage within three years from its original recordation as required by section 4036, Rev. Laws 1910, and that thereafter, and after the filing of the petition herein, C. secured a chattel mortgage upon the same personal property. S. concedes that by virtue of the foregoing section of the statute his mortgage ceased to be valid as against subsequent incumbrancers in good faith, but contends that, inasmuch as his mortgage continued to be valid as between the parties, the doctrine of lis pendens applies, by virtue of section 4732, Rev. Laws 1910, which provides: "When the petition has been filed, the action is pending, so as to charge third persons with notice of its pendency, and while pending no interest can be acquired by third persons in the subject-matter thereof as against the plaintiff's title; but such notice shall be of no avail unless the summons be served or the first publication made within sixty days after the filing of the petition." *Held*: (1) The failure to refile a copy of the chattel mortgage was not fatal to the instrument, nor did it affect its validity as between the parties or those with actual notice thereof; (2) that section 4732, Rev. Laws 1910, applies to personal property; (3) that when the petition was filed it protected the plaintiff to the extent of preventing the acquisition of any interest by third persons, in the subject-matter thereof, as against the plaintiff's title; (4) that the plaintiff's title was sufficient to entitle him to the benefit of the statute.

Error from County Court, Kiowa County; J. S. Carpenter, Judge.

Action by A. J. Smith against T. D. Huckaby and N. D. Harris to foreclose a chattel mortgage and to secure possession of property, in which defendants defaulted, and the Curreather's Mercantile Company and another appeared as interpleaders. Judgment for interpleaders, and plaintiff brings error. On rehearing, reversed and remanded, with directions.

Wylie Snow, of Coalgate, for plaintiff in error.

Zink & Cline, of Hobart, for defendants in error.

KANE, J. Upon rehearing we are convinced that the order dismissing the appeal should be set aside and the cause decided on its merits.

The facts, briefly, are these: That A. J. Smith, plaintiff in error herein, filed his petition in an action in replevin and brought suit on the 20th day of February, 1915, to foreclose a chattel mortgage given by T. D. Huckaby and N. D. Harris. Said mortgage was filed for record on the 29th day of December, 1911. On the 24th day of February, 1915, the Curreather's Mercantile Company and G. W. Green filed for record in the office of the county clerk a mortgage given by Huckaby and Harris on the same property; said mortgage being given to secure a debt for merchandise sold the year prior.

When the case came on for trial in the county court, Huckaby and Harris made default and dropped out of the case, and, Curreather's Mercantile Company and G. W. Green appearing as interpleaders, a trial was had for the sole purpose of determining the respective rights of the mortgagees under their respective mortgages. Upon judgment being rendered in favor of the interpleaders, Smith appealed to this court, but did not join Huckaby and Harris as defendants in error. In an opinion prepared by Mr. Commissioner West, which is pending on rehearing, this court dismissed the appeal for failure to make Huckaby and Harris parties to the proceedings to reverse the judgment of the lower court.

The opinion of the commissioner which was filed November 20, 1917, overlooks an order of this court of April 11, 1916, overruling motion of defendants in error to dismiss appeal, wherein this court considered the precise question upon which the commissioner dismisses the appeal. The grounds urged by defendants in error for dismissal were, of course, not briefed by counsel for plaintiff in error, in view of the prior order of this court. Regardless of the order of this court overruling the motion of defendants in error to dismiss appeal, the opinion of Commissioner West seems to be wrong as to the law.

The rule covering appeals of this character is stated in 3 C. J. 1007, § 958, as follows:

"Where a judgment or decree is rendered against a part only of coplaintiffs or codefendants, an appeal on writ of error may and should be prosecuted only in the names of those prejudiced, and, where those not prejudiced are joined therein, the petition or writ will generally be dismissed."

[1] Plaintiff in error in his petition for rehearing cited the cases of Gillette & Libby v. Murphy et al., 7 Okl. 91, 54 Pac. 413; Southern Pine Lumber Co. et al. v. Ward et al., 16 Okl. 131, 85 Pac. 459. The fifth paragraph of the syllabus of the latter case reads:

"In an appeal to the Supreme Court from a determination of a district court, persons not affected by or interested in the result need not be made parties."

Other cases in point are Outcalt v. Collier, 8 Okl. 473, 58 Pac. 642; Chapple et al. v. Gidney, 38 Okl. 596, 599, 134 Pac. 859; De Bolt v. Farmers' Exchange Bank et al., 46 Okl. 258, 259, 265, 148 Pac. 830. As it was wholly immaterial to Huckaby and Harris whether plaintiff in error or defendants in error herein prevailed in the county court, they cannot be affected by the decision of this court. The opinion of the commissioner dismissing the appeal should be set aside, and the case should be decided on its merits.

[2, 3] The case upon its merits requires the construction of section 4035, Rev. Laws 1910, relating to refilling mortgages on personal property at the end of three years, and section 4732, Rev. Laws 1910, relating to the doctrine of *lis pendens*.

Counsel for plaintiff in error concedes that his client did not refile his chattel mortgage within three years from its original recordation, and that thereafter, by virtue of the statute, it ceased to be valid as against creditors of the mortgagor and subsequent purchasers or incumbrancers in good faith. But he says that the defendant in error having taken the chattel mortgage upon which he bases his claim, after the plaintiff had filed his petition in the present action for the purpose of foreclosing his lien and securing possession of the specific personal property covered by both mortgages, no interest adverse to his title was acquired.

We think the contention of counsel is well taken. Section 4732 reads as follows:

"When the petition has been filed, the action is pending, so as to charge third persons with notice of its pendency, and while pending no interest can be acquired by third persons in the subject-matter thereof as against the plaintiff's title; but such notice shall be of no avail unless the summons be served or the first publication made within sixty days after the filing of the petition."

The Supreme Court of New Mexico, in passing upon the effect, as between the par-

ties, of failure to refile a chattel mortgage, under a statute similar to our own held that the failure to refile a copy of a chattel mortgage is not fatal to the instrument, nor does it affect its validity as between the parties or those with actual notice thereof. Hunt v. Gragg et al., 19 N. M. 450, 145 Pac. 136.

If the first chattel mortgage herein was good as between the parties, notwithstanding it was not refiled, and this is not seriously disputed, then when the petition was filed, the action being for foreclosure and the possession of specific personal property, no interest could be acquired by third persons in the subject of the action, as against the plaintiff's title. The statute seems to be quite clear on this point, and its applicability is not seriously denied by counsel for the plaintiff in error, unless, as they contend, the doctrine of *lis pendens* does not apply to personal property. We are unable, however, to agree with this contention. So far as concerns the extension of the rule to personalty, it may be urged that every consideration of necessity and of public policy which demands and justifies the law of *lis pendens*, as applied to real estate, also demands and justifies the application of the same law to personal property. In fact, the ease with which personalty could be transferred to parties having no notice of the litigation is much greater than in the case of real estate. The probability of the defendant's entirely defeating the object of the suit by a transfer of the property *pendente lite* is rather greater in the case of personal than of real estate; and the necessity of some law prohibiting such transfer, to the prejudice of the prevailing party, is therefore greater in the former case than in the latter. While there are decisions implying that *lis pendens* does not apply to personal property, the decided weight of authority is in favor of extending the doctrine to such property. 17 R. C. L. § 18, tit. *Lis Pendens*.

In this action which involves the foreclosure of a lien on the possession of specific personal property, filing the petition protected the plaintiff to the extent of preventing the acquisition of any interest by third persons in the subject-matter thereof, as against the plaintiff's title. Marshall v. Shepard, 23 Kan. 321. That the plaintiff's title was sufficient to entitle him to invoke this section of the statute, see Holland v. Cofield, 27 Okl. 469, 112 Pac. 1032, where it was held that the word "title," as used in the statute, must be construed "in its broadest meaning and most comprehensive signification."

For the reasons stated, the judgment of the court below is reversed and remanded, with directions to proceed in accordance with the views herein expressed.

OWEN, C. J., and RAINEY, JOHNSON, and HARRISON, JJ., concur.

(76 Okl. 165)

CARDEN et al. v. HUMBLE. (No. 8541.)(Supreme Court of Oklahoma. April 8, 1919.
Rehearing Denied Oct. 14, 1919.)*(Syllabus by the Court.)***1. APPEAL AND ERROR ⇐1001(1)—VERDICT AND JUDGMENT REASONABLY SUPPORTED BY EVIDENCE SUSTAINED.**

In an action for the recovery of money and for specific real property, the same is triable by a jury, and when such a case is tried to a jury, and there is evidence reasonably tending to support the verdict of the jury and the judgment of the trial court, the judgment of the lower court will not be disturbed.

2. TRIAL ⇐280(1) — INSTRUCTION SUBSTANTIALLY COVERED BY THOSE GIVEN PROPERLY DENIED.

It is not error to refuse to give a requested instruction that correctly states the law, if substantially the same instruction is embodied in the charge of the court to the jury and the charge as a whole correctly states the law applicable to the facts in the case.

3. INDIANS ⇐16(1)—ORAL LEASE FOR YEAR OF FARMING LAND AFTER PENDING LEASE VALID.

An oral agricultural lease upon the lands of a full-blood Cherokee may be made during the existence of a valid and unexpired lease, for the ensuing year, but only for a fair rental, and near the expiration of a valid lease, that the tenant may know what he has to depend on for the ensuing year, but in no case can the oral lease be for more than one year.

4. APPEAL AND ERROR ⇐1047(1)—IMPROPER ADMISSION OR REJECTION OF EVIDENCE, IF NOT PREJUDICIAL, HARMLESS.

The improper admission or rejection of evidence, if not prejudicial to the party complaining, is not grounds for reversal.

5. SUFFICIENCY OF EVIDENCE.

Evidence in the case at bar examined, and held sufficient to sustain the judgment of the trial court.

Error from District Court, Craig County; Preston S. Davis, Judge.

Suit for injunction by John D. Humble against Frank Carden, William Pace, and Pearl Smith, with cross-petition by defendants, and suit by William Pace against John D. Humble. Cases consolidated for trial and judgment for plaintiff Humble against Pace, Carden, and Smith, and they bring error. Affirmed.

W. T. Rye and W. H. Kornegay, both of Vinita, for plaintiffs in error.

Seymour Riddle and Albert D. Bennett, both of Miami, for defendant in error.

McNEILL, J. John D. Humble filed suit in the district court of Craig county asking for an injunction against Frank Carden, William Pace, and Pearl Smith, to enjoin

said defendants from trespassing on certain lands and for damages. The defendants below asked possession of said premises and filed a cross-petition, this being in case No. 1860. William Pace filed suit against the plaintiff, being case No. 1893, and asked for damages against John D. Humble in the sum of \$3,000, for trespassing on this same land. John D. Humble claimed possession of said land by reason of an oral lease, and Pace and others claimed possession of said land by reason of a written lease. The cases were consolidated and tried to a jury, and the jury found in favor of Humble and against Pace and others and fixed the damages in the sum of \$100.

[1] The first assignment of error is that the court erred in overruling the motion for new trial, and states:

"This being a nonjury case, the appellate court will review and weigh the evidence, and, if the weight of evidence is against the judgment of the lower court, the appellate court will reverse the judgment."

Section 4993 of the Revised Laws of 1910 is as follows:

"Issues of law must be tried by the court, unless referred. Issues of fact arising in actions for the recovery of money, or of specific real or personal property, shall be tried by a jury, unless a jury trial is waived, or a reference be ordered, as hereinafter provided."

This was a cause for the recovery of money and the possession of specific real property and was strictly a jury case. The law governing the weight given to the finding of the jury has been laid down by this court as follows:

"Where there is evidence reasonably tending to support the verdict of the jury or the judgment of the trial court, the judgment of the lower court will not be disturbed." Frazier Brick Co. v. Herber (Ardmore Nat. Bank) 162 Pac. 205; Berryhill v. Thrailkill, 160 Pac. 874; Kapp v. Levysen, 160 Pac. 457, 58 Okl. 651; Eoff v. Alexander, 161 Pac. 807; First Nat. Bank of Checotah v. Lewis, 161 Pac. 175. (Only one of the above cases has been officially reported.)

[5] The evidence was conflicting; the defendant Humble's contention being that he had been renting said land by verbal agreement for four or five years prior to the institution of this suit for a year at a time, and that in October, 1914, he again rented the land for the year 1915. This was denied, and the plaintiff in error claimed possession by virtue of a written lease, which had been approved by the Department of Interior. The case was tried on a question of fact, and the evidence being conflicting, the jury made its findings upon said issue of fact, and the verdict having been approved by the trial court, this court will not disturb the same on appeal if there is any evidence

reasonably tending to support said verdict. From an examination of the record there was sufficient evidence to support the findings of the jury.

[2] The plaintiff complained that the court refused to give instructions Nos. 2, 3, 4, and 5 offered on behalf of plaintiff in error. Instruction No. 2 offered by said plaintiff in error was incorporated in instruction No. 7, given. Instruction No. 4, requested by the plaintiff in error, we do not think correctly stated the law, but the portion of the same that correctly stated the law was incorporated in instructions Nos. 3 and 6, given. Instruction No. 3, being a peremptory instruction, was properly refused by the court. Instruction No. 5 was on the question of damages. The court submitted the measure of damages that each party would be entitled to in instruction No. 5 given by the court. This was not excepted to by plaintiffs in error, and, the jury having found that Humble was rightfully in possession of the premises, the measure of damages the plaintiff in error would be entitled to would not be material, as the jury found they were not entitled to possession.

This court has laid down the following rule as to instructions:

"It is not error to refuse to give an instruction that correctly states the law, if substantially the same instruction is embodied in the charge of the court to the jury and the charge, taken as a whole, correctly states the law." *St. Louis & S. F. Ry. Co. v. Walker*, 31 Okl. 494, 122 Pac. 492.

[4] The next assignment of error was: The court permitted, over the objection of the plaintiffs in error, the following questions and answers:

"Q. Did you consult any attorney in the statement of facts of your lease? A. Yes.

"Q. Who did you see? A. Mr. Thompson.

"Q. What did you do after you consulted your attorney, Mr. Thompson? A. I went back and went to work."

These questions were objected to by plaintiff in error and overruled. No evidence was introduced as to what instructions Mr. Thompson gave to the defendant in error, Humble, and we are unable to see in what way the same was prejudicial or could in any way influence the jury.

This court has held:

"The improper admission or rejection of evidence, if not prejudicial to the party complaining, is not ground for reversal." *City of Anadarko v. Argo*, 35 Okl. 115, 128 Pac. 500.

The next question presented is: Excessive damages. There was no complaint made as

to the instruction given by the court as to the measure of damages. This controversy arose over the possession of some 500 acres of land. While it is true the defendant in error was in possession of the same, still we are unable to say from the evidence that the judgment for \$100 would be excessive.

[3] The next question presented by plaintiff in error deals with the question of full-blood Cherokees leasing the land which included their homestead without the consent of the Secretary of the Interior, for a period of one year. Counsel in his brief, after citing section 19 of the Act of April 28, 1906, c. 1878, 34 Stat. 144, and the Act of May 27, 1908, c. 190, 35 Stat. 312, states as follows:

"It is probable that Congress intended to confer the power on a full-blood to lease his homestead for one year, but the act does not so provide, unless the Secretary of the Interior approves. The prohibition is against alienation of the homestead at all. With the approval of the Secretary of the Interior, a lease could be made for more than a year, making the inference that without the approval it could be made for one year and no more."

The courts have adopted or practically adopted the rule that a full-blood may lease the homestead for a period of one year by verbal lease as stated in the case of *U. S. v. Noble*, 237 U. S. 74, 35 Sup. Ct. 532, 59 L. Ed. 844. Then the same rule and reason would apply to a lease to begin in the future that would apply to a written lease for five years to begin in the future. This court has laid down the following rule in the case of *Hudson v. Hildt*:

"A valid lease for agricultural purposes of a restricted Creek allotment may be made during the existence of a prior, valid lease, provided it is made for a fair rental, near the termination of the existing lease, and that it does not extend the term more than five years from the date of the last lease." *Hudson v. Hildt*, 51 Okl. 359, 151 Pac. 1063; *Brown v. Van Pelt*, 166 Pac. 102.

Under the reasoning of the above-entitled cases, an oral lease made in September or October, 1914, for a fair consideration, beginning January 1, 1915, for the year 1915, is valid, although there was a valid lease on said land, which did not expire until December 31, 1914.

We see no material error in the record or in the assignment of errors pointed out by the plaintiffs in error.

The judgment of the trial court is therefore affirmed.

All the Justices concur.

(76 Okl. 9)

WALCHER et al. v. FIRST PRESBYTERIAN CHURCH OF NORMAN, OKL.
(No. 10414.)

(Supreme Court of Oklahoma. Sept. 16, 1919.
Rehearing Denied Oct. 14, 1919.)

(Syllabus by the Court.)

1. MUNICIPAL CORPORATIONS \S 611 — NUISANCE \S 61—LAUNDRIES MAY BE REGULATED THOUGH NOT "NUISANCE PER SE."

A laundry is not a "nuisance per se," but acting under the police and sanitary powers a city may regulate the establishment and operation of same.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Nuisance Per Se.]

2. CONSTITUTIONAL LAW \S 296(1)—MUNICIPAL REGULATION OF LAUNDRIES NOT WITHOUT DUE PROCESS OF LAW.

It is not depriving one of his property without due process of law for a city, acting under its police and sanitary powers, to regulate by ordinance a business deleterious to public health, morals, safety, or welfare of its inhabitants.

3. MUNICIPAL CORPORATIONS \S 625—ORDINANCES TO PROMOTE PUBLIC HEALTH AND WELFARE MUST BE REASONABLE.

An ordinance of a regulatory nature in contravention of the natural rights of individuals must be reasonable, and a court must be able to see that it will tend to promote the public health, morals, safety, and welfare.

4. EVIDENCE \S 5(1), 14—COURT WILL TAKE JUDICIAL NOTICE OF CHANGING CONDITIONS IN MANNER OF LIVING.

A court, in passing upon an ordinance of a regulatory nature as to whether it is reasonable and will tend to promote the public health, morals, safety, or welfare, can take judicial notice of the changing conditions in manner of living and matters of common knowledge.

5. CONSTITUTIONAL LAW \S 239, 295—LIVERY STABLE AND GARAGE KEEPERS \S 4½—MUNICIPAL CORPORATIONS \S 611, 625 — POLICE AND SANITARY REGULATION OF LOCATION OF LAUNDRIES AS TO CHURCHES AND SCHOOLS DUE PROCESS OF LAW.

In the instant case, plaintiffs attempted to install machinery and operate a laundry within 10 feet of the First Presbyterian Church of the City of Norman, in violation of an ordinance prohibiting the installation and operation of an oil mill, tannery, cotton gin, steam laundry, machine shop, garage, or blacksmith shop within 150 feet of a church, school, or hospital, on the theory that the ordinance was void and in violation of the fourteenth amendment of the federal Constitution. *Held*, that such an ordinance is of a regulatory nature and reasonable, and within the police and sanitary powers of a city to enact and enforce, and not in violation of the fourteenth amendment to the federal Constitution.

Error from District Court, Cleveland County; F. B. Swank, Judge.

Suit for injunction by the First Presbyterian Church of Norman, Okl., against C. T. Walcher and others. Judgment for plaintiff, and defendants bring error. Affirmed.

T. C. Whiteley, of Guthrie, for plaintiffs in error.

W. L. Eagleton, of Norman, for defendant in error.

HIGGINS, J. The city council of the city of Norman passed an ordinance prohibiting certain business within 150 feet of church, school, or hospital; the second section of the ordinance being as follows:

"It shall be unlawful for any person, partnership or corporation to install, maintain, carry on, operate or run an oil mill, tannery, cotton gin, steam laundry, machine shop, garage, or blacksmith shop within 150 feet of any church building, school house or hospital, within the limits of the city of Norman, Oklahoma, and the carrying on, maintaining or running of any of the above mentioned businesses within said 150 feet of any church, school building or hospital be and the same is hereby declared to be a nuisance and subject to abatement upon suit of any citizen or organization affected thereby."

The plaintiffs in error, believing the ordinance to be void, installed machinery and began to operate a laundry within 10 feet of the First Presbyterian Church of that city. Upon suit being brought by the church, the lower court, by virtue of the ordinance, restrained the operation of the laundry, whereupon an appeal was taken to this court.

[1-3] The plaintiffs in error contended that the ordinance declares a laundry a nuisance per se, which is beyond the power of the city council so to do, and is in violation of the fourteenth amendment of the Constitution of the United States, and cites as authority the following opinions: *In re Tie Loy* (C. C.) 26 Fed. 611; *In re Sam Kee* (C. C.) 31 Fed. 680; *In re Lee Sing* (C. C.) 43 Fed. 359; *In re Hong Wah* (D. C.) 82 Fed. 624; *Soon Hing v. Crowley*, 113 U. S. 703, 5 Sup. Ct. 730, 28 L. Ed. 1145; *Yick Wo v. Hopkins*, 118 U. S. 389, 6 Sup. Ct. 1064, 30 L. Ed. 220.

The defendant in error contends that the ordinance does not declare a laundry a nuisance per se, but merely regulates the operation of same, and cites the following cases: *Ex parte Jones*, 4 Okl. Cr. 74, 109 Pac. 570; *Duncan Electric & Ice Co. v. City of Duncan*, 166 Pac. 1048; *In re Lacey*, 108 Cal. 326, 41 Pac. 411, 38 L. R. A. 640, 49 Am. St. Rep. 93.

The cases cited by plaintiffs in error arose in California, where certain cities passed ordinances apparently intended to place restrictions upon Chinese operating laundries, by either declaring the same to be a nuisance and preventing the operation of same in the city, or in certain portions of same, which was usually a major portion, or by requiring a certain percentage of the property owners to agree thereto, or that a certain permit must

be first obtained, and leaving it to the arbitrary act of some city official to grant or refuse this permit.

26 Cyc. 727, lays the following law down:

"Under power to regulate laundries municipalities may require as police regulations that laundries shall be confined to certain parts of the city, and that they shall be carried on only in buildings of brick or stone, and within certain reasonable hours. But it seems that an ordinance is invalid which requires the consent of a certain number of tax payers and citizens of the vicinity for the establishment of the business."

Ex parte Lacey, supra, is a case very similar to the case at bar. The city of Los Angeles by ordinance prohibited a steam shoddy and carpet beating machine within 100 feet of a church, schoolhouse, or residence. Lacey disregarded this ordinance, claiming the same to be void for the reason given by plaintiffs in error in this case, was tried, convicted, and imprisoned, and sought release on a writ of habeas corpus. In discussing the legality of the ordinance the court stated:

"We see nothing in the language of this ordinance contrary to the great principles of our government. We see nothing there depriving petitioner of any fundamental right. In the exercise of its police and sanitary power, the city has attempted to regulate the business of beating carpets by steam power. Under its constitutional grant, it had the right to regulate this business. The use of steam power, of itself, within municipal territory, has always been recognized as a proper subject of regulation; and, in addition, here it may well be assumed that the dust and other disagreeable and unhealthy matters arising in such quantities from the beating of carpets, as would naturally be indicated by the use of steam power, are a constant source of danger and menace to the good health and general welfare of the neighborhood where located.

"Conceding the business covered by the provisions of this ordinance not to constitute a nuisance per se, and to stand upon different grounds from power factories, street obstructions, and the like, still the case is made no better for petitioner. This is not a question of nuisance per se, and the power to regulate is in no way dependent upon such conditions. Indeed, as to nuisances per se, the general laws of the state are ample to deal with them. But the business here involved may properly be classed with livery stables, laundries, soap and glue factories, etc.—a class of business undertaking in the conduct of which police and sanitary regulations are made to a greater or less degree by every city in the country. And in this class of cases it is no defense to the validity of regulation ordinances to say, 'I am committing a nuisance, and I insist upon being heard before a court or jury upon that question of fact.' In this class of cases a defendant has no such right. * * *

"It cannot be urged that petitioner is deprived of his property without due process of law, for, as is said by Judge Dillon in his work upon Municipal Corporations (section 141), in speaking of police and sanitary regulations: 'It is

well settled that law and regulations of this character, though they may disturb the enjoyment of individual rights, are not unconstitutional, though no provision is made for compensation for such disturbances.'"

We find that the ordinance of the city of Norman does not declare laundries a nuisance per se, but merely regulates the same, and being within the police powers of a city, looking to the public health, safety, or welfare of the inhabitants of the city, is not a violation of the fourteenth amendment to the Constitution of the United States.

[4, 5] An ordinance of a regulatory nature in contravention of the natural rights of individuals must be reasonable; that is, the court must be able to see that it will tend to promote the public health, morals, safety, or welfare. 19 Ruling Case Law, 112. A court passing upon an ordinance of regulatory nature in deciding whether it is reasonable can take judicial notice of matters of common knowledge and of changing conditions in manner of living. It is within the memory of those of this age that the washing of clothes formerly was the work of the household, or some poor person living in the community, then the Chinese came along and opened up what was called a laundry, usually consisting of one or two rooms, the work being done by hand, and such was the fact when the opinions of the federal court above cited were written. But as time passed, the population became more dense, labor-saving machinery was invented, great numbers employed, and the soiled clothes of a city, from those in all walks of life, were gathered at one place to be made clean. In addition to the cleansing, there is now the noise of machinery, many voices, smoke from the steam boilers, all of which would have a tendency to greatly disturb the quietude of those at public worship, children at school, or the sick in hospitals. Consequently, we find that, under the present well-known conditions, it is within the police powers of a city, looking to the public health, safety, and welfare of its inhabitants, to pass such regulatory ordinances as the one in question, and that such an ordinance is not unreasonable, arbitrary, or discriminating.

In the instant case, the contract for the rental of the building was let before the passage of the ordinance; but such, we find, does not take away from a city its police and sanitary powers to regulate the business in question. The machinery was installed and operation of the laundry was begun after the passage of the ordinance, and in the face of same, as to the power of a city to regulate an established business, by requiring it to seek other locations therein, we express no opinion.

Judgment affirmed.

(74 Okl. 312)

HART-PARR CO. v. DUNCAN.
(No. 7825.)(Supreme Court of Oklahoma. Oct. 17, 1916.
Rehearing Denied Oct. 14, 1919.)*(Syllabus by the Court.)***1. ATTACHMENT §250—ON MOTION TO DISCHARGE HEARING UPON AFFIDAVITS AND OTHER EVIDENCE NECESSARY.**

While the statutory proceeding upon a motion to discharge an attachment is entirely interlocutory, not affecting the merits of the original action, and a "trial" in a strict legal sense is not contemplated, yet when the grounds of attachment are controverted by motion to discharge, a hearing upon the affidavits or other evidence adduced is required, and a determination of the questions of fact and law must necessarily be had. Upon such hearing the rules of law ordinarily governing the trial of such questions ought properly to be applied by the court or judge to whom the motion is presented.

2. MOTION TO DISCHARGE ATTACHMENT — DEMURRER TO EVIDENCE.

Record examined, and *held* error to sustain a demurrer to the evidence offered to sustain the ground of attachment set forth in the affidavit.

Commissioners' Opinion, Division No. 3.
Error from District Court, Tillman County; T. P. Clay, Judge.

Action by the Hart-Parr Company against Joseph T. Duncan. From an order discharging an attachment, plaintiff brings error. Reversed and remanded for hearing on the motion to discharge attachment.

Mounts & Davis, of Frederick, Fred R. Ellis, of Lawton, and Chester I. Long and Austin M. Cowan, both of Wichita, for plaintiff in error.

Wilson & Roe, of Frederick, for defendant in error.

BLEAKMORE, C. This is an appeal from an order of the district court of Tillman county discharging an attachment.

On July 15, 1915, the plaintiff commenced action against defendant to recover on certain promissory notes evidencing the purchase price of machinery sold by it to defendant. Upon the filing of proper affidavit and bond, an order of attachment was issued and levied upon the property of defendant; the ground of attachment being that—

"The defendant fraudulently contracted the debt, or fraudulently incurred the liability or obligation for which the suit is brought."

On October 2, 1915, defendant moved the discharge of the attachment; the motion being accompanied by his affidavit stating:

"That the alleged grounds for attachment contained in plaintiff's affidavit herein are wholly untrue, and this affiant specifically denies that he fraudulently contracted the debt sued on by

plaintiff herein, and further specifically denies that he fraudulently incurred the liability or obligation for which this suit is brought. And this affiant further says that said obligation was incurred by him entirely in good faith and without fraud of any kind on his part; and further affiant saith not."

Upon hearing of said motion the court sustained a demurrer to the evidence of plaintiff and ordered the attachment discharged.

[1] The sole question for consideration is whether the trial court erred in sustaining such demurrer.

The evidence offered by plaintiff, consisting of affidavits, documents, and oral testimony, disclosed that defendant gave his order to the plaintiff for certain machinery, accompanying and as a part of which was a financial or property statement signed by him setting forth that he was the owner of, and had good title duly registered to, 320 acres of land in Tillman county, Okl., of the value of \$13,000, incumbered to the extent of \$4,600; that the plaintiff, believing such statement to be true and relying thereon, accepted such order and sold to him the machinery; that in fact he was not the record owner of but 80 acres of land in said county.

While the statutory proceeding upon a motion to discharge an attachment is entirely interlocutory, not affecting the merits of the original action, and a "trial" in a strict legal sense is not contemplated, yet, when the grounds of attachment are controverted by motion to discharge, a hearing upon the affidavits or other evidence adduced is required, and a determination of the questions of fact and law must necessarily be had. Upon such hearing the rules of law ordinarily governing the trial of such questions ought properly to be applied by the court or judge to whom the motion is presented.

"A demurrer to the evidence admits all facts proven, admits the existence of the facts which there is evidence tending to prove, and all the reasonable inferences which may be drawn from the evidence. The question on demurrer is: Does the evidence, considering only that which is favorable to the demurree and yielding to him the full benefit of the reasonable inferences which it supplies and furnishes, entitle him to recover?" *Crow v. Crow*, 40 Okl. 455, 139 Pac. 122.

The statement made by defendant was obviously for the information of the plaintiff and to be acted upon by it in the particular transaction involved. The plaintiff was authorized to rely upon it independently of any search of the county records to ascertain and establish its truthfulness. That it did so rely in extending credit to the defendant, and that the statement was materially false, is undisputed.

[2] The evidence adduced, uncontradicted, together with the reasonable inferences which it supplies, in our opinion, strongly

tends to establish the ground of attachment set forth in the affidavit. It should have been considered and weighed by the court, and order made thereon determining the question of fact involved. The demurrer was therefore erroneously sustained.

The order discharging the attachment should be set aside, and the cause remanded for hearing on the motion to discharge.

PER CURIAM. Adopted in whole.

(76 Okl. 192)

ARMSTRONG v. PHILLIPS et al.
(No. 9458.)

(Supreme Court of Oklahoma. Oct. 14, 1919.)

(Syllabus by Editorial Staff.)

1. VENDOR AND PURCHASER ⇐221—STATUTORY PROVISION THAT DEFEASANCE MUST BE RECORDED REPEALED BY STATUTE AS TO INNOCENT PURCHASERS.

Rev. Laws 1910, § 1158, defining the rights of innocent purchasers, having been enacted in 1897 and being in conflict with section 4021 in the Statutes of 1890, providing that defeasance must be recorded, repealed that section by implication until the adoption of the 1910 Code.

2. VENDOR AND PURCHASER ⇐221—STATUTE RELATING TO BONA FIDE PURCHASERS OVERCOME BY PROVISION OF REVISION — "LATTER."

Rev. Laws 1910, § 1158, defining rights of innocent purchasers, though adopted by Legislature as part of the Code at same time it adopted section 4021, requiring a defeasance to be recorded, conflicts with that section on same subject-matter, and under section 8158, the latter section 4021 prevails over section 1158; "latter," as used in section 8158, referring to place or arrangement in the Code.

On rehearing. Former opinion modified, and petition denied.

For former opinion, see 181 Pac. 715.

PER CURIAM. In the original opinion it is said, in effect, that when section 1158, Rev. Laws of 1910, is considered, that the very most defendant Frank Phillips and those claiming under him were entitled to was protection for the purchase price paid, etc., as provided by said section. On rehearing it is urged that section 4021, Rev. Laws of 1910, is squarely in conflict with section 1158, supra, and that, in the event it is finally decreed that the deed executed by Minnie Armstrong to her grandfather is a mortgage, the rights of defendant Frank Phillips and those claiming under him are governed by section 4021. This section was not called to the attention of the court in any of the briefs filed in the cause previous to the decision of this

court, and the provisions of this section were overlooked and not considered by the court. The section reads as follows:

"When a grant of real property purports to be an absolute conveyance, but is intended to be defeasible on the performance of certain conditions, such grant is not defeated or affected as against any person other than the grantees or his heirs or devisees or persons having actual notice, unless an instrument of defeasance, duly executed and acknowledged, shall have been recorded in the office of the register of deeds of the county where the property is situated."

[1, 2] It is in the Statutes of 1890. Section 1158 was enacted in 1897, and, being in conflict with section 4021, repealed the same by implication. This was the state of the law on this question until the adoption by the Legislature of the 1910 Code. Both sections were incorporated therein. Section 1158 is found in the Code under the subject of "Conveyances" (chapter 13, p. 291, Rev. Laws of 1910), and section 4021 is found in the Code under the subject of "Mortgages" (chapter 48, p. 1049, Rev. Laws of 1910). It thus appears that these two provisions of the Code were adopted by the Legislature at the same time, and since we are of the opinion, as contended, that they are in conflict and both cover the same subject-matter, it is necessary to determine which controls. The solution of this question is found in chapter 76, § 8158, of the same Code, which reads:

"If the provisions of any Code, title, chapter or article conflict with or contravene the provisions of any former Code, title, chapter or article, the provisions of the latter Code, title, chapter or article must prevail as to all matters and questions arising thereunder out of the same subject-matter."

It seems to us that the clear import of this provision is that if any former Code conflicts with the present Code the present Code shall govern, and that if any chapter, title, or article of the present Code conflicts with the provisions of any former title, chapter, or article in the same Code, the provisions of the latter title, chapter, or article must prevail. We think, under the above rule of construction, the word "latter," as applied to two conflicting provisions in the same Code, must be held to have reference to place or arrangement. From this it follows that section 4021 is the applicable provision.

We have re-examined the record, and are still of the opinion that, as to whether the Minnie Armstrong deed should be deemed a mortgage, plaintiff's evidence is sufficient to withstand the defendant's demurrer. If upon the trial the deed is held to be a mortgage, the burden will be on the defendants to show that they are innocent purchasers.

We therefore adhere to the former opinion, except as herein modified, and the petition for rehearing is denied.

(78 Okl. 162)

DRUMRIGHT et al. v. BROWN et al.
(No. 9394.)(Supreme Court of Oklahoma. July 15, 1919.
Rehearing Denied Oct. 14, 1919.)*(Syllabus by the Court.)***1. CONTRACTS —211—TIME AS ESSENCE OF CONTRACT MUST BE CLEARLY STATED.**

Section 968, Rev. Laws of 1910, provides: "Time is never considered as of the essence of a contract, unless by its terms expressly so provided."

Although no particular form of expression is necessary, it must appear from the plainly expressed provisions contained in a contract, independent of all extraneous matter or circumstances, that it was the intention of the parties thereto that time should be the essence thereof.

2. CONTRACTS —175(2)—EVIDENCE —461(1)—EVIDENCE AS TO PRELIMINARY NEGOTIATIONS SHOWING TIME AS OF THE ESSENCE ADMISSIBLE.

Where plaintiffs allege that time is the essence of a contract, and it does not so appear from the expressed provisions thereof, plaintiffs are not prejudiced by permitting defendants to introduce testimony concerning the negotiations leading up to the execution of the contract for the purpose of showing the intention of the parties thereto; but such preliminary negotiations may not be considered for the purpose of varying or contradicting the plain terms of the instrument.

3. CONTRACTS —301—RECOVERY OF DEPOSIT PERMITTED THOUGH CONTRACT NOT COMPLETED IN SPECIFIED TIME.

Failure to complete a railroad within the time specified in the contract will not defeat the recovery of money deposited in escrow as a consideration for the construction of the road, where time is not shown by the expressed provisions of the contract to be of the essence thereof, and where in all other respects there has been a compliance with its terms.

Error from District Court, Muskogee County; R. P. De Graffenreid, Judge.

Action by Aaron Drumright and others against Frank Brown and others. Judgment for defendants, and plaintiffs bring error. Affirmed.

Earl Foster, of Sapulpa, and Dillard, Allen & Dillard, of Tulsa, for plaintiffs in error.

N. A. Gibson, J. L. Hull, and T. L. Gibson, all of Muskogee, for defendants in error.

RAINEY, J. Aaron Drumright et al., citizens of Drumright, Okl., brought action against Frank Brown, R. D. Long, and the First National Bank of Muskogee to recover \$25,000 deposited by plaintiffs in escrow in

said bank, subject to the terms of a written contract entered into between plaintiffs and defendants, wherein it is provided that defendants Brown and Long shall procure the construction by the Oil Fields & Santa Fé Railway Company of a road from Pemeta, Okl., into and through the town of Drumright; said road to connect with a line already built from Cushing, Okl., to Pemeta, Okl., and with the line from Jennings and Oilton, Okl. It was also provided therein that the construction of the line of railway into the town of Drumright from the town of Pemeta should be completed by the 1st day of July, 1915, and from Jennings and Oilton not later than the 1st day of September, 1915. The fourth section of article 1 of the contract provides:

"If the completion of said line [Jennings and Oilton to Drumright] is delayed to a date later than September 1, 1915, on account of the failure to secure right of way on which to build the same, then the time to complete the same shall be extended after September 1, 1915, equal to the period of such delay."

It is further provided in said contract that the time limit for the construction of said line of railway shall not be binding in the event the construction is delayed on account of failure to get right of way over which to build the road, "provided such failure is caused by delays occasioned by legal proceedings which are being prosecuted with reasonable vigor and dispatch." The road into Drumright from Pemeta was completed by July 1, 1915, but the line from Jennings and Oilton to Drumright was not completed until November 14, 1915.

[1] Plaintiffs contend that time was of the essence of the contract, and that the failure to complete the road from Jennings and Oilton to Drumright by the date of September 1, 1915, constitutes a breach of the contract and a forfeiture of the \$25,000 now on deposit in the First National Bank of Muskogee. Section 968, Rev. Laws of 1910, provides:

"Time is never considered as of the essence of a contract, unless by its terms expressly so provided."

See Snyder v. Stribling, 18 Okl. 205, 89 Pac. 233, affirmed in Snyder v. Rosenbaum, 215 U. S. 261, 30 Sup. Ct. 73, 54 L. Ed. 186.

Although no particular form of expression is necessary, it must appear from the plainly expressed provisions of the contract, independent of all extraneous matter or circumstances, that it was the intention of the parties thereto that time should be the essence thereof. Standard Lumber Co. v. Miller & Vidor Lbr. Co., 21 Okl. 617, 96 Pac. 761; Wiebener et al. v. Peoples, 44 Okl. 32, 142 Pac. 1036, Ann. Cas. 1916E, 748; Shenners v. Adams, 46 Okl. 368, 148 Pac. 1023.

[2] Plaintiffs allege error, in that the trial court permitted defendants to introduce testimony as to the negotiations leading up to the signing of the contract; the purpose of this testimony being to show that the parties to the contract did not have in mind making time as of the essence thereof. A literal interpretation of the statute would preclude plaintiffs' recovery on the theory that time is of the essence of the contract, because it was nowhere shown that time was stipulated to be of the essence thereof. It is therefore difficult to see wherein plaintiffs could be prejudiced by the introduction of testimony tending to show what importance the parties attached to the date specified for the completion of the road. In case of doubt as to the meaning, all the negotiations between the parties should be considered in construing a contract. 13 Corpus Juris, 544, § 515, and cases therein cited; Lamont Gas & Oil Co. v. Doop & Frater, 39 Okl. 427, 135 Pac. 393; Farley v. Board of Education, 162 Pac. 797; Bearman v. Dux Oil & Gas Co., 166 Pac. 199.

The rule, however, is that, whereas preliminary negotiations between the parties to a contract may be considered for the purpose of determining their meaning and intention, they may not be considered for the purpose of varying or contradicting the plain terms of the instrument. 6 Ruling Case Law, 229, § 228. Under section 968, Rev. Laws of 1910, heretofore quoted, the plaintiffs assume the burden of proving time to be of the essence of the contract, unless they can point out wherein by its terms it is expressly so provided, and it was not error for the trial court to permit defendants to introduce testimony as to the preliminary negotiations leading up to its execution.

The trial court found that time was not of the essence of the contract, and, after a careful reading of the counsel's briefs and a review of the evidence in the record, we are of the opinion that the trial court was correct in its findings of fact and conclusions of law. While the testimony, in some respects, is conflicting, it strongly indicates that the primary object of the citizens of Drumright was to secure the construction of a railroad into the city at a reasonably early date. A road had been constructed from Cushing east to Pemeta, and there was danger, if a line was not built into Drumright, that business would be drawn away from Drumright to Pemeta, and that eventually the industries and inhabitants of Drumright would locate at Pemeta, where shipping facilities could be had. The closing of the contract to construct the road into Drumright from Pemeta removed the fear that people would move from Drumright to Pemeta, and the construction of the road into Drumright from Pemeta destroyed the chance of a rival town at Pemeta, thus se-

curing to Drumright the primary advantage which it was hoped to gain by the contract. The trade advantage coming to Drumright from the north and east through a road from Jennings and Oilton, and the advantages which Drumright would have over Oilton as a trade center from such road, seem to have been a secondary consideration. The time of the completion of the road from Jennings and Oilton to Drumright, therefore, does not seem to have been considered of the essence of the contract.

[3] Plaintiffs also allege error, in that the trial court permitted testimony to be introduced as to the difficulties encountered in the construction of the road and the conclusion of law that the road was completed within a proper extension of time by reason of the failure to secure right of way owing to the impossibility of securing actual possession thereof for the purpose of constructing said road. Inasmuch as we have held that time was not of the essence of the contract, it is unnecessary to discuss that feature of the case. We are convinced, however, that the road was completed within a reasonable time, and, if there was a compliance with the contract in all other respects, the failure to complete the road by the date specified, time not having been shown by the expressed provisions of the contract to be the essence thereof, plaintiffs cannot defeat the recovery by the defendants of the money deposited in escrow awaiting the contingency of the completion of the road.

It is significant that, although plaintiffs now contend that time was of the essence of the contract, no complaint was made until the road had been constructed. It is admitted that the line had not been laid into Drumright from Jennings and Oilton until November 1st, and that the road was not actually completed and freight and passenger traffic commenced thereon into Drumright until November 14th. Plaintiffs notified the bank on November 5, 1915, not to pay over the money to defendants Brown and Long. If plaintiffs had regarded time as of the essence of the contract, such notice would probably have been given not later than September 1, 1915.

The case of Cooper v. Ft. Smith & W. R. Co., 23 Okl. 139, 99 Pac. 735, cited by counsel for plaintiffs, is clearly distinguishable from the case under consideration, for therein it was held that it was the intention of the parties to the contract to make time the essence thereof. The finding of the trial court herein, which is sustained by the terms of the contract and by the testimony, was that it was not the intention of the parties to make time of the essence of the contract. Likewise other cases cited by plaintiffs in error are distinguishable from the case under consideration.

The conclusion we have reached renders

It unnecessary to consider other errors alleged by plaintiffs.

The judgment of the lower court is accordingly affirmed.

OWEN, C. J., and KANE, HARRISON, and JOHNSON, JJ., concur.

(76 Okl. 42)

COVINGTON v. CATER. (No. 10087.)

(Supreme Court of Oklahoma. Sept. 30, 1919.)

(Syllabus by the Court.)

1. APPEAL AND ERROR \S 529(2)—MOTION TO REINSTATE AND TO VACATE DISMISSAL NOT PART OF BILL OF EXCEPTIONS.

Where a party seeking to reverse an order of the district court in overruling a motion to vacate a former order dismissing an appeal from the justice court and to reinstate the cause attempts to appeal from such order on a transcript of the record containing a bill of exceptions signed and allowed by the trial judge, and when such motion to reinstate the cause and vacate the order of dismissal is not incorporated in the said bill of exceptions, or attached or annexed thereto, or identified in said bill, then said motion is not properly made a part of the bill of exceptions, and therefore not properly made a part of the record in the cause, and this court will not review the action of the trial court in overruling the same.

2. EXCEPTIONS, BILL OF \S 9 — INCORPORATION OF PAPER AS PART OF BILL OF EXCEPTIONS.

If a paper which is to constitute a part of the bill of exceptions is not incorporated in the body of the bill, it must be annexed to it, or so marked by means of identification mentioned in the bill as to leave no doubt, when found in the record, that it is the one mentioned or referred to in the bill of exceptions.

3. APPEAL AND ERROR \S 635(1)—MOTION TO REINSTATE CAUSE NOT PRESERVED IN BILL OF EXCEPTIONS NOT REVIEWABLE.

A motion to reinstate a cause, not preserved in the transcript by bill of exception, so as to make it a part of the record, cannot be considered, and where the only error complained of is the ruling on the motion to reinstate, and such motion was not incorporated in the bill of exceptions, the same cannot be considered here on appeal, and the appeal will be dismissed.

Error from District Court, Mayes County; Preston S. Davis, Judge.

Action by W. H. Cater against D. W. Covington. Judgment in justice's court for plaintiff, defendant's appeal to the district court dismissed, and from an order therein overruling his motion to reinstate the cause, he brings error. Dismissed.

T. C. Wilson, of Pryor, for plaintiff in error.

J. M. Hill, of Pryor, for defendant in error.

McNEILL, J. This action was originally instituted in the justice court of Mayes county, Okl., where judgment was rendered for plaintiff in the sum of \$87.50, interest and costs, defendant appealing to the district court of Mayes county, where the appeal was dismissed on January 8, 1919. On January 11, 1919, appellant in the district court filed a motion in said court to reinstate the cause, which upon hearing on January 15, 1919, was overruled, from which order of the district court overruling the motion to reinstate the case the defendant appeals to this court on a transcript of the record and bill of exceptions included therein, the appeal being filed in this court on July 15, 1919.

Defendant in error has filed a motion to dismiss the appeal assigning four reasons therefor:

[1, 2] The first reason assigned for the dismissal is that the appeal was not lodged in this court within six months from the date of entry of the judgment appealed from. The judgment was rendered on an order appealed from January 15, 1919, and the appeal filed in this court July 15, 1919, which is within six months from the date of the judgment appealed from.

The next ground for dismissal urged by counsel is that the certificate of the transcript does not show that the record is a full, true, and complete transcript of the record in the case. An examination of the certificate shows that it substantially complies with the rules of this court as to a proper certificate for a transcript of the record with the additional statement that it contains a bill of exceptions allowed and signed by the judge of the court. This objection is not well taken. But it is next contended that the motion sought to be reviewed, not being incorporated in the bill of exceptions signed by the judge, nor made part of the record by case-made, cannot be considered on the transcript, and the appeal should therefore be dismissed.

This court has held in the case of Hicks v. Gay, 31 Okl. 150, 120 Pac. 636:

"A motion to reinstate a cause, not preserved in the transcript by bill of exceptions so as to make it a part of the record, cannot be considered."

To the same effect is the rule announced by this court in the case of Williams v. Kelly (not yet officially reported) 176 Pac. 204; Collins v. Garvey, 171 Pac. 330; Wyant v. Beavers, 162 Pac. 732; Miller v. Markley, 49 Okl. 177, 152 Pac. 345; Vannier v. Frat. Ass'n, 40 Okl. 732, 140 Pac. 1021.

The question then presented is: Is the mo-

tion sought to be reviewed incorporated in the bill of exceptions signed by the judge? The purported bill of exceptions sets out the ruling on the motion to reinstate, but does not set out the motion to reinstate, neither does it refer to the motion to reinstate the cause, nor identify the same by any reference other than the statement that the court overruled said motion to set aside the order of dismissal, and overruled the motion to reinstate the case. The record contains a copy of the motion to reinstate the cause, but it is not annexed or attached to the bill of exceptions, either as an exhibit or part of such bill. It only shows that it was filed in the court clerk's office in the cause on January 11, 1919. We are of the opinion that this is not sufficient to make the said motion a part of the bill of exceptions.

This court, in the case of *Bruce v. Casey-Swasey Co.*, 13 Okl. 554, 75 Pac. 280, held in a case somewhat similar that:

"A reference in a bill of exceptions to an affidavit as 'Exhibit A,' and not otherwise incorporated, is not sufficient to make it a part of the bill of exceptions. It must be annexed to the bill and be embodied in it in order to be a part of it."

"Affidavits used on a motion, to become a part of the record in such a way as to enable the Supreme Court to review the same, must be made part of the record by bill of exceptions or incorporated into the case-made."

A discussion of the question here presented is found in an opinion written by Mr. Justice Brewer of the Supreme Court of Kansas, in which it is held:

"The office of a bill of exceptions is to bring upon the record some portion of those proceedings which do not of right and of course go upon the record. * * * It is itself a part of the record. But a record must speak for itself. It must show upon its face all that it is. It must be its own evidence of all that it contains. No part of its contents may rest upon the discretion of the clerk, the recollection of the judge, or the testimony of counsel. But, to insure this certainty, is it essential that everything be written out in full, every document and writing copied into the bill before signature? Such appears to be the import of some of the authorities cited; but that seems to us unnecessary stringency, and to impose needless clerical labor. Where a deposition or other writing is to be made a part of a bill, it can be referred to with such marks of identification as to exclude all doubt. That surely ought to be sufficient; and so we think the better authorities hold. But these things must exist to exclude all doubt:

"(1) The bill in referring to such extrinsic document must purport to incorporate it into and make it a part of the bill. A mere reference to the document, although such as to identify it beyond doubt, or a statement that it was in evidence, is not sufficient, for such reference and statement do not make it certain that judge

or counsel intended that it should be copied into and made a part of the bill."

A. & N. R. Co. v. Wagner, 19 Kan. 335.

[2] The Supreme Court of the United States, in the case of *Leftwich v. Lecanu*, 4 Wall. 187, 18 L. Ed. 388, said:

"If a paper which is to constitute a part of a bill of exceptions is not incorporated into the body of the bill, it must be annexed to it, or so marked by letter, number, or other means of identification mentioned in the bill, as to leave no doubt, when found in the record, that it is the one referred to in the bill of exceptions."

We are therefore of the opinion that the motion to reinstate the cause has not been properly brought into and made a part of the bill of exceptions signed by the trial judge, and hence cannot be reviewed here on a transcript of the record.

For the reason stated, the appeal is dismissed.

OWEN, C. J., and SHARP, RAINEY, JOHNSON, PITCHFORD, and HIGGINS, JJ., concur.

(76 Okl. 120)

STATE ex rel. MILLER et al. v. HUSER,
Oklfuskee County Judge. (No. 10517.)

(Supreme Court of Oklahoma. July 15, 1919.
Rehearing Denied Oct. 7, 1919.)

(Syllabus by the Court.)

1. COURTS ~~§~~44—CONGRESSIONAL GRANT OF ADDITIONAL JURISDICTION TO STATE COURTS AND OFFICERS CONSTITUTIONAL.

The judicial power granted by section 1, art. 3, of the Constitution of the United States, is the power to try the ten classes of cases specified in section 2 of that article; but said sections neither expressly nor impliedly prohibit the Congress from conferring judicial power upon other courts, or upon executive or other officers, in other cases, where, in its opinion, the devolution of such power is either necessary or convenient in the execution of the authority granted to the legislative or to the executive department of the government through the Constitution. The congressional power to make such grant and to vest such power in state courts and officers, in such cases, exists by virtue of the established rule that the grant of a power to accomplish an object is a grant of the authority to select and use the appropriate means to attain it. *Levin v. United States*, 128 Fed. 828, 63 C. C. A. 476.

2. COURTS ~~§~~44—CREATION OF TRIBUNALS HAVING ADMINISTRATIVE OR JUDICIAL POWERS AS TO FIVE CIVILIZED TRIBES CONSTITUTIONAL.

The government of the Indians of the Five Civilized Tribes and the management of their property and affairs is a political and administrative function, and the power and duty of the United States to legislate for restricted Indians and their property during the continuance of

the national guardianship over them is well established, and it is entirely competent for Congress to confer upon and delegate to individuals, courts, commissions, boards, tribunals, or other agencies administrative or ministerial duties, even though such duties involve the exercise by them of judicial or quasi judicial power.

3. INDIANS ⇐28—ACT OF CONGRESS CONFERRING POWER ON DISTRICT COURTS AS TO INDIAN LANDS CONSTITUTIONAL.

The Act of Congress of June 14, 1918 (40 Stat. 606, c. 101, sections 4234a, 4234b, Append. Comp. St. 1918), entitled "An act to provide for a determination of heirship in cases of deceased members of the Cherokee, Choctaw, Chickasaw, Creek, and Seminole Tribes of Indians in Oklahoma, conferring jurisdiction upon district courts to partition lands belonging to full-blood heirs of allottees of the Five Civilized Tribes, and for other purposes," is not unconstitutional and void, nor in contravention of sections 1 and 2, art. 3, of the Constitution of the United States, but is a proper and lawful exercise of the political and administrative power and duty of Congress to legislate for restricted Indians of the Five Civilized Tribes concerning their property during the continuance of the national guardianship over such restricted Indians.

4. STATES ⇐4—FEDERAL LEGISLATION WITHIN THE CONSTITUTION SUPREME LAW OF THE LAND.

The national government, though limited in its powers, is supreme, and its laws, when made in pursuance of the Constitution of the United States, form the supreme law of the land, "anything in the Constitution or laws of any state to the contrary notwithstanding." *McCulloch v. Maryland*, 17 U. S. (4 Wheat.) 316, 4 L. Ed. 579.

5. INDIANS ⇐28—CONGRESSIONAL LEGISLATION AS TO INDIANS NOT IMPAIRED BY STATE CONSTITUTION OR LAWS.

The plenary authority of Congress to legislate for full-blood members of the Five Civilized Tribes concerning their restricted lands cannot be limited or impaired by the Constitution or laws of the state, and section 12, art. 7, of the state Constitution, does not prohibit the county courts from exercising the authority conferred on said courts by the Act of Congress of June 14, 1918 (U. S. Comp. St. 1918, §§ 4234a, 4234b, Append.).

6. INDIANS ⇐28—STATE HAS NOT PROHIBITED COUNTY COURTS FROM EXERCISING AUTHORITY CONFERRED BY INDIAN LEGISLATION.

The state has not prohibited county courts from exercising the authority conferred on them by said act, but, on the contrary, has specifically sanctioned it. Chapter 25, Sess. Laws 1919.

7. INDIANS ⇐27(2), 28—FINDINGS OF COUNTY COURTS OF STATE AS TO HEIRSHIP OF DECEASED INDIAN ALLOTTEE CONCLUSIVE.

The power and authority conferred on the county courts by said act, though it involves the exercise by said courts of judicial or quasi judicial power, is not strictly judicial, but is administrative and ministerial, and in determining, pursuant to said act, as a question of fact who are the heirs of any deceased citizen al-

lottee of the Five Civilized Tribes, the court merely finds the facts and fixes the status, which finding, when material to the question at issue, is conclusive and binding upon the state courts and upon the administrative officers of the national government in determining questions arising under acts of Congress to which it is applicable. The act, however, does not deprive the district courts of this state of jurisdiction of suits involving lands allotted to an Indian of the Five Civilized Tribes who may die or may have heretofore died leaving restricted heirs, where such suit necessarily includes the determination of the title, and, incidentally, the question of fact as to who are the heirs of said deceased allottee.

8. INDIANS ⇐28—PROHIBITION WILL NOT LIE TO RESTRAIN COUNTY COURTS FROM DETERMINATION OF RESTRICTED INDIAN HEIRS.

Prohibition will not lie to restrain a county court from proceeding under the Act of Congress of June 14, 1918 (U. S. Comp. St. 1918, §§ 4234a, 4234b, Append.), as an administrative agency of the United States government to determine the question of fact as to who are the restricted Indian heirs of a deceased citizen allottee of the Five Civilized Tribes of Indians.

Original action for writ of prohibition by the State of Oklahoma, on the relation of Hall C. Miller and others, against W. A. Huser, as County Judge of Okfuskee County. Writ denied.

Ernest B. Hughes and John G. Ellinghausen, both of Sapulpa, for relators.

Lewis C. Lawson, of Holdenville, for respondent.

RAINEY, J. This is an original action filed in this court in the name of the state of Oklahoma, on the relation of Hall C. Miller, Ben H. Cash, and A. V. Rupprecht, wherein it is sought to prohibit W. A. Huser, as county judge of Okfuskee county, Okla., from proceeding under the Act of Congress of June 14, 1918, c. 101, 40 Stat. 606 (U. S. Comp. St. 1918, §§ 4234a, 4234b, Append.), entitled:

"An act to provide for a determination of heirship in cases of deceased members of the Cherokee, Choctaw, Chickasaw, Creek, and Seminole Tribes of Indians in Oklahoma, conferring jurisdiction upon district courts to partition lands belonging to full-blood heirs of allottees of the Five Civilized Tribes, and for other purposes."

Said act reading as follows:

"A determination of the question of fact as to who are the heirs of any deceased citizen allottee of the Five Civilized Tribes of Indians who may die or may have heretofore died, leaving restricted heirs, by the probate court of the state of Oklahoma having jurisdiction to settle the estate of said deceased, conducted in the manner provided by the laws of said state for the determination of heirship in closing up the estates of deceased persons, shall be conclusive of said question: Provided, that an appeal may be taken in the manner and to the court

provided by law, in cases of appeal in probate matters generally: Provided further, that where the time limited by the laws of said state for the institution of administration proceedings has elapsed without their institution, as well as in cases where there exists no lawful ground for the institution of administration proceedings in said courts, a petition may be filed therein having for its object a determination of such heirship and the case shall proceed in all respects as if administration proceedings upon other proper grounds had been regularly begun, but this proviso shall not be construed to reopen the question of the determination of an heirship already ascertained by competent legal authority under existing laws: Provided further, that said petition shall be verified, and in all cases arising hereunder service by publication may be had on all unknown heirs, the service to be in accordance with the method of serving nonresident defendants in civil suits in the district courts of said state; and if any person so served by publication does not appear and move to be heard within six months from the date of the final order, he shall be concluded equally with parties personally served or voluntarily appearing."

"The lands of full-blood members of any of the Five Civilized Tribes are hereby made subject to the laws of the state of Oklahoma, providing for the partition of real estate. Any land allotted in such proceedings to a full-blood Indian, or conveyed to him upon his election to take the same at the appraisal, shall remain subject to all restrictions upon alienation and taxation obtaining prior to such partition. In case of a sale under any decree, or partition, the conveyance thereunder shall operate to relieve the land described of all restrictions of every character."

The principal allegations in the petition are that one Magie Yarhola, a full-blood Creek Indian, died in 1906, seized of an allotment of land in Creek county; that in October, 1918, Walter Templeton, Walter L. Ransom, and L. O. Lytle, filed an application in the county court of Okfuskee county, Okl., setting forth that they were the grantees of one Losanna Lewis, née West, a restricted Creek Indian heir of the said Magie Yarhola, deceased, and praying for a determination of the heirship of the said Magie Yarhola, deceased. It is further alleged that petitioners in the county court of Okfuskee county caused notice to be given of the filing of said petition, notifying certain designated parties and any unknown heirs of the said Magie Yarhola, deceased, to appear and exhibit their respective claims of heirship, ownership, or interest in said estate on or before January 24, 1919. Relators also allege that all the persons so named either have or claim to have some claim, right, title, or interest in the estate of the said Magie Yarhola, deceased, either by virtue of being the restricted heirs of the said decedent, or by being grantees of such heirs. The petition herein then recites that the county court of Okfuskee county has no jurisdiction of the particular subject-matter of the proceeding attempted to be presented therein, for the

reason that long prior to the filing of the petition for the determination of heirship in said court the district court of Creek county had obtained jurisdiction to determine the question sought to be determined in said county court, and that all those made parties to the proceedings in the county court are parties to the action in the district court wherein the title to the allotment of the decedent is involved, and wherein it is necessary, in order to adjudicate the title to said land as between the same parties, to determine who, in fact, are the heirs of the said decedent. It further appears that petitioners in the county court and relators herein claim through the same alleged heir, to wit, Losanna Lewis, née West, through conveyances approved by the county courts of Okfuskee and Okmulgee counties, respectively; each set of claimants asserting that the court approving their conveyances was the court having jurisdiction of the settlement of the estate of the deceased allottee. Rebecca Baker, and Peter and Jimmie Davis, full-blood Creek Indians, parties to both proceedings, also claim to be heirs of the decedent.

Counsel for relators, in their briefs, insist that the question for determination in the proceedings instituted in the county court of Okfuskee county, and the question to be determined in the action pending in the district court of Creek county, is the question of fact as to who are the heirs of Magie Yarhola, deceased, and say that petitioners have no plain, adequate, complete, or speedy remedy at law; that their remedy by appeal would be inadequate, for the reason that before such appeal could be determined said cause will, in the usual course of court proceedings, be called for trial in the district court of Creek county, and said relators will be harassed, annoyed, and be put to great expense by being required to try the same question in two different courts; and that they will be greatly injured and damaged by reason of the probability of having conflicting judgments rendered by the said two courts, whereby relators' interests in said estate would be clouded and rendered uncertain.

[1] In entering upon a discussion of the very important and interesting questions presented by the record in this case, we will first consider the objection that the act of Congress is unconstitutional and void, in that it is in contravention of sections 1 and 2 of article 3 of the Constitution of the United States, the pertinent parts of which are as follows:

"The judicial power of the United States, shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish. The judges, both of the Supreme Court and inferior courts, shall hold their offices during good behaviour, and shall, at stated times, receive for their services, a compensation, which shall not be diminished during their continuance in office.

"Sec. 2. The judicial power shall extend to all

cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority;—to all cases affecting ambassadors, other public ministers and consuls;—to all cases of admiralty and maritime jurisdiction;—to controversies to which the United States shall be a party;—to controversies between two or more states;—between a state and citizens of another state;—between citizens of different states;—between citizens of the same state claiming lands under grants of different states, and between a state, or the citizens thereof, and foreign states, citizens or subjects. * * *

Accepting, for the purposes of discussion, the contention of counsel for relators that "a determination of the question of fact as to who are the heirs of any deceased allottee of the Five Civilized Tribes of Indians" involves the exercise of judicial power, it does not follow that Congress is prohibited from conferring judicial or quasi judicial power upon other courts, boards, commissions, tribunals, or agencies created or designated by it as to cases not embraced within the class of cases specifically mentioned in section 2, *supra*. *Edward Prigg v. Pennsylvania*, 16 Pet. 539, 10 L. Ed. 1060; *United States v. Winona & St. P. R. Co.*, 67 Fed. 948, 15 C. C. A. 96; *United States v. Archibald A. Ritchie*, 17 How. 525, 15 L. Ed. 236; *Levin v. United States*, 128 Fed. 826, 63 C. C. A. 476; *American Ins. Co. v. 356 Bales of Cotton*, 1 Pet. 511, 7 L. Ed. 242; *Clinton v. Englebrecht*, 13 Wall. 434-447, 20 L. Ed. 659; *McAllister v. United States*, 141 U. S. 174, 188, 11 Sup. Ct. 949, 35 L. Ed. 693; *Clafin v. Houseman*, 93 U. S. 130, 23 L. Ed. 833; *Robertson et al. v. Baldwin*, 165 U. S. 275, 17 Sup. Ct. 326, 41 L. Ed. 715; *In the Matter of Martin Conner*, 39 Cal. 98, 2 Am. Rep. 427.

This principle has been too long recognized by Congress and the courts to justify a recitation of the numerous detailed circumstances under which the power has been applied. Quite a number are mentioned in *Levin v. United States*, *supra*, wherein the Circuit Court of Appeals of the Eighth Circuit, speaking through Judge Sanborn, said:

"Nor are the conclusions which contemporaneous construction, time, and practice have adopted without cogent reasons to support them. While it is true that Mr. Justice Story, speaking for the Supreme Court, declared in 1816, in *Martin v. Hunter's Lessee*, 1 Wheat. 304, 328-333, 4 L. Ed. 97, that the Congress could not vest any portion of the judicial power of the nation in courts which it did not itself ordain and establish, and this statement has since been repeated, the fact is that he was then thinking and speaking of the judicial power granted by section 1, and defined by section 2, of article 3 of the Constitution. The better opinion now is that the judicial power granted by the former section, which may be vested in the national courts only, is defined in the latter section; that it necessarily extends only to the trial of 'all cases in law and equity arising under this Constitution,' and to the trial

of the other nine classes of cases named in section 2, and specified by Chief Justice Day in his opinion in *Chisholm v. Georgia*, 2 Dall. 419, 475, 1 L. Ed. 440 (*Ex parte Gist*, 26 Ala. 156, 162; *Clafin v. Houseman*, 93 U. S. 130, 139, 23 L. Ed. 833; *Robertson v. Baldwin*, 165 U. S. 275, 279, 17 Sup. Ct. 326, 41 L. Ed. 715); and that these sections neither expressly nor impliedly prohibit the Congress from conferring judicial power upon other courts, or upon executive or other officers, in other cases, where, in its opinion, the devolution of such power is either necessary or convenient in the execution of the authority granted to the legislative or to the executive department of the government through the Constitution.

"Thus the authority granted to territorial courts to hear and determine controversies arising in the territories of the United States is judicial power. But it is not a part of that judicial power granted by section 1, and defined by section 2, of article 3 of the Constitution. Nevertheless under the constitutional grant to Congress of power to 'make all needful rules and regulations respecting the territory * * * belonging to the United States' (article 4, § 3), that body may create territorial courts not contemplated or authorized by article 3 of the Constitution, and may confer upon them plenary judicial power, because the establishment of such courts and the bestowal of such authority constitute appropriate means by which to exercise the congressional power to make needful rules respecting the territory belonging to the United States. *American Ins. Co. v. Canter*, 1 Pet. 511, 544, 7 L. Ed. 242; *Clinton v. Englebrecht*, 13 Wall. 434, 447, 20 L. Ed. 659; *McAllister v. U. S.*, 141 U. S. 174, 184, 188, 11 Sup. Ct. 949, 35 L. Ed. 693.

"Of the same nature is the judicial power conferred upon the Secretary of the Interior, the Commissioner of the General Land Office, and his subordinate officers, to hear and determine claims to the public lands of the nation (*U. S. v. Winona & St. P. R. Co.*, 67 Fed. 948, 957, 15 C. C. A. 96, 104); that bestowed upon justices of the peace and other magistrates of the states, by Act Sept. 24, 1789, c. 20, § 33, 1 Stat. 91, to arrest and commit or bail persons charged with a violation of the criminal laws of the United States (*Ex parte Gist*, 26 Ala. 156, 164); that conferred upon the state courts to hear and determine suits by or against corporations and officers created by the nation (*Bank of the United States v. Deveaux*, 5 Cranch, 61, 3 L. Ed. 38; *Clafin v. Houseman*, 93 U. S. 135, 23 L. Ed. 833); that given to magistrates of any county, city, or town corporate to hear, determine, and certify the claims of owners of fugitive slaves under Act Feb. 12, 1793, c. 7, 1 Stat. 302, § 8 (*Prigg v. Pennsylvania*, 16 Pet. 539, 615, 620, 621, 10 L. Ed. 1060); that bestowed upon justices of the peace to arrest, commit to jail, and deliver to the master deserting seamen, under Act July 20, 1790, c. 29, 1 Stat. 131, 134 (*Robertson v. Baldwin*, 165 U. S. 275, 277, 280, 17 Sup. Ct. 326, 41 L. Ed. 715); that conferred upon the courts of the states by the various acts of Congress which empower them to naturalize aliens (1 Stat. 103, 414; 2 Stat. 153, 155; *Rev. Stat. § 2165*; *Robertson v. Baldwin*, 165 U. S. 275, 17 Sup. Ct. 326, 41 L. Ed. 715; *Clafin v. Houseman*, 93 U. S. 130, 140, 23 L. Ed. 833; *In the Matter of Martin Conner*,

39 Cal. 98, 101, 2 Am. Rep. 427); and that granted by acts of Congress to executive officers of the United States to courts and magistrates of the states in numerous other instances, not to try and determine the cases specified in section 2 of article 3 of the Constitution, but to perform the judicial function of hearing and determining other questions and issues which a proper exercise of the powers granted to the various departments of the government required to be thus decided. The grant by the Congress of the United States of the judicial power to admit aliens to citizenship, and to hear and decide the various questions which do not arise in the cases specified in article 3 of the Constitution, but which a proper exercise of the powers granted by that instrument to the executive or to the legislative department of the government requires to be judicially decided, was neither expressly nor impliedly prohibited by that article. The congressional power to make such a grant, and to vest judicial authority in state courts and officers, in such cases, exists by virtue of the established rule that the grant of a power to accomplish an object is a grant of the authority to select and use the appropriate means to attain it."

The early case of *Prigg v. Pennsylvania*, supra, involved the constitutionality of an act of Congress conferring upon any magistrate of any county, city, or town corporate, jurisdiction to hear and determine claims of owners of fugitive slaves under an act of Congress, and the rule was there enunciated by the Supreme Court of the United States that the national government, through its legislative, executive, and judicial departments, was bound to carry into effect all the rights and duties imposed upon it by the Constitution in the absence of positive provisions in the Constitution to the contrary. The court, speaking through Mr. Justice Story, said:

"We hold the act to be clearly constitutional, in all its leading provisions, and, indeed, with the exception of that part which confers authority upon state magistrates, to be free from reasonable doubt and difficulty, upon the grounds already stated. As to the authority so conferred upon state magistrates, while a difference of opinion has existed, and may exist still, on the point, in different states, whether state magistrates are bound to act under it, none is entertained by this court that state magistrates may, if they choose, exercise that authority, unless prohibited by state legislation."

[2] According to the averments in the complaint, the deceased allottee and his heirs are tribal Indians of the Creek Tribe of Indians, all being of the full-blood, according to the approved rolls, and as to the lands inherited by said heirs from the deceased allottee, "the restrictions are not removed, but merely relaxed or qualified to the extent of sanctioning such conveyances as receive the court's approval." *Parker v. Richard et al.*, 250 U. S. 235, 39 Sup. Ct. 442, 68 L. Ed. —, filed June 2, 1919.

In such circumstances the power and duty of the general government to legislate for them and their property during the continuance of the national guardianship over them has been too long and too well established to admit of discussion. Beginning with the cases of *Cherokee Nation v. Georgia*, 30 U. S. (5 Pet.) 1, 8 L. Ed. 25, and *Lone Wolf v. Hitchcock*, 187 U. S. 565, 23 Sup. Ct. 216, 47 L. Ed. 306, down to comparatively recent cases, such as *Brader v. James*, 246 U. S. 88, 38 Sup. Ct. 285, 62 L. Ed. 591, it has been the consistent holding of the Supreme Court of the United States that the management of the Indians and their estates was an administrative and political function not subject to the control or interference of the courts. *United States v. Kagama et al.*, 118 U. S. 375, 6 Sup. Ct. 1109, 30 L. Ed. 228; *Heckman v. United States*, 224 U. S. 413, 32 Sup. Ct. 424, 56 L. Ed. 820; *Marchie Tiger v. Western Investment Co.*, 221 U. S. 286, 31 Sup. Ct. 578, 55 L. Ed. 738; *Pam-To-Pee v. United States*, 187 U. S. 371, 23 Sup. Ct. 142, 47 L. Ed. 221; *Stephens v. Cherokee Nation*, 174 U. S. 445, 19 Sup. Ct. 722, 43 L. Ed. 1041; *Roff v. Burney*, 168 U. S. 218, 18 Sup. Ct. 60, 42 L. Ed. 442; *United States v. Thomas*, 151 U. S. 577, 14 Sup. Ct. 426, 38 L. Ed. 276; *Sizemore v. Brady*, 235 U. S. 441, 35 Sup. Ct. 135, 59 L. Ed. 308.

We quote from two of the recent cases, *Roff v. Burney* and *Brader v. James*, supra. In the first case the court said:

"The condition of the Indians and Indian tribes within the limits of the United States is anomalous. The tribes, though in certain respects regarded as possessing the attributes of nationality, are held to be not foreign, but domestic dependent nations. *Cherokee Nation v. Georgia*, 30 U. S. (5 Pet.) 1, 8 L. Ed. 25; *Worcester v. Georgia*, 31 U. S. (6 Pet.) 515, 8 L. Ed. 483; *Choctaw Nation v. United States*, 119 U. S. 1 [7 Sup. Ct. 75], 30 L. Ed. 306; *Cherokee Nation v. Kansas Railway Company*, 135 U. S. 641 [10 Sup. Ct. 965], 34 L. Ed. 295. While the Indians and the territory which may have been specifically set apart for their use are subject to the jurisdiction of the United States, and Congress may pass such laws as it sees fit prescribing the rules governing the intercourse of the Indians with one another and with citizens of the United States, and also the courts in which all controversies to which an Indian may be a party shall be submitted (*United States v. Rogers*, 45 U. S. [4 How.] 568, 11 L. Ed. 1105; *United States v. Kagama*, 118 U. S. 375 [6 Sup. Ct. 1109], 30 L. Ed. 228; *Gon-shay-ee*, Petitioner, 130 U. S. 343 [9 Sup. Ct. 542], 32 L. Ed. 973; *Cherokee Nation v. Kansas Railway Company*, supra), the mere fact that a citizen of the United States has become a member of an Indian tribe by adoption may not necessarily cancel his citizenship."

In the second we find this explicit language:

"In view of the repeated decisions of this court, we can have no doubt of the constitution-

ality of such legislation. While the tribal relation existed, the national guardianship continued, and included authority to make limitations upon the rights which such Indians might exercise in respect to such lands as are here involved. This authority did not terminate with the expiration of the limitation upon the rights to dispose of allotted lands; the right and duty of Congress to safeguard the rights of Indians still continued. It has been frequently held by this court that the grant of citizenship is not inconsistent with the right of Congress to continue to exercise this authority by legislation deemed adequate to that end. It is unnecessary to again review the decisions of this court which support that authority. Some of them were reviewed in the *Tiger Case*. The doctrine is reiterated in *Heckman v. United States*, 224 U. S. 413 [32 Sup. Ct. 424, 56 L. Ed. 820], and *United States v. Nice*, 241 U. S. 591, 598, 60 L. Ed. 1192, 1193, 36 Sup. Ct. 696."

And in another part of the opinion the court said:

"Notwithstanding Rachel James might have conveyed the homestead allotment after it descended to her, she was a tribal Indian, and as such still subject to the legislation of Congress enacted in discharge of the nation's duty of guardianship over the Indians. Congress was itself the judge of the necessity of legislation for this purpose; it alone might determine when this guardianship should cease."

Inasmuch, then, as the government of the Indians and their property and affairs is a political and an administrative function, it is entirely competent for Congress to delegate administrative duties upon courts, commissions, boards, tribunals, or other agencies.

[3, 4] But it is insisted that Congress may not confer particular judicial power on a particular state court so as to permit such state court to exercise jurisdiction in cases where the Constitution and laws of the state prohibit the court from acting on like matters, especially where under the laws and the Constitution of said state other courts are clothed with the jurisdiction thus attempted to be conferred. Summarized, the argument on this proposition is, as we understand it: First, that at the time of the passage of the act under consideration the district courts of this state had jurisdiction, by virtue of laws theretofore enacted by Congress conferring jurisdiction generally on said courts over the persons and property of Indians of the Five Civilized Tribes, to determine the heirship of deceased Indians, which jurisdiction included cases where the decedent and his heirs were restricted members of said tribes; second, that section 12, art. 7, of the Constitution of Oklahoma, denies jurisdiction to the county courts in any matter wherein the title to land may be in dispute or called in question, and that under said section county courts only have jurisdiction to determine heirship as an incident to administration proceedings, which makes that part of the act of Congress unconstitutional which attempts

to confer jurisdiction on said courts to determine heirship "where the time limited by the laws of said state for the institution of administration proceedings has elapsed without their institution, as well as in cases where there exists no lawful ground for the institution of administration proceedings in said courts."

We agree with counsel for relators that before the passage of the Act of June 14, 1918, supra, district courts of this state had jurisdiction of actions involving Indian allotments, and as an incident to the adjudication of titles in actions of ejectment to cancel conveyances, to quiet title, or other actions, said courts were authorized, where necessary to a decision of the case, to determine as between the parties to the action, including restricted Indians, the question of who, in fact, were the heirs of the decedent. Jurisdiction of such actions has been entertained without question by both state and federal courts, and we have no doubt that the final judgments rendered in such cases by said courts have the same binding force and effect on the parties over which the court had jurisdiction in the particular case as to all questions necessarily involved in the suit as like judgments of courts of general jurisdiction. But the fact that said courts did have jurisdiction of such questions did not deprive Congress, in performing its duties and obligations to these Indians, of its power, so far as these restricted Indian heirs are concerned with reference to their restricted lands, to withdraw the jurisdiction that it had theretofore conferred on said courts and to confer it upon any other commission, court, board, or tribunal as it saw fit. *McKay v. Kalyton*, 204 U. S. 458, 27 Sup. Ct. 346, 51 L. Ed. 566; *Hallowell v. Commons*, 239 U. S. 506, 36 Sup. Ct. 202, 60 L. Ed. 409; *Pel-Ata-Yakot v. United States (C. C.)* 188 Fed. 387; *Brader v. James*, 246 U. S. 88, 38 Sup. Ct. 285, 62 L. Ed. 591; *Wilson v. Wall*, 73 U. S. (6 Wall.) 83, 18 L. Ed. 727; *Reichert v. Felps*, 73 U. S. (6 Wall.) 160, 18 L. Ed. 849; *Jones v. Meehan*, 175 U. S. 1, 20 Sup. Ct. 1, 44 L. Ed. 49; *Caesar v. Krow*, 176 Pac. 927.

As to whether Congress intended, or whether the act had the effect, to withdraw the jurisdiction theretofore exercised by such district courts, and as to whether the county courts, in exercising the power or authority conferred by the act, do so as courts or merely as administrative agencies of the government, will be hereinafter considered. At present we will notice the contention that the Constitution and laws of this state prohibit county courts from exercising jurisdiction "in any matter wherein the title or boundaries of land may be in dispute or called in question." Nor need we say, though it is extremely doubtful, whether in the determination of heirship the title of land is in dispute or called in question. *Fitzpatrick v. Simonson Bros.*, 86 Minn. 140, 90 N. W.

378; *Fischer v. Sklenar*, 101 Neb. 553, 163 N. W. 861. We call attention, however, to the fact that under section 9 of the Act of May 27, 1908 (35 Stat. at L. 312, c. 190), the act of a county judge of the court having jurisdiction of the settlement of the estate of the deceased allottee in approving conveyances executed by full-blood Indian heirs to inherited lands is the act of the court as distinguished from the act of the judge thereof. *MaHarry v. Eatman*, 29 Okl. 46, 116 Pac. 935; *Tiger et al. v. Creek County Court*, 45 Okl. 701, 146 Pac. 912. Said act, nevertheless, is not a judicial act, but is the act of an administrative or ministerial agency designated by Congress for the protection of the Indians. *Parker v. Richard et al.*, supra; *Brader v. James*, supra; *Barnett v. Kunkle*, (C. C. A.) 256 Fed. 644.

It is significant that, during the eleven years said act has been in force and effect, in the numerous controversies which have arisen concerning the legality of conveyances of these lands it has never been held that the county courts are prohibited from performing the duties imposed on them by the act on the ground that the title of land is in dispute or called in question. But if we accept, for the purposes of discussion, counsel's premise that a determination of heirship affects the title of the land within the meaning of section 12, art. 7, of the state Constitution, supra, we differ widely on the effect of the provision as applied to the instant case. The Constitution, laws, and treaties of the United States are the supreme law of the land, and, although, within the limits of state sovereignty, the national government cannot interfere with the states, on the other hand, the states cannot interfere with the government of the United States in the exercise of its constitutional powers. In the language of Chief Justice Marshall, in *McCullough v. Maryland*, 17 U. S. (4 Wheat.) 316, 4 L. Ed. 579:

"If any one proposition could command the universal assent of mankind, we might expect it would be this—that the government of the Union, though limited in its powers, is supreme within its sphere of action. This would seem to result necessarily from its nature. It is the government of all; its powers are delegated by all; it represents all, and acts for all. Though any one state may be willing to control its operations, no state is willing to allow others to control them. The nation, on those subjects on which it can act, must necessarily bind its component parts. But this question is not left to mere reason; the people have, in express terms, decided it by saying, 'this Constitution and the laws of the United States, which shall be made in pursuance thereof,' 'shall be the supreme law of the land,' and by requiring that the members of the state Legislatures, and the officers of the executive and judicial departments of the states, shall take the oath of fidelity to it.

"The government of the United States, then, though limited in its powers, is supreme; and its laws, when made in pursuance of the Con-

stitution, form the supreme law of the land, 'anything in the Constitution or laws of any state to the contrary notwithstanding.'"

[5-7] The plenary authority of Congress to legislate for these Indians concerning their restricted lands cannot be limited or impaired by any state law, and in section 1 of the Enabling Act for the admission of the state of Oklahoma into the Union, Congress reserved the authority of the national government over the Indians, their lands and property, which it had prior to the passage of the act. *Marchie Tiger v. Western Inv. Co.*, 221 U. S. 286, 31 Sup. Ct. 578, 55 L. Ed. 738. The language employed is comprehensive and exact, and is as follows:

"That the inhabitants of all that part of the area of the United States now constituting the territory of Oklahoma and the Indian Territory, as at present described, may adopt a Constitution and become the state of Oklahoma, as hereinafter provided: Provided, that nothing contained in the said Constitution shall be construed to limit or impair the rights of persons or property pertaining to the Indians of said territories (so long as such rights shall remain unextinguished) or to limit or affect the authority of the government of the United States to make any law or regulation respecting such Indians, their lands, property, or other rights by treaties, agreement, law, or otherwise, which it would have been competent to make if this act had never been passed." (Act June 16, 1906, c. 3335, 34 Stat. L. 267).

The people of the new state, in their Constitution, accepted this reservation in unequivocal language, as appears from section 3, art. 1, Williams' Constitution, which reads:

"The people inhabiting the state do agree and declare that they forever disclaim all right and title in or to any unappropriated public lands lying within the boundaries thereof, and to all lands lying within said limits owned or held by any Indian tribe, or nation; and that until the title to any such public land shall have been extinguished by the United States, the same shall be and remain subject to the jurisdiction, disposal, and control of the United States. Land belonging to citizens of the United States residing without the limits of the state shall never be taxed at a higher rate than the land belonging to residents thereof. No taxes shall be imposed by the state on lands or property belonging to or which may hereafter be purchased by the United States or reserved for its use."

In the light of this provision of our Constitution, which must be taken into consideration in construing section 12, art. 7, of the same instrument, it may well be doubted whether there is anything in our Constitution prohibiting county courts from exercising the power and authority conferred by the Act of June 14, 1918, so far as restricted Indians and their property are concerned, even though a determination of the question of heirship by such courts should affect the title of the land; but, however this may be,

In view of the governing principles heretofore alluded to, there can be no doubt that section 12, art. 7, *supra*, has no application in such cases. The state Legislature has not prohibited the county courts from exercising the authority conferred on them by the Act of June 14, 1918, but, on the contrary, has specifically sanctioned it. Chapter 25, Sess. Laws 1919. And in view of section 1 of the Enabling Act, and section 3, art. 1, of our state Constitution, it is entirely logical that the state government cannot prohibit its exercise and thus defeat the object and purpose of Congress concerning a subject over which it has exclusive control.

Firmly convinced, as we are, as to the power of Congress to enact the legislation under consideration and to confer upon county courts, as courts, jurisdiction to determine heirship, we come to a consideration of the most serious and difficult question in the case, which is to ascertain the nature of the power conferred, whether strictly judicial or ministerial, and the scope and purpose of the act. But let us first see whether Congress may confer duties upon administrative or ministerial officers or agencies which involve the exercise by them of judicial power. In the light of the adjudicated cases there can arise no question as to the right of Congress so to do.

In the case of *Ross v. Stewart*, 227 U. S. 530, 33 Sup. Ct. 345, 57 L. Ed. 827, involving the decision of the town-site commission in the Cherokee Nation, the contention was made that the commission was without jurisdiction to pass upon the contest and that only courts could exercise such power. Unquestionably the town-site commission exercised judicial power in deciding contest cases arising before it under the act of Congress, but still they were merely administrative officers of the United States government. In disposing of the contention, the court, speaking through Mr. Justice Van Devanter, said:

"We are asked to say, as was the state court, that the town-site commission was without jurisdiction to entertain or pass upon the contest resulting from the conflicting applications to purchase, and that such a controversy could be determined only in the courts. But, like the state court, we are unable so to say. No time need be spent in upholding the power of Congress to invest the town-site commission with such authority, for our prior decisions leave no doubt upon that subject. It is merely a question of what Congress intended by the legislation adopted."

In the syllabus it is held:

"The town-site commission for a town in the Cherokee Nation must be deemed to have been given jurisdiction to entertain and pass upon a contest resulting from conflicting applications to purchase by the Acts of June 28, 1898 (30 Stat. at L. 495, c. 517), May 31, 1900 (31 Stat. at L. 221, c. 598), and July 1, 1902 (32 Stat. at L. 716, c. 1375), the contrary view finding no support in any statutory provision, being opposed to the plain implication of this

legislation, and ignoring the settled practice of Congress to commit such questions to the determination of administrative officers."

See case, 25 Okl. 611, 106 Pac. 870.

In *United States v. Winona & St. P. R. Co.*, 67 Fed. 948, 15 C. C. A. 90, the first paragraph of the syllabus is as follows:

"The land department of the United States (including in that term the Secretary of the Interior, the Commissioner of the General Land Office, and their subordinates) is a special tribunal, vested with judicial power to hear and determine the claims of all parties to the public lands which it is authorized to dispose of, and also with power to execute its judgments by conveyances to the parties it decides are entitled to them."

In the body of the opinion, the court, speaking through Judge Sanborn, said:

"In every case there must, in the nature of things, be a decision of questions of fact and of questions of law, because in every case the ultimate question is whether or not the facts proved show that the claimant is entitled to the land, under the acts of Congress. A certificate or patent is the record evidence of the judgment of this tribunal, and it necessarily follows that, when such a judgment is rendered in a case within the jurisdiction of the land department, it is, like the judgments of other special tribunals, vested with judicial powers, impervious to collateral attack."

From the inception of our government, Congress on numerous occasions, has conferred upon the officers of the government legislative, judicial, and executive powers, and these officers have exercised and are now exercising strictly legislative or judicial powers in the performance of duties delegated by Congress. The statutes of the United States are replete with instances where such authority is conferred upon the executive department with reference to the enforcement of the laws of the United States. Legislative and judicial power may be delegated to the Secretary of War. *Union Bridge Co. v. United States*, 204 U. S. 364, 27 Sup. Ct. 367, 51 L. Ed. 523. In this case it appears that Congress delegated to the Secretary of War the duty and power of determining whether certain bridges were an unreasonable obstruction to free navigation so as to interfere with interstate commerce. In sustaining the validity of the act, the court, speaking through Mr. Justice Harlan, said:

"By the statute in question, Congress declared in effect that navigation should be freed from unreasonable obstructions arising from bridges of insufficient height, width of span, or other defects. It stopped, however, with this declaration of a general rule, and imposed upon the Secretary of War the duty of ascertaining what particular cases came within the rule prescribed by Congress, as well as the duty of enforcing the rule in such cases. In performing that duty the Secretary of War will only execute the clearly expressed will of Congress, and will not, in any true sense, exert legislative or

judicial power. He could not be said to exercise strictly legislative or judicial power any more, for instance, than it could be said that executive officers exercise such power when, upon investigation, they ascertain whether a particular applicant for a pension belongs to a class of persons who, under the general rules prescribed by Congress, are entitled to pensions. If the principle for which the defendant contends received our approval, the conclusion could not be avoided that executive officers, in all the departments, in carrying out the will of Congress, as expressed in statutes enacted by it, have, from the foundation of the national government, exercised and are now exercising powers, as to mere details, that are strictly legislative or judicial in their nature. This will be apparent upon an examination of the various statutes that confer authority upon executive departments in respect of the enforcement of the laws of the United States. Indeed, it is not too much to say that a denial to Congress of the right, under the Constitution, to delegate the power to determine some fact or the state of things upon which the enforcement of its enactment depends, would be 'to stop the wheels of government' and bring about confusion, if not paralysis, in the conduct of the public business."

In the approval of conveyances executed by full-blood Indian heirs under section 9 of the Act of May 27, 1908 (35 Stat. L. 312), it is the duty of the court to make sufficient investigation as to satisfy it that the consideration paid is just and equitable and for the best interest of the grantor, and, although this involves judicial power, it is not strictly judicial power but is administrative. *Barnett v. Kunkle*, supra; *Parker v. Richard*, supra.

In the last-named case the court said:

"That the agency which is to approve or not is a state court is not material. It is the agency selected by Congress and the authority confided to it is to be exercised in giving effect to the will of Congress in respect of a matter within its control. Thus in a practical sense the court in exercising that authority acts as a federal agency, and this is recognized by the Supreme Court of the state. *Marcy v. Board of Commissioners*, 45 Okl. 1, 144 Pac. 611."

If it is competent for Congress to decide the question, it may delegate that authority to some administrative officer. This it has done with respect to the determination of heirship of restricted Indians by the Secretary of the Interior during the trust period. *Bond v. United States* (C. C.) 181 Fed. 618; *McKay v. Kalyton*, supra.

It is within the power of Congress to say, in the first instance, according to what law of descent restricted lands shall descend, and it is certainly within its power to intrust administrative officers with the ascertainment of facts necessary to effectuate its purposes, and to provide for a determination of heirship as a question of fact, which simply amounts to a declaration of the persons on whom the law casts the succession—it finds a

fact and fixes a status. *Fischer v. Sklenar et al.*, supra.

Was the power conferred strictly judicial, or quasi judicial and administrative? Was it intended, after the passage of the act, that the district courts of the state should no longer exercise jurisdiction over cases involving the title to inherited lands where the question to be adjudicated depended upon the determination of heirship? The decisions in *Bond v. United States*, supra, and *McKay v. Kalyton*, supra, give some basis for the contention that the act had such an effect. Under the Act of Congress of June 25, 1910, c. 431, 36 Stat. 855, providing that, if an allottee dies before the expiration of the trust period and the issuance of a patent without having disposed of his allotment by will, the Secretary of the Interior shall ascertain the legal heirs of such decedent, and his decision shall be final and conclusive, it has been held that said act operated to repeal the Act of Congress of February 6, 1901, c. 217, 31 Stat. 760 (U. S. Comp. St. §§ 4214, 4215), conferring jurisdiction on the Circuit Courts of the United States over controversies growing out of the execution of the allotment act, and deprived said courts of jurisdiction to determine such heirship, and, since the act of 1910 contained no saving clause, the authority of the courts under the repealed act of 1901 immediately ceased in so far as pending causes were concerned. This court has followed the cases cited, and held that the district court of Pawnee county did not have jurisdiction of an action to try title to the allotment of a deceased Pawnee Indian before the expiration of the trust period where the question of heirship was necessarily involved, because such authority was vested solely in the Secretary of the Interior. *Caesar v. Krow*, supra.

In construing the Act of June 25, 1910, the court, in *McKay v. Kalyton*, supra, emphasized two elements which do not affect the act we are now considering. This appears from the following excerpt:

"State courts were not given jurisdiction of controversies necessarily involving the determination of the title, and, incidentally, of the right to the possession, of Indian allotments while the same were held in trust by the United States, by the provision of the Act of August 15, 1894 (28 Stat. at L. 236, c. 290), delegating to the federal Circuit Courts the power to determine such questions, since the purpose of that act to continue the exclusive federal control over disputes concerning allotments which, prior to that act, could only have been decided by the Secretary of the Interior, is manifested by its provision that a judgment or decree in any such controversy shall be certified by the court to the Secretary of the Interior, and by the provision of the Act of February 6, 1901 (31 Stat. at L. 760, c. 217), that in such suits 'the parties thereto shall be the claimant as plaintiff and the United States as party defendant.'"

After an extended and careful consideration of the act under consideration, we have concluded that its purpose and effect was not to deprive the state courts of jurisdiction of actions involving the title to allotments inherited by restricted Indian heirs of the Five Civilized Tribes, even though such actions are dependent upon heirship. In interpreting the statute we must give effect, if possible, to the intent of Congress, and in ascertaining what was intended we should interpret its language in such a manner as, consistent with the words employed, to completely effectuate the object of Congress. If by one mode of interpretation the end sought to be attained will not be substantially subserved, and the evil sought to be prohibited will, in a large measure, still exist, or a worse condition is created, that mode should not be adopted if the language is susceptible of any interpretation that will secure its manifest purpose. Let us, for a moment, examine and notice the evil existing at the time of the enactment which Congress sought to remedy. Under section 9 of the Act of May 27, 1908, the death of an allottee of any of the Five Civilized Tribes operated to remove all restrictions from said allottee's land, and the land descended, free of restrictions, to the said allottee's heirs according to the Oklahoma law of succession, except that as to full-blood Indian heirs the restrictions were only qualifiedly removed and their conveyances were only effectual when approved by the county court having jurisdiction of the settlement of the estate of the deceased allottee. Section 3 of the same act provides that the approved rolls of citizenship and of freedmen of the Five Civilized Tribes shall be conclusive evidence as to the quantum of Indian Blood of any enrolled citizen or freedman of said tribes, and that the enrollment records of the Commissioner to the Five Civilized Tribes shall be conclusive evidence as to the age of said citizen or freedman to determine questions arising under the act.

In determining the validity of conveyances executed by virtue of the provisions of this act, it was always pertinent, among other things, to determine the quantum of blood of the Indian grantor, his age, and the heirship; that is, those who succeeded to his inheritance. The county courts which were authorized to approve conveyances of the full-blood Indian heirs under section 9 of the act, as we have seen, acted as administrative agencies, and under the act authority was not delegated to such courts to determine who, in fact, the heirs were. The approval by the proper court simply had the effect of vesting in the grantee whatever interest, if any, the Indian grantor had in such land. It is a matter of common knowledge, as disclosed by the records of this and the United States courts, that many suits arose involving lands of great value which were

dependent upon the question of who, in fact, were the heirs of the decedent. For reasons which have frequently been stated by the courts, and which it is not necessary to restate here, the question of heirship proved difficult of solution as between conflicting claimants, and although, as we have already seen, the judgments of the courts having jurisdiction of actions to try the title to the land were binding as to the parties to the record, said judgments did not bind or foreclose other claimants, and the question of heirship remained unsettled so long as there was a claimant whose rights had not been litigated. This uncertainty as to the heirship in many instances worked serious injury to the Indian heirs and greatly depreciated the value of their inheritance, for on this account purchasers were reluctant to pay full value for the land. It restricted competitive bidding, and often the inheritance went to speculators who were willing to take a chance.

Now, it seems clear to us that it was the intent of Congress to provide a method that would settle the question of heirship as a question of fact as against the world, for the act provides for service upon unknown heirs in accordance with the method of serving nonresidents in civil actions in the district courts of the state, and provides that, if any person so served fails to appear and moves to be heard within six months from the date of the final order, "he shall be concluded equally with parties personally served or voluntarily appearing." Nor do we think Congress had in mind solely the determination of heirship for the purpose of establishing with certainty and finality the identity and status of the restricted Indian heirs to whom the deceased's allotment passed at his death. Under previous acts of Congress the heirs of enrolled deceased members of the Five Civilized Tribes became entitled to the decedent's pro rata share of the tribal funds. Congress, from time to time, has appropriated out of such tribal funds a stipulated amount of money per capita to be paid to living members and to heirs of deceased members. In carrying out this duty it has become necessary for the administrative officers of the government to determine who the heirs were in order to make payment to the right parties. Although no specific authority was given to determine heirship, it is one that necessarily flowed from the duty imposed on such administrative officers. The task has proved burdensome and unsatisfactory, because of the failure of Congress to provide any definite procedure to be followed in determining the question. In practice these administrative officers, in determining the heirship of deceased allottees, have relied upon what information was obtainable from the approved rolls and enrollment records, which, in many cases, was very meager, and which it be-

came necessary to supplement by affidavits and proofs of heirship made by claimants to the funds and those vouching for them. These proofs of heirship were made ex parte and were often indefinite or conflicting. So, from these considerations we think that Congress intended by the act to establish a method for a determination of the fact of heirship which would be binding upon its administrative officers, the courts, or other tribunals wherein the question might arise in ascertaining and protecting the rights of these wards of the government to their inherited lands or shares of the tribal funds.

The reports of the Senate and House Committees of Congress recommending the passage of the act substantiate this view. The Senate Committee report states:

"This bill is identical with H. R. 10590 as reported by the House Committee on Indian Affairs on March 19, 1918. The legislation is urged by W. P. Z. German, general attorney of the Federal Land Bank of Wichita, Kan., who states that under existing conditions titles based on deeds from the heirs of deceased full-blood Indians offered to the land bank as security for loans have to be rejected as it is impossible to know with certainty who the heirs of a deceased full-blood Indian are, because no court, under existing law, can judicially determine conclusively that question."

There is incorporated in both reports for the information of Congress a brief bearing on the question by Hon. W. F. Semple, now Principal Chief of the Choctaw Nation, who, at the time of making the reports, was a Choctaw Indian attorney and had formerly been one of the probate attorneys for the Five Civilized Tribes and clerk to the committee on Indian affairs.

We quote two paragraphs from his brief:

"The federal government through the farm-loan banks is loaning millions of dollars to actual farmers throughout the country on first mortgages on farms, and the records will show that in the state of Kansas something over six millions have been loaned to farmers, while in the state of Oklahoma less than half that amount has been loaned. The difference in the amount of money loaned is to be attributed to the fact the title examiner for the federal farm-loan bank declines to approve titles acquired from heirs who are Indians of the full-blood for the reason that there can be no judicial determination of heirship in such cases which will be binding and preclude other Indians from coming into court and asserting an interest in the land. * * *

"The need for legislation of this kind is made necessary not only for the reason that titles are uncertain and the uncertainty has the effect of diminishing the market value of the land, but, further, the reason that there is a considerable amount of money in the hands of the superintendent of the Five Civilized Tribes, in the form of per capita payments, which has not been distributed for the reason that there is no means of determining who are the heirs. The department has followed the practice of making these payments on affidavits of

Indians that they are the lawful heirs, but this has resulted in injustice being done. In fact it is a very unsatisfactory way of determining the heirs, and unless a commission is sent out with authority to take testimony and hear conflicting claims this policy will result in grave injury being done in distributing the large sums of money now in the hands of the superintendent belonging to the Choctaws and Chickasaws."

To attain this object we have already seen that it was competent for Congress to create its own commissions, boards, courts, or other agencies, and to provide the procedure to be followed by such agencies in order to discharge the duties so imposed. Likewise, it was within the power of Congress, if it saw fit, to make use of courts already created, such as the county courts, as administrative agencies, and it was also within the power of Congress to provide that such agencies should use the procedure already established by the laws of the state as instrumentalities in obtaining this object, instead of creating an entirely new mode of procedure. We have no doubt, also, that Congress had the right to make use of all the existing procedure or any part thereof, or, if the existing procedure was not sufficient, to supplement it. If the procedure already established for the state courts had been considered sufficiently comprehensive, Congress would doubtless have omitted that language found in the second proviso relative to cases where the time limited by the law of the state for the institution of administration proceedings has elapsed and to those where no lawful grounds existed for the institution of such proceedings. Realizing that in many instances administration proceedings had never been instituted over the estates of deceased allottees, and that in other cases, although proceedings had been instituted, the same had been closed without heirship having been determined, and in order to make clear its intent to provide for the determination of heirship in all cases where the deceased allottee left restricted Indian heirs, Congress, by the terms of the second proviso, evinced a purpose to supplement the procedure already existing in the state courts under the state law by providing a procedure to determine heirship in the two classes of cases thus mentioned, as well as in cases where it was practical to follow the procedure according to the state law.

The wrong impression under which counsel for relators are laboring apparently grows out of the fact that Congress designated state courts as the agencies to determine heirship as a question of fact, instead of some other individual, board, or commission; but this, as already stated, is immaterial. Had Congress delegated the power and authority conferred by the act to the Commissioner of the Five Civilized Tribes or to the county clerk of the county of the

deceased allottee's residence, and had provided substantially the same procedure to guide such administrative officers in obtaining the desired end, which it certainly could have done, it is clear that no state law or constitutional provision could have defeated or impaired the exercise of that power. So, when we bear in mind that the county courts, in proceeding under the act, are acting merely as federal agencies and as administrative officers, as distinguished from courts exercising strictly judicial powers, it is equally clear that the laws of the state cannot be asserted to defeat or impair the operation of the act.

That Congress did not intend to disturb existing judgments of the district and superior courts where the question of heirship was necessarily involved as to the parties over which the court had jurisdiction is evident from the use of the following language:

"But this proviso shall not be construed to reopen the question of the determination of an heirship, already ascertained by competent legal authority under existing laws."

Counsel for relators propound this question:

"What significance is to be gathered from the fact that Congress used the phrase 'question of fact'? Was it because it thought it would not be conferring judicial power by merely giving the county court the power to ascertain this question as a fact?"

They insist that, if the county court is to stay within the bounds fixed by Congress, the act is utterly incapable of being enforced, for the reason that a determination of such question as a "question of fact" is both a legal and logical impossibility. We have no hesitancy in answering the question propounded in the affirmative. As has been often held, in every case there are questions of fact and questions of law. This is recognized in our Code, for by section 4989 it is provided:

"*Kinds of Issues.*—Issues arise on the pleadings, where a fact or conclusion of law is maintained by one party, and controverted by the other. There are two kinds: First, of law. Second, of fact."

As to the trial of such issues section 4993 provides:

"*Trial of Issues.*—Issues of law must be tried by the court, unless referred. Issues of fact arising in actions for the recovery of money, or specific real or personal property, shall be tried by a jury, unless a jury trial is waived, or a reference be ordered, as hereinafter provided."

For illustration, if an ejectment action is instituted by parties claiming to be the heirs of a decedent and as such are entitled to the inheritance, and there is a dispute and conflicting evidence as to whether the respective claimants are related to the

decedent, and, if so, in what degree, this conflicting evidence is submitted to the jury for its decision on the facts under the law, while the law is given to the jury by the court in its instructions. The words "the question of fact" were employed by Congress to make clear its purpose that the agencies designated were to exercise administrative functions as distinguished from strictly judicial functions.

We are of the opinion then that, when heirship of a deceased allottee leaving restricted Indian heirs is established as a question of fact by the county courts as administrative agencies of the federal government under the procedure provided by the act, such determination becomes conclusive evidence of that fact and bears the same relation to that issue, when the same arises in an action in the courts, as do the approved rolls as to quantum of blood and the enrollment records as to the age of a member of said tribes.

[8] Therefore, it is our opinion that the district courts were not ousted of jurisdiction of actions pending or deprived of jurisdiction of actions that may hereinafter be instituted involving the title to lands inherited by restricted Indian heirs by the passage of the act. When the case proceeds to trial, if it becomes necessary to prove the degree of blood of the Indian grantor, the approved rolls may be introduced for that purpose; if it becomes necessary to prove the age of the Indian grantor, the enrollment record may be introduced for that purpose; and, if it becomes necessary to establish who are the heirs as a question of fact, the determination by the county court, if it has been had, may be introduced for that purpose, and each, when introduced, becomes conclusive of the question. If the case is called for trial in the district court, after the institution of the proceedings in the county court and before the conclusion thereof, the party desiring to make proof of heirship may present his motion to the district court for a continuance on account of the absence of evidence material to his case, which doubtless will be granted upon a showing of due diligence. In the event of a denial of such motion, the action of the court will be subject to review on appeal. We think, however, the district courts should give a reasonable opportunity to procure this evidence; but we do not think said courts are ousted as to jurisdiction of pending cases or prohibited from exercising jurisdiction over cases hereinafter instituted where the title of land is involved and it is necessary to prove, as an incident thereto, who, in fact, are the restricted Indian heirs of the deceased allottee. To hold otherwise would result in chaos, and we would have the district courts deprived of jurisdiction of such actions and the county courts clothed therewith without power to execute their judg-

ments or to afford adequate relief to all parties.

From what we have said it follows that the writ of prohibition should be, and is, denied.

All the Justices concurred.

(76 Okl. 159)

PURDOM et al. v. SHOCK. (No. 8201.)

(Supreme Court of Oklahoma. July 22, 1919.
Rehearing Denied Oct. 14, 1919.)

(Syllabus by the Court.)

1. PLEADING \S 204(5) — ANSWER DENYING MATERIAL ALLEGATION NOT DEMURRABLE.

Where an answer denies a material allegation essential to plaintiff's recovery, it is error to sustain a demurrer on the ground that it does not state a defense.

(Additional Syllabus by Editorial Staff.)

2. PARTIES \S 6(1)—MERELY NOMINAL PARTY NOT A NECESSARY PARTY.

In action upon a series of contracts relating to sale and purchase of general warrants of the Chickasaw Nation, with answer and cross-petition alleging plaintiff's claim by purchase or assignment of interest in contracts from one H., who was merely a nominal party to contracts, plaintiff being the only real party in interest, H. was not a necessary party.

Error from District Court, Johnson County; J. H. Linebaugh, Judge.

Action by Floyd Shock against Kirby Purdom and others, with answer and cross-petition by defendants. Demurrer to answer and cross-petition sustained, and defendants bring error. Reversed and remanded, with directions to overrule the demurrer.

Cruce & Potter, of Ardmore, Alexander Gullett, of Tishomingo, and Stephen O. Treadwell, of Oklahoma City, for plaintiffs in error.

Ledbetter, Stuart & Bell, of Oklahoma City, for defendant in error.

KANE, J. This was an action upon a series of contracts relating to the sale and purchase of certain general warrants of the Chickasaw Nation, commenced by the defendant in error, plaintiff below, against the plaintiffs in error, defendants below. Hereafter, for convenience, the parties will be designated "plaintiff" and "defendants," respectively, as they appeared in the trial court.

In addition to pleading the original contract in writing, the plaintiff set up an oral contract, by the terms of which Purdom, one of the defendants, agreed to execute certain promissory notes in connection with and supplementary to the transactions mentioned in the written contract. After alleging various

branches of these obligations on the part of the defendants and the assignment of the contracts to the plaintiff in due course, etc., the plaintiff prayed for judgment.

The answer of the defendants consisted of: (1) A general denial. And (2) allegations to the effect that, although Shock, the plaintiff, claimed to be the owner and holder of the various contracts referred to in his petition by purchase in due course from one Hubbard, who by the terms of the written contract appears to be the party of the second part thereto, he was and always had been in truth and in fact the real party of the second part to said contract; that said agreement was drawn and executed under the directions of the plaintiff and for his sole use and benefit; and that while the plaintiff had some sort of an agreement or understanding with said R. M. Hubbard, mentioned in said agreement as the party of the second part, to assist the plaintiff in performing and carrying out his part of the agreement to purchase said warrants, said Hubbard was merely a nominal party thereto, said plaintiff always being the real party of the second part to said contract and the principal in dealing with said defendants for the purchase of said warrants. Then, after alleging various breaches of the contracts set up in the petition and mentioned in the answer and cross-petition on the part of the plaintiff, the defendants prayed that plaintiff take nothing by his action, and that they have and recover judgment against the plaintiff in the sum of \$14,991.82, etc. Thereafter a demurrer was filed to the answer and cross-petition of the defendants upon the following grounds:

(1) The court had no jurisdiction of the person of the plaintiff, for the purpose of determination of the matters of defense, nor cause of action set up as grounds for affirmative relief in said amended answer and cross-petition.

(2) That there is a defect of parties plaintiff necessary for a determination of the matters set up in said amended answer and cross-petition.

(3) That there is a defect of parties defendant necessary for a determination of the matters set up in said amended answer and cross-petition.

Upon this demurrer being sustained, the defendants elected to stand upon their answer and cross-petition and commenced this proceeding in error for the purpose of reviewing the action of the trial court.

Counsel for defendants say that the trial court erred in sustaining the demurrer to their answer and cross-petition: (1) For the reason that it contained a general denial which put in issue several of the material allegations of the petition. (2) It was error to sustain the demurrer upon the ground that

Hubbard was a necessary party to the action, for the reason that it clearly appears he had no interest in the subject-matter of the action under either the allegations of the petition, to the effect that Floyd Shock was the owner and holder of the contract sued on by assignment from Hubbard, or the allegations of the answer and cross-petition, to the effect that Floyd Shock was always the real owner and holder of the contracts sued upon, R. M. Hubbard being merely a nominal party thereto.

In answer to the first contention, counsel for the defendants in error say in their brief:

"As we have shown in the above additional statement, in effect defendant in error abandoned his suit. He did not choose to amend his petition after the demurrer had been sustained thereto. Therefore the claim of error of the trial court by plaintiffs in error, based upon the fact that the answer contained a general denial, becomes immaterial. The case brought by defendant in error being no longer before the trial court, the question is whether or not the court erred in sustaining the demurrer leveled against the cross-petition."

We do not think this contention is available to counsel for the purpose of sustaining the action of the trial court in passing upon the demurrer to the answer and cross-petition. What counsel refers to as in effect an abandonment of his suit by the plaintiff arose as follows:

It seems that, after the action was commenced, certain of the defendants filed demurrers to the petition of the plaintiff on the ground that there was a defect of parties plaintiff and defendant, which were sustained. In the order sustaining the demurrers, the trial court granted plaintiff leave to amend his petition within a time limited, which was not done within the time allowed by the court. Counsel now say that, this being the condition of the record at the time the answer and cross-petition was filed, it showed an abandonment of his action by the plaintiff, and therefore the only matter before the court for examination is whether or not the court erred in sustaining the demurrer to the amended cause of action. We do not think this contention is germane to the action of the trial court in sustaining the demurrers leveled against the answer and cross-petition. If the action was abandoned at the time the answer and cross-petition was filed, as counsel contend, then a motion to strike the same probably would have been proper practice. The demurrer merely attacked the sufficiency of the answer and cross-petition upon certain specific grounds. Assuming that these were all proper grounds for attacking an answer and cross-petition by demurrer, it is clear that it is only necessary to examine the allegations of the pleading assailed, in order to pass upon them.

[1] Taking this view, it follows that the first contention of counsel for the defendants must be sustained, for it is well settled that, where an answer denies a material allegation essential to plaintiff's recovery, it is error to sustain a demurrer on the ground that it does not state a defense. *Lee v. Me-hew*, 8 Okl. 136, 56 Pac. 1046.

[2] We think it was also error to sustain the demurrer upon the ground that there was a defect of parties plaintiff or defendant. This, no doubt, was the ground on which the demurrer was sustained; the trial court erroneously taking the view that under the allegations of the answer and cross-petition it appeared that R. M. Hubbard was a necessary party to the action. We do not think he was. According to the allegations of the petition, Hubbard had disposed of his interest in the contracts involved by assignment to Floyd Shock, the plaintiff, and, according to the allegations of the answer and cross-petition, Floyd Shock, the plaintiff, was always the real party to the contract, Hubbard being a mere nominal party. In these circumstances, whichever theory prevailed, Hubbard was not a necessary party to the action, for the reason that in either event Shock was the real party in interest and the proper person to prosecute or defend the action.

For the reasons stated, it was error to sustain the demurrer to the answer and cross-petition of the defendants. The cause is therefore reversed and remanded, with directions to overrule the demurrer.

(76 Okl. 41)

WINNINGHAM v. CHASE, Woods County Judge. (No. 10819.)

(Supreme Court of Oklahoma. Sept. 30, 1919.)

(Syllabus by the Court.)

PROHIBITION \S 24—WRIT DISMISSED ON FAILURE TO ANSWER MOTION TO DISMISS.

Cause dismissed for reason stated in the opinion.

Original proceeding for writ of prohibition by Quincy V. Winningham against R. M. Chase, County Judge of Woods County, Okl. Petition dismissed.

E. W. Snoddy, of Alva, and Ames, Chambers, Lowe & Richardson, of Oklahoma City, for complainant.

A. J. Stevens, of Alva, for respondent.

HIGGINS, J. On August 11, 1919, a petition for writ of prohibition was filed in this court by Quincy V. Winningham, wherein he alleges that his wife, Etta Winningham, has instituted a suit against him for divorce in the district court of Woods county, Okl., and

has made application to the county judge of said county for a restraining order and appointment of a receiver to take charge of a mercantile business; that the county court is without jurisdiction to determine the petition, and for the appointment of a receiver; and prays that a writ of prohibition be issued, prohibiting him from appointing a receiver. On September 6th, A. J. Stevens, attorney for the county judge, filed a petition to dismiss the cause of action for the reason, first, that the district judge of the district in which Woods county is situated is now within said district and county, and for the further reason that all matters and differences between Quincy V. Winningham and his wife, Etta Winningham, have been settled satisfactorily to the parties.

On September 3, 1919, notice was served upon the petitioner in this action that the motion to dismiss would be filed, and on September 6th the motion to dismiss was filed in this court. The time fixed by the rules of the court to permit the petitioner to answer the motion to dismiss has expired, and no answer has been filed; this court will therefore take it for granted that the district judge of the district comprising Woods county is now within the district and has jurisdiction to hear all matters growing out of the divorce case between Winningham and his wife, and will further take it for granted that all matters therein have been settled, and, there being nothing further for this court to hear in this matter, the petition for writ of prohibition should be, and is hereby, dismissed.

OWEN, C. J., and SHARP, PITCHFORD, McNEIL, RAINEY, KANE, and JOHNSON, JJ., concur.

HARRISON, J., not participating.

(76 Okl. 167)

MUNNAH v. GATES. (No. 9265.)

(Supreme Court of Oklahoma. June 24, 1919.
Rehearing Denied Oct. 14, 1919.)

(Syllabus by the Court.)

1. INDIANS §—1, 15(1) — ACT REMOVING RESTRICTION ON ALIENATION OF ALLOTMENTS LIMITED TO ADOPTED CITIZENS.

Act Cong. April 21, 1904, c. 1402, 33 Stat. 189-204, which provides that all restrictions upon the alienation of lands of all the allottees of the Five Civilized Tribes who are not of Indian blood, except minors, are, except as to the homesteads, hereby removed, has no application to Creek Indians of more than half blood adopted by the Seminoles before the allotment, but is limited in its application to the adopted citizens not of any degree of Indian blood; and *held*, further, that where a person of any degree of Indian blood was enrolled by

the Dawes Commission as "adopted," parol evidence may be received to show that such person is an Indian or possesses a quantum of Indian blood and thereby entitled to all protection and benefits thereof, notwithstanding such enrollment.

2. INDIANS §—27(6)—EVIDENCE SUSTAINING JUDGMENT FOR PLAINTIFF IN EJECTMENT BY ADOPTED CITIZEN.

Record examined, and *held*, that there was no evidence reasonably tending to support the verdict of the jury.

Error from District Court, Seminole County.

Action in ejectment by Munnah, Seminole Roll No. 1066, against E. S. Gates. Verdict and judgment for defendant, motions for judgment notwithstanding the verdict and for a new trial overruled, and plaintiff brings error. Reversed and remanded, with instructions to grant a new trial.

James C. Wilhoit, of Muskogee, and John W. Willmott, of Wewoka, for plaintiff in error.

W. W. Pryor and T. S. Cobb, both of Wewoka, for defendant in error.

JOHNSON, J. This is an action in ejectment filed in the district court of Seminole county, on March 24, 1914, by the plaintiff in error, Munnah, against the defendant in error, E. S. Gates. By her petition the plaintiff in error seeks to recover from the defendant in error her individual allotment of 120 acres of land situate in Seminole county, together with damages for its detention.

In addition to the usual allegations in such petition, it is stated by the plaintiff that she is a Creek Indian of full blood, but that by reason of long residence in the Seminole Nation she was adopted by that tribe, and is enrolled upon the allotment roll of the said Seminole Tribe of Indians, opposite No. 1066, as an "adopted citizen."

July 8, 1914, the defendant filed his answer, which contains a general denial, a plea of the statute of limitations, and a plea of bona fide purchaser.

January 1, 1917, the plaintiff filed her reply in which she denies that the defendant has any title to said land, and that all pretended conveyances held by him are void, for the reason that she is a restricted Indian and never had any power to alienate. The reply also contains a general denial, and a specific denial of the plea of the statute of limitations.

On January 4, 1917, the cause was tried to a jury, and on the same date the jury returned a verdict for the defendant.

The plaintiff in due time filed a motion for judgment notwithstanding the verdict, and also statutory motion for new trial, from

the overruling of which the plaintiff appeals to this court by petition in error with copy of case-made attached, which petition contains numerous assignments of error, the first twelve of which go to the questions of overruling motions for new trial and for judgment in accordance with the verdict of the jury, and the remaining assignments go to the question of the rulings of the court in admitting and rejecting testimony upon the trial of the cause.

At the commencement of the trial the parties made the following agreement and stipulations:

"It is agreed by and between the parties hereto that Munnah was duly enrolled as a citizen of the Seminole Tribe of Indians, on the roll of the citizens by blood, opposite No. 1066, but is not admitted by the defendants that the plaintiff has any Indian blood at all; and as such received the following allotment of land in Seminole county, Okl., to wit:

"As surplus: The northeast quarter of the northeast quarter and the southwest quarter of the northeast quarter of section twenty-five, township nine north, range five east.

"And as her homestead allotment: The northeast quarter of the northeast quarter of said section twenty-five, township five north, range five east.

"That thereafter, to wit, on the 8th day of May, 1906, said Munnah executed a warranty deed to said land purporting to convey the aforesaid surplus to J. B. Stigall, reciting a consideration of \$200.00, which deed appears of record in Book K, at page 457 of the deed records of Seminole county, Okl.

"That thereafter, to wit, on July 27, 1908, said Munnah executed a warranty deed to J. B. Stigall purporting to convey the aforesaid homestead allotment reciting a consideration of \$150.00, which deed appears of record in Book 5 at page 594 of the deed records of Seminole county, Okl.

"That thereafter, to wit, on February 17, 1909, J. B. Stigall executed a warranty deed to L. L. Cobb purporting to convey the whole of said land, both homestead and surplus, which deed appears of record in book 10 at page 9.

"That thereafter, to wit, on January 1, 1909, L. L. Cobb, joined by her husband, T. S. Cobb, executed a warranty deed to E. S. Gates purporting to convey the whole of said land, which deed appears of record in book 27 at page 311 of the deed records of Seminole county, Okl."

The theory of the plaintiff, as contended for in her brief, was and is that, while on the Seminole Indian roll merely as an adopted citizen, she was in reality a full-blood Creek Indian, and therefore she was at all times restricted and without power to convey the lands.

A certified copy of the census card showing the enrollment of Munnah, the plaintiff, was introduced by the plaintiff without objection and shows, among other things, that the plaintiff was enrolled in 1897 as an adopted citizen of the Seminole Tribe of In-

dians, and was then 60 years of age, enrolled opposite No. 1066; that she had a daughter, Katie Miller, age 27, placed upon the roll as a half blood, a granddaughter, Cinda Coker, age 3 months and enrolled a quarter, new-born, and a son, Nussey Miller, age 28, half blood, and a son Jeff Coker, age 7 years, half blood.

The evidence further showed that the plaintiff was married to Tewetka, a full-blood Creek Indian, and they had children named Katie Miller and Nussey Miller, enrolled as half blood, as before stated, and that she married London Coker, who was a Seminole, full blood, and they had a son, Jeff Coker, who was enrolled as a half blood, and a granddaughter, Cinda Coker, enrolled as a new-born, quarter blood.

The plaintiff's witness Jennie Jacobs testified that she knew the plaintiff; that plaintiff was much older than witness; that plaintiff was witness' father's wife; that she knew plaintiff's father; that plaintiff's father's name was Con-Charthe Harjo, and her mother's name was Susan, and that they were full-blood Creek Indians; that both her father and mother died over 30 years ago; that witness' father's name was London Coker. She testified, on cross-examination, that all she knew about the case was what the plaintiff had told her, and that was the way she found out about it.

Peter Ewing testified for the plaintiff that he was a Creek Indian about 56 years of age; that he knew the plaintiff, and that she was a sister of his mother; that from all he knew she was a full-blood Indian and that she had been so considered by the Indians; that plaintiff spoke the Creek language, and no other language; that he lived at Eufaula, had never lived in the Seminole Nation; that plaintiff's first husband was a full-blood Indian, named Tewetka, second husband was a full-blood Indian named London Coker; knew plaintiff's father and mother, Harjo and Susan; that they were both full-blood Creek Indians.

Lester Williams testified for the plaintiff that he was a Creek Indian, 77 years old, and that he knew the plaintiff, and that she was a full-blood Creek Indian; knew her father Harjo, and mother, Susan; that they were both Creek Indians, and spoke the Creek language and that they looked like Indians, and were full-blood Indians. Testified on cross-examination that he lived near Eufaula, and that his father was a white man.

Plaintiff testified in her own behalf that she was an Indian, a Seminole, spoke the Creek language. Her father's name was Con-Charthe Harjo, and her mother's name was Susan; that they were both dead; that they were Indians of the Creek Tribe, and full blood. She did not know her age. On cross-examination, stated that she did not remem-

ber when she was enrolled; that it was one of the boys that did the enrolling of her; that the band chief's name was Otiarche, and that her first husband's name was Tewetka and was a full-blood Creek; her second husband was London Coker, a full-blood Indian.

Lille Chupco testified for the plaintiff that witness was told that she was 80 years old just recently; that plaintiff was older; that witness knew plaintiff's father and mother, Harjo and Susan; that they were both full-blood Creek Indians, and spoke the Creek language; that people considered them Indians. Testified on cross-examination: "Don't know anything about her age herself, but that was what the white people said." Testified that when she was sworn they told her that she was just to testify that she "knew Munnah's father."

No witness for the defendant testified as to whether or not the plaintiff was an Indian by blood. At the conclusion of the testimony the plaintiff requested peremptory instructions to the jury in favor of the plaintiff for the land sued for, and that such amounts of rents as the proof established, limiting rents to the years 1912, 1913, 1914, 1915, and 1916, which was refused by the court, and excepted to by the plaintiff.

The court in his charge submitted but one question of fact to the jury, which was as to whether or not the plaintiff was an Indian of the Five Civilized Tribes, which question was submitted in paragraphs 2 and 3 of the court's instructions to the jury, which were as follows:

"(2) You are instructed that, if you find by a preponderance of the evidence that the plaintiff is an Indian of the Five Civilized Tribes, then you will find for the plaintiff for the possession of the lands described in the petition and for damages for the wrongful withholding of same in such sum as you may find the reasonable rental value of the same to be for the years 1912, 1913, 1914, 1915, and 1916, not to exceed \$600, unless you find for the defendant under other instructions herein given you. Given; excepted to by plaintiff; exception allowed.

"(3) If you find from the evidence in this case that the plaintiff is an Indian of the Five Civilized Tribes, but that she is less than a half blood, then you will find for the defendant for the possession of the homestead allotment described as follows: The northwest quarter of the northeast quarter of section 25, township 9 north, range 5 east. Given; excepted to by plaintiff; exception allowed."

The jury returned a general verdict in favor of the defendant.

The first proposition discussed in the brief of the plaintiff under the assignments of error is:

"There is no evidence in the record reasonably tending to support the verdict and judgment."

The plaintiff alleged in her petition that she is a Creek Indian of the full blood; that her father and mother, naming them, were Creek Indians of the full blood, and by reason of her residence in the Seminole Nation she was by action of the Seminole National Commission adopted into such tribe, and enrolled upon the rolls as an Indian citizen thereof, opposite roll No. 1066, as an adopted citizen, and that the land in controversy, describing it, was allotted to her. By the stipulations entered into between the parties herein, all issues of fact were taken from the jury, except the issue of whether or not the plaintiff was an Indian by blood, and the quantum thereof, and a member of one of the civilized tribe of Indians.

[1, 2] The certified copy of the census card offered by the plaintiff showing that her name was entered on the rolls of Seminoles by blood and as a member of the tribe by adoption afforded no evidence of, nor did not indicate to, what race she belonged. Such was the holding of the United States Circuit Court of Appeals, Eighth District, in the case of United States v. Stigall, 226 Fed. 183, 141 C. C. A. 188, construing the identical card of which this is a copy, and this court cited that case with approval in the case of Scott v. Quimby, 56 Okl. 301, 155 Pac. 1154.

The testimony of the plaintiff reasonably tended to support the issues submitted to the jury by the court that she was a Creek Indian of the full blood. We fail to find in the record, after a thorough examination thereof, that the defendant offered any testimony that in any way reasonably tended to show to what race the plaintiff belongs, and in no way contradicted the testimony offered by the plaintiff. The defendant has cited no authorities in his brief, except four decisions of this court upon a proposition about which there is no dispute, that is:

"That where there is no substantial evidence reasonably tending to support the verdict of the jury, the same will be permitted to stand here in review."

That is the rule announced by this court in case of Avanto v. Bruner, 39 Okl. 730, 136 Pac. 593; City of Hugo v. Nance, 39 Okl. 640, 135 Pac. 346; C., R. I. & P. Ry. Co. v. Gilmore, 52 Okl. 296, 152 Pac. 1096; Great Western Mfg. Co. v. Mill & Elevator Co., 26 Okl. 626, 110 Pac. 1096. And many other decisions of this court might be cited in support of the rule announced, but the converse of the rule that—

"Where it is apparent from the record that the evidence does not reasonably sustain the verdict of the jury, this court will set said verdict aside and grant a new trial." Conwill v. Eldridge, 177 Pac. 79, citing Stock Exchange Bank v. Williamson, 6 Okl. 348, 50 Pac. 93; Harrah v. First National Bank, 26 Okl. 620,

110 Pac. 725; *Solts v. S. W. Cotton Oil Co.*, 28 Okl. 706, 115 Pac. 776; *Offutt v. Wagoner*, 30 Okl. 458, 120 Pac. 1018; *Fitzpatrick v. Nations*, 30 Okl. 462, 120 Pac. 1021.

We have carefully searched the record in this case and have been unable to find any evidence reasonably tending to support the general verdict rendered by the trial jury in favor of the defendant. Therefore the judgment of the trial court is reversed, and this cause remanded, with instructions to grant a new trial and proceed in accordance with this opinion.

OWEN, C. J., and KANE, HARRISON, and RAINEY, JJ., concur.

(76 Okl. 6)

KING COLLIE CO. v. RICHARDS.
(No. 9487.)

(Supreme Court of Oklahoma. Sept. 16, 1919.
Rehearing Denied Oct. 14, 1919.)

(Syllabus by the Court.)

1. FRAUDS, STATUTE OF §103(1)—MEMORANDUM OF SALE SUFFICIENT IF CLEARLY STATING AGREEMENT.

The memorandum in writing relied upon to take a contract out of the statute of frauds, however informal, is adequate if it states the agreement with sufficient clearness. The memorandum must state the contract with such certainty that its essentials can be known from the memorandum itself or by a reference contained in it to some other writing without recourse to parol proof to supply them.

2. EVIDENCE §455—EXPLANATION OF FIGURES AND ABBREVIATIONS APPLICABLE TO CERTAIN BUSINESS ADMISSIBLE.

In the use of modern appliances to modern business when it is customary to use figures and abbreviations applicable to certain lines of business, oral evidence may be adduced to show in what sense figures and abbreviations were used and understood by the parties.

(Additional Syllabus by Editorial Staff.)

3. FRAUDS, STATUTE OF §106(1)—MEMORANDUM FOR SALE OF GOODS SUFFICIENTLY CLEAR.

Letter from buyer of cotton, stating that the "65 bl sold us at 19¹/₁₆ basis" had been reclassified and figured "at 98 off mid.," and requiring seller to fill the cotton or let buyer cancel and buy elsewhere, in light of tagging with buyer's tags, its return of draft, etc., was sufficiently clear to show the agreement and take contract out of statute of frauds. Rev. Laws 1910, § 941.

Error from County Court, Jefferson County; E. L. Dillard, Judge.

Action by V. L. Richards against the King Collie Company. Judgment for plaintiff, and defendant brings error. Affirmed.

H. F. Weldon, of Wichita Falls, Tex., and Guy Green, of Waurika, for plaintiff in error.

Bridges & Vertrees, of Waurika, for defendant in error.

HIGGINS, J. For convenience, the parties will be referred to as plaintiff and defendant as they appeared in the lower court.

The plaintiff instituted suit against defendant, and alleged that he entered into a verbal contract with it for the purchase by it of 65 bales of cotton; that the same was tagged with tags furnished by defendant and, at the request of defendant, shipped to it at Bowie, Tex.; that the contract price agreed upon was upon a basis of 19¹/₁₆; that defendant refused to accept or pay for the cotton, whereupon plaintiff took possession and sold the same at the highest market price, but, owing to a decrease in the market, there was a loss of \$15 per bale, a total of \$975, for which judgment is asked. For the confirmation of the contract, the plaintiff pleads the following memorandum:

"Bowie, Texas, 12-15-1916.

"Mr. V. L. Richards, Terral, Okl.—Dear Sir: On the 65 bl sold us at 19¹/₁₆ basis for which you classed and drew for, we reclassified this cotton and figure the class at 98 off mid. We also classed a list for Mr. Barber running 98% off. Your draft was returned for reasons indorsed. We insist on your filling this cotton at the earliest possible moment or let us cancel and buy elsewhere.

"Yours truly, King Collie & Co.,
"Per R. L. Kennedy."

[1] The only question for determination is whether or not the memorandum in writing above referred to takes the case out of the statute of frauds. In support of his contention, that the case is within the statute of frauds, the defendant cites the following cases: *Baker v. Haswell et al.*, 36 Okl. 429, 128 Pac. 1086; *Wright v. Weeks*, 25 N. Y. 153; *Catterlin v. Bush*, 39 Or. 496, 59 Pac. 706, 65 Pac. 1064; *Waterman v. Meigs*, 4 Cush. 497. The plaintiff fails to cite any authorities in his brief showing that the memorandum relied upon by him takes the case out of the statute of frauds, but argues, in addition, that there has been an acceptance of the cotton by the defendant, which is contrary to his pleadings, as he sets forth therein, that there has been no acceptance of the cotton in question by defendant.

The statute relied upon to take the case out of the statute of frauds is section 941 of the Revised Laws of Oklahoma 1910, which is as follows:

"The following contracts are invalid, unless the same, or some note or memorandum thereof, be in writing and subscribed by the party to be charged, or by his agent: * * * An agreement for the sale of goods, * * * at a price not less than fifty dollars, unless the

buyer accept or receive part of such goods and chattels. * * *

In regard to the requisites and sufficiency of the memorandum, 20 Cyc. 253, states the law as follows:

"The memorandum need not formally recite its purpose as a note of the agreement; any memorandum, however informal, is adequate if it states the agreement with sufficient clearness."

And on page 258 states:

"In order to render an oral contract falling within the scope of the statute of frauds enforceable by action, the memorandum thereof must state the contract with such certainty that its essentials can be known from the memorandum itself, or by a reference contained in it to some other writing, without recourse to parol proof to supply them."

The question in this case for determination is whether or not the letter of the King Collie Company of date December 15, 1916, states the agreement between the parties with sufficient clearness. This letter states the number of bales of cotton sold, the basis upon which it was sold, and a request that the defendant be permitted to cancel and buy elsewhere.

[2] It is sufficiently clear that 65 bales of cotton were sold and that it was on a basis of 19¹/₁₆, and that the defendant requests a cancellation of the contract. Oral evidence may be received to show in what sense figures and abbreviations may be used and their meaning may be stated as it was understood between the parties. In this case it was competent to prove by oral testimony what was meant by the parties in stating that the cotton was sold at 19¹/₁₆ basis; this being a term peculiarly known to cotton men in the purchase and sale of cotton.

In *Brewer v. Horst-Lachmund Co.*, 127 Cal. 643, 60 Pac. 418, 50 L. R. A. 240, it is stated:

"A telegram to a hop dealer, by his agent W., stating, 'Bought thirteen, at eleven five-eighths net you; confirm purchase by wire to B.,' with a reply by the dealer, sent to B., stating, 'We confirm purchase W. eleven five-eighths cent, like sample'—are a sufficient written contract by the dealer to purchase hops to satisfy the statute of frauds, where it can be shown by parol evidence that, according to the usages of the hop business, the words were understood by the parties to mean an agreement to purchase a certain quantity of hops, of a certain grade, for a certain price."

[3] We are therefore satisfied that the letter of the King Collie Company above referred to, in the light of the circumstances surrounding the parties, is sufficiently clear to show the agreement between the parties and to take the contract out of the statute of frauds. Any other conclusion than the one here reached would certainly impair the usefulness of modern appliances to modern

business, tend to hamper trade, and increase the expense thereof.

The defendant contends that the contract is within the statute of frauds for reason that evidence shows that it was to pay a certain price for a class of cotton called "boleys," and that this is not mentioned in the letter or memorandum; that is, that all the contract is not set forth in the memorandum. This contention is untenable for the reason that it was optional with plaintiff to ship this class, that he elected not to do so, but shipped the grade referred to in the letter of which the letter is a confirmation of that portion of the contract which was optional with plaintiff to fulfill.

Judgment affirmed.

(76 Okl. 116)

BENTLEY et al. v. ZELMA OIL CO. et al.
(No. 9060.)

(Supreme Court of Oklahoma. June 17, 1919.
Rehearing Denied Oct. 7, 1919.)

(Syllabus by the Court.)

1. CORPORATIONS ⇨307, 314(4) — OFFICERS CANNOT DEAL WITH CORPORATE PROPERTY FOR THEIR PERSONAL ADVANTAGE.

Directors and officers of a corporation, having the management of its corporate affairs, occupy the position of trustees of the welfare of the company, and guardians of the interests of the stockholders, and will not be permitted by a court of equity to violate such trust, by selling or purchasing the corporate property to their own personal advantage and to the detriment of their cestuis que trust.

2. CORPORATIONS ⇨312(5)—SALE OF PROPERTY BY OFFICERS CLOSELY SCRUTINIZED.

The law is averse to sale of corporate property to directors and officers intrusted with the making of such sales, and courts of equity look with suspicion upon them, and will sustain them only upon clear proof of good faith and adequacy of consideration.

3. CORPORATIONS ⇨318 — CONTRACT BETWEEN TWO CORPORATIONS WITH INTERLOCKING DIRECTORATES PRESUMABLY INVALID.

A contract between two corporations, effected by votes of directors common to both, is presumptively invalid, and can only be sustained by an affirmative showing of fairness and good faith.

4. CORPORATIONS ⇨206(1) — VACATION OF SALE OF PROPERTY BY PRESIDENT FOR INADEQUATE CONSIDERATION.

Where the president of a corporation makes a sale of corporate property, either real or personal, in violation of the by-laws of the company, or in violation of a resolution adopted by the board of directors, and such sale is for an inadequate consideration, it will be set aside in an action by dissenting stockholders, where the board of directors refuse to bring suit.

5. CORPORATIONS ⚡204, 444—**SALE OF INTEREST IN OIL LEASE NOT UNDER SEAL OR ATTESTED INVALID.**

A conveyance of an interest in an oil and gas lease on land is a conveyance affecting real estate, within the provisions of our statutes, and where the instrument of such conveyance is not under the seal of the corporation, nor attested by the secretary thereof, as required by section 1187, Rev. Laws 1910, and is not acknowledged in substantial compliance with section 1188, such conveyance is invalid, and subsequent purchasers are charged with notice of its invalidity, and such conveyance may be set aside by dissenting stockholders defrauded thereby, where the directors refuse to bring suit.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Real Estate.]

6. CORPORATIONS ⚡99(3) — **STOCK FALSELY ISSUED AS FULLY PAID INVALID.**

Under section 39, art. 9, of the Constitution of Oklahoma, as construed in *Lee v. Cameron*, 169 Pac. 17, all stock of a corporation issued as fully paid up, when in fact the par value of such stock has not been paid into the corporation in money or money's worth, is fictitious and void.

7. CORPORATIONS ⚡197, 204—**SALE AUTHORIZED BY VOTING FICTITIOUS STOCK VACATED.**

Stock which is fictitious and void under section 39, art. 9, of the Constitution, cannot be counted and voted against stock for which the par value in cash, or its equivalent, has been paid, in order to obtain a majority in voting on a proposition to sell the property of the corporation, and a sale authorized by a majority composed of such stock may be set aside by dissenting holders of valid stock.

8. APPEAL AND ERROR ⚡173(6)—**WHETHER EMPLOYMENT OF ATTORNEYS WAS CHAMPERTOUS MUST BE FIRST RAISED BELOW.**

The question whether a contract of employment between plaintiffs and their attorney is champertous cannot be raised for the first time here.

9. CORPORATIONS ⚡445 — **ON FRAUDULENT SALE OF PROPERTY TO ANOTHER CORPORATION, ITS STOCKHOLDERS NOT INNOCENT PURCHASERS.**

Where one corporation has made a fraudulent sale of its property to another corporation, and the stockholders of the "one corporation" bring an action to set aside such fraudulent sale, in such case the stockholders, of the "other corporation," who have purchased their stock before the property of the "one corporation" was purchased, are not innocent purchasers.

10. CORPORATIONS ⚡204 — **ON SALE OF LEASE TO ANOTHER CORPORATION, ACCOUNTING FOR EXPENDITURES AND PROFITS NECESSARY.**

It appearing that the officers of the Zelma Company made a fraudulent sale of a lease to the Nemo Company, and that afterwards the Nemo Company expended money in developing such lease, but it appearing that in the meantime certain amounts of profits which right-

fully belonged to the Zelma Company had been received and appropriated by the Nemo Company, in such case a proper accounting should be had, and the rights of the parties determined thereby.

11. CORPORATIONS ⚡204 — **DISSENTING STOCKHOLDERS MAY SUE TO CANCEL FRAUDULENT CONVEYANCE OF PROPERTY WHERE OFFICERS REFUSE TO ACT.**

Where the officers and directors of a corporation refuse to bring suit to cancel conveyances of corporate property, fraudulently made by such officers and directors, dissenting stockholders in such case may maintain an action for the cancellation of such conveyance.

Error from District Court, Tulsa County; Conn Linn, Judge.

Suit by W. C. Bentley and others against the Zelma Oil Company, the Almez Oil Company, the Nemo Oil Company, and H. B. Houghton, president of such corporations and trustee for some one or more of them. Judgment for defendants, and plaintiffs bring error. Reversed, with instructions to order a proper accounting by defendant Zelma Oil Company, and to render judgment in accordance with conclusions of opinion.

Solon W. Smith, of Oklahoma City, McGuire & Devereux, of Tulsa, and Ames, Chambers, Lowe & Richardson, of Oklahoma City, for plaintiffs in error.

Everest, Vaught & Brewer and Everest & Campbell, all of Oklahoma City, for defendant in error Zelma Oil Co.

Cottingham & Hayes, of Oklahoma City, Poe & Lundy, of Tulsa, and Ringolsky & Friedman, of Kansas City, Mo., for defendant in error Nemo Oil Co.

HARRISON, J. W. C. Bentley and 13 other minority stockholders of the Zelma Oil Company brought this suit against the Zelma Oil Company, the Almez Oil Company, the Nemo Oil Company, separate corporations, and H. B. Houghton, president and manager of all of said corporations, and trustee for some one or more of same; the object of the suit being to cancel a certain well-drilling contract and certain assignments of an oil and gas lease, for fraud. The well-drilling contract was made between H. B. Houghton, as president of the Zelma Oil Company, and one Max Moore; the assignments in question being of a lease belonging to the Zelma Oil Company, and assigned by George Houghton, as vice president of the Zelma Oil Company, to H. B. Houghton, trustee, thence by H. B. Houghton to the Almez Oil Company, and thence by H. B. Houghton to the Nemo Oil Company—the Nemo Oil Company claiming said lease at the time this suit was brought.

The primary grounds for the suit were fraud; the primary purpose was the cancellation of the instruments in question; hence the right to cancellation depended upon the

evidence of fraud. The transactions out of which the case grew and upon which plaintiffs relied for evidence of fraud were as follows:

Prior to June 3, 1913, there was a scope of territory, near the town of Newcastle, in McClain county, which was worthless for oil and gas purposes, and designated as "wild-cat" territory, and upon which oil and gas leases were obtainable for comparatively nothing, viz. \$1 each, notary and recording fees. On June 3, 1913, H. B. Houghton, his brother, George Houghton, W. M. Sawyers, and J. M. Hamilton organized the Zelma Oil Company, capital stock \$50,000, shares \$1 each. On the next day, June 4th, said parties, being the directors named in the articles of incorporation, held a directors' meeting, at which by-laws were adopted and the following persons unanimously elected, viz.: H. B. Houghton, president; George Houghton, vice president; and W. M. Sawyers, secretary. The articles of incorporation provided for four directors; but they adopted by-laws providing for only three, and then elected five, viz. H. B. Houghton, George Houghton, W. M. Sawyers, J. M. Hamilton, and J. E. Wright.

Now it developed that these directors had come into possession of a number of leases in said "wild-cat" territory, and on June 10th they held another meeting, at which it was concluded unanimously that it was to the best interest of the Zelma Oil Company to own all these "wild-cat" leases, whereupon it was resolved unanimously that the Zelma Oil Company purchase said "wild-cat" leases from said directors and issue to them 26,000 shares of its stock as fully paid up and non-assessable. Said resolution being substantially followed out, they thus became majority stockholders without paying any money for their stock—it appearing from the record that these same directors caused themselves to be reimbursed by the Zelma Oil Company for all the expense they had incurred in procuring said "wild-cat" leases, viz. \$1 each, notary and recording fees; also their hotel bills, traveling expenses, etc., while so engaged. Having thus acquired a controlling interest, these directors resolved that the company should borrow \$3,000 with which to begin drilling. This being done, they unanimously recognized the necessity of at once starting a stock-selling campaign, which they did, selling to yeomen, artisans, clerks, stenographers, etc., in various counties of the state at \$1 a share, par value, cash.

But, while this class of subscribers, among whom were plaintiffs herein and 41 others, were required to and did pay the par value in cash for all the stock they purchased, about 4,257 shares, there were others to whom stock was sold at much better figures. H. L. Houghton, a brother of President Houghton and Vice President Houghton, was issued 3,000 shares for \$1,000, G. R. Witmer, a friend of the brother of President Hough-

ton and Vice President Houghton, was issued 4,000 shares for \$1,750, Mrs. H. L. Houghton, wife of the brother of President Houghton and Vice President Houghton, was issued 100 shares, Mrs. George Houghton, wife of Vice President Houghton, and Mrs. A. H. Hanson, were each issued 100 shares, and Mrs. H. B. Houghton, wife of President Houghton, was issued 500 shares, making in all 800 shares, for which nothing was paid.

On June 20, 1913, President Houghton and Vice President Houghton, assuming to act for the Zelma Oil Company, entered into a contract with the original lessors of McClain county, whereby all of said wild-cat leases were purchased over again; that is to say, the Zelma Oil Company, through its directors, first bought said wild-cat leases from the directors, paying them just what the leases had cost them, together with their expenses in procuring same, and in addition issuing them 26,000 shares of stock; and, secondly, through its president and vice president the Zelma Oil Company again bought the same wild-cat leases from the original lessors, paying the lessors \$1 each and the notary and recording fees.

In said contract—that is, the one whereby the Zelma Oil Company bought said leases the last time—it was provided that the company should drill a well somewhere on said leases, and that the lessors should place the leases in escrow in a bank, and the company should place a bond for \$2,500 in the bank, the leases to be turned over to the company when it got all the drilling equipment on the ground and began drilling, and the bank to turn over the \$2,500 bond to the lessors if the company failed to drill 2,000 feet, or failed to strike oil or gas at a lesser depth. The contract provided, also, that if drilling be abandoned for three years at any one time the leases should become void, and it may be observed at this point that the well was never drilled to a depth of 2,000 feet nor was oil or gas struck at a lesser depth, and that the leases ultimately expired and passed away quite naturally. However, on August 13, 1913, at a directors' meeting, the minutes of which purport to show a quorum present, Vice President Houghton in the chair, a proposition of Eaton & Morgan, a drilling firm, to drill a well 2,000 feet deep, was accepted, and on September 9, 1913, a contract purporting to be between the Zelma Oil Company and G. C. Eaton and A. R. Morgan was entered into between Eaton and Morgan, of the first part, and George Houghton, W. M. Sawyers, and J. M. Hamilton, of the second part. Said contract was not signed by the president of the Zelma Oil Company, nor attested by the secretary of the Zelma Oil Company, nor under the seal of the Zelma Oil Company, nor was the name of the Zelma Oil Company subscribed to said contract. It was signed simply by G. C. Eaton and A. R. Morgan, parties of the first part, and Geo.

Houghton, W. M. Sawyers, and J. M. Hamilton, parties of the second part. It provided, however, that the Zelma Oil Company would pay Eaton & Morgan \$5,000 and issue them 1,000 shares of paid-up nonassessable stock for drilling a well 2,000 feet deep, unless oil or gas in paying quantities be struck at a lesser depth. The well was never drilled 2,000 feet, nor was oil or gas found at a lesser depth; but Eaton & Morgan were paid \$2,250 of the bona fide stockholders' money on this contract, and, being desirous of getting the balance, \$2,750, Morgan, who owned an 80-acre lease in what was known as the "Bixby field," in Tulsa county, made a new contract with the Zelma Oil Company, whereby he agreed to assign his 80-acre lease in the Bixby field to the Zelma Oil Company and drill a well on said lease 1,750 feet deep for the balance due under the other drilling contract. So on March 20, 1914, the following letter was sent out to the stockholders:

"H. B. Houghton, W. M. Sawyers,
"President. Secretary.

"Zelma Oil Company.

"Capital Stock, \$50,000.00, Fully Paid and Non-assessable.

"306-7-8 American National Bank Building.

"Oklahoma City, Okla., 3/20/14.

"Stockholders of the Zelma Oil Company:

"We believe that the stockholders of the Zelma Oil Co. are entitled to all the information that is obtainable in regards to the work done by our company; also our future intentions.

"We began work on Sept. 20, 1913, and have been drilling continuously, day and night, since the above date. We encountered red beds after the first 200 feet. At 1,020 feet we struck a broken formation and 12 feet of oil sand, with a nice showing of oil. Directly under this we struck a large volume of salt water, which we cased off. From 1,032 to 1,415 feet we encountered red beds and veins of water. At 1,415 our driller could go no further. Our expert, who has been at the well continuously during the last 1,000 feet, advised us that it would be impossible to go any deeper.

"We have acquired an 80-acre tract in sec. 20-17-13, east of the Glen Pool in the proven oil field of the state, and we are proceeding to at once drill a well on the above tract. We are pulling our casing from the first hole and expect to be in full operation in the proven field within ten days.

"This gives every stockholder an interest in a well being drilled in the proven fields. Just 1½ miles from our 80-acre lease a well was brought in during the past ten days making 1,800 barrels per day. Other wells are coming in there from 200 to 600 barrels per day. We are going to complete a well there at a deep depth. If we are successful and strike a well, our intentions are to drill another well on our 8,000 acres of leases we are now moving off of.

"We would be pleased to have any stockholder who desires further information to write us direct and we will give their letters prompt attention.

By Order of Directors."

At this time, March 20, 1914, the company had been organized something over nine months; its president and directors had invested nothing in the company; they had bought the McClain county wild-cat leases twice, and paid for them both times out of money paid in by the bona fide subscribers, and in addition had issued to themselves and their friends a controlling interest in the company's stock. They had paid \$2,250 of the bona fide stockholders' money in a pretense of drilling a well on the wild-cat leases, and at this time had contracted to spend \$2,750 more and to issue 1,000 more shares for drilling on the newly acquired lease, which lease it may be observed had been bought with the bona fide stockholders' money, and was all that the company owned at this time that held out even a promise of value for their money, and is the lease in controversy here. Hence the significance of the above letter.

The contract with Morgan provided that Morgan should drill at a point to be designated by President Houghton. President Houghton designated the point, and Morgan began drilling. Now it happened that the Gladys Belle Oil Company had a lease adjoining the Zelma Company lease, and that the point designated for drilling by President Houghton was 140 feet from the line of the Gladys Belle Oil Company, and it subsequently developed that the Gladys Belle Oil Company gave President Houghton 40 acres of its lease for locating the Zelma well at this point, thereby developing the Gladys Belle property. President Houghton took the 40-acre lease in his own name, instead of in his company's name.

On May 8, 1914, Morgan struck oil on the new lease at a depth of 1,668 feet, flowing 40 barrels per day. President Houghton was present on the night the oil was struck, and returned that night to Oklahoma City, saying he was going back to buy more stock before the stockholders heard of the strike. On the next day he bought 100 or more shares, and Vice President Houghton bought about 50 shares. It does not appear that the rest of the directors knew anything of this strike, except Sawyers, the secretary. He and President Houghton and Vice President Houghton held a meeting the next day and reported to each other.

So, on May 23, 1914, another significant letter was addressed to a portion of the stockholders, saying in substance that they had struck paying oil at 1,668 feet, that it was flowing 40 barrels per day, that experts had informed them that a large well could be struck by drilling to deep sand, that they were going to drill to deep sand, that another well just south of theirs was flowing 1,600 barrels per day, and that "financially we are in good shape." A few days after the date of the above letter, assuring the stockholders that "financially we are in good

shape," to wit, on June 10, 1914, a meeting was held by four directors, viz. Sawyers, Wright, and the two Houghtons, at which it was resolved that the company owed \$5,586.21, and that it had \$425.52 in the bank, and further resolved that the officers of the company be authorized to obtain a loan from the American National Bank and to assign the Zelma lease as security therefor. Subsequently a loan of \$6,300 was obtained from said bank upon a note signed by the Zelma Company and eight stockholders, H. B. Houghton, George Houghton, H. L. Houghton, J. H. Everest, J. S. Twyford, W. M. Shaver, J. E. Wright, and W. M. Sawyers. It may be observed here that the by-laws of the Zelma Oil Company provided that—

"An annual meeting of the stockholders shall be held on the first Monday in June of each year, at which the president shall submit a complete report of the company's operations and the state of its corporate affairs for the year."

No such meeting was held or called, and the bona fide stockholders were in total ignorance of all of the above transactions. The above-mentioned loan, however, was obtained in July, 1914; hence on that date the company owned the 80-acre lease in the Bixby field, owned a "standard drilling rig," for which it had paid \$1,000, and should have had nearly \$7,000 in the treasury, the \$6,300 obtained on the aforesaid loan and the \$425 resolved to be in the bank at the meeting of June 10th, aforesaid, and had a well which on May 23d was flowing 40 barrels per day, and according to said letter of May 23d had a very bright prospect for striking a great well, and was "financially in good shape"; yet no further developments were made, no further efforts to drill another well for more than a year thereafter, although Morgan had moved over just 300 feet upon a lease of his own and drilled a well which flowed 50 barrels per day, and notwithstanding the owners of the land covered by the Zelma lease were complaining and insisting that drilling be resumed.

In the meantime the date for holding the annual meeting, the first Monday in June, had passed again without any meeting, and without the bona fide stockholders having any knowledge whatever of the condition of the company's affairs. But in July, 1915, President Houghton went to R. L. Cummings, who owned 40 acres of land covered by the Zelma Company's lease, and told Cummings that he (President Houghton) had plenty of money with which to develop the lease and would drill on Cummings' 40, if Cummings would give him some acreage or pay him \$300; otherwise, he would drill elsewhere. Cummings declined to give the acreage or pay the \$300. The well was not drilled on Cummings' 40.

But on August 12, 1915, President Houghton entered into a contract with one Max

Moore, whereby a one-half interest in the Zelma Company's lease and all other property owned by the Zelma Company was assigned to Max Moore, for which Moore was to drill to a depth of 2,100 feet, unless oil or gas be struck in paying quantities at a lesser depth. The contract also provided that Moore was to do some work on the well already drilled, but was to be the judge of what work was to be done. It does not appear from the contract what work was to be done, nor from the record that any was ever done, except that Morgan hired another man, Robbins, to pull some casing, for which he never paid Robbins, and Robbins filed a lien against the company for \$400 for the work, nor did Moore ever drill the well, but the one-half interest assigned to him ultimately turned up in President Houghton's name. This is the drilling contract which the plaintiffs herein seek to have canceled. It was not under the seal of the corporation, nor attested by the secretary thereof, was made without the knowledge or consent of any bona fide stockholders, and against the advice of the company's attorney, and in violation of law and the resolution adopted by the directors on May 9, 1914, which provided:

"Any contract for drilling new wells to be approved by the board of directors."

On August 26, 1915, W. M. Sawyers resigned as secretary; his resignation was in writing and pasted in the minute book of the company. It shows that he resigned as secretary only. Sawyers said that he resigned as secretary only, and not as both secretary and director. President Houghton said that Sawyers resigned as both secretary and director; but the written resignation was only as secretary, and President Houghton admitted that he altered the written resignation, so as to make it show both director and secretary, after this suit was brought, and after a writ of duces tecum had been served upon him, commanding him to bring the books of the company into court.

On December 21, 1915, President Houghton, Vice President Houghton, and Director J. E. Wright met in the company's office for the purpose of discussing ways and means. At this time they owed the American National Bank \$6,300, and owed some other bills, aggregating several hundred dollars, though nothing had been done on the lease since the 40-barrel well had been brought in on May 8, 1914, except to shoot this well into salt water and ruin it. Nothing had happened to diminish the value of the lease since May 23, 1914, nothing left of the money which President Houghton told Cummings he had in July, 1915, and nothing to show for the \$6,300 borrowed from the American National Bank; yet it was necessary to pro-

vide ways and means, and in order to provide ways and means it was deemed necessary to call some kind of a meeting of stockholders. The by-laws provided that a majority of the directors could request the president to call a meeting of the stockholders. There was not a majority present at this meeting, so President Houghton told Vice President Houghton to get Shaver to sign it. Shaver was not a director. But President Houghton told Vice President Houghton that a stockholder could sign it, whereupon Vice President Houghton, Director Wright, and Stockholder Shaver signed a request to President Houghton to call a special stockholders' meeting for the purpose of devising ways and means. Upon such request President Houghton prepared a notice for a special stockholders' meeting to be held in the company's office, 508 American National Bank Building, on December 31, 1915. Though these notices purported to have been issued December 21st, they were in fact not mailed out at all to but a few of the stockholders, and too late for any but a very few of those who did receive them to attend.

However, on December 31st the directors and a few of the stockholders met in the American National Bank Building, but the meeting was not called to order and no business was transacted. An understanding was reached among a few of the managers that the meeting would be adjourned to a later date, January 7th, but only a few of the manipulators knew anything of the meeting to be held on January 7th, and no one knew where it was to be held. No further notice was given the stockholders in reference to such meeting, but on January 7th, a meeting was held, the minutes of which show to have been held in the Colcord Building. A resolution was passed at such meeting directing their officers and directors to make a sale of all the company's property and then give notice of such sale to the stockholders.

On January 13th a report of the meetings of December 31st and January 7th it is claimed was mailed out to a few of the stockholders. There were about 50 stockholders—in fact, nearly all of the bona fide stockholders—who never received such notice and never heard of such meeting until this suit was brought. Said report to the stockholders, dated January 7, 1916, is in part as follows:

"You are hereby notified that at a meeting of the stockholders, lawfully called, and at which a legal quorum was present, the original meeting being called for the 31st day of December, 1915, and which meeting was by a majority of those present adjourned to the 7th day of January, 1916, held at the office of the company in Oklahoma City, Oklahoma, that it was unanimously resolved to sell the leases of the Zelma Oil Company held near Bixby, Oklahoma, and the other property of the company situated

thereon, upon due advertisement to be made by the directors and at either public or private sale for the best sum obtainable. * * *

"As a part of the same resolution, it was suggested by a number of the stockholders present that a new company be formed to purchase the leasehold interests and develop these leases, and it was moved that every stockholder in the old Zelma Oil Company be given an opportunity to purchase the same proportion of stock in the new company that his stock in the old company bears to the paid-up stock in the old company.

"Looking toward the formation of a new company, and the taking over of the old company and developing it, provided the new company is successful in bidding in the property, a stock subscription has been started, a copy of which is inclosed herewith, and if you desire to subscribe for any stock in the new company to be formed in accordance with the subscription blank, sign and return the same to H. B. Houghton, Colcord Building, this city, being careful to write the amount of stock you wish to take in the new company opposite your name. If the new company is not successful in bidding on the leases of the old Zelma Oil Company, your stock subscription, of course, will be returned to you canceled. Otherwise, you will be called upon for payment.

"Yours truly,

"Zelma Oil Company, by ———."

The stock subscription blank referred to in the above notice is as follows:

"Subscription to Capital Stock.

"We, the undersigned persons, do hereby agree to associate ourselves together for the purpose of forming a private corporation under the laws of the state of Oklahoma, said corporation to be known as Zelma Oil Company No. 2, with its principal place of business at Oklahoma City, Oklahoma, for the purpose of acquiring and developing oil and gas, with the power of acquiring such real estate either by lease or purchase, as may be necessary or pertinent to said business, and transacting such other business as may be connected with the development of oil and gas, with a capital stock of fifteen thousand dollars (\$15,000), subdivided into fifteen thousand shares (15,000), of the par value of one dollar (\$1) each. Said corporation is to exist for twenty years, and to have as its first directors, Harry B. Houghton, of Oklahoma City, Oklahoma, George Houghton, of Oklahoma City, Oklahoma, J. E. Wright, of Newcastle, Oklahoma, W. M. Shaver, of Oklahoma City, Oklahoma, and J. H. Everest, of Oklahoma City, Oklahoma, or such other persons as the stockholders may select. The specific intention and purpose of the organization of said company is to purchase, if possible, at either public or private sale, certain leases now owned and used by the Zelma Oil Company of Oklahoma City, near Bixby, Oklahoma, together with such personal property as there may be thereon.

"We agree to pay for said stock upon the issuance of a charter by the state of Oklahoma to the Zelma Oil Company No. 2, conditioned as above, fifty per cent. (50%) upon receiving notice of said incorporation, and the balance when the same may be directed by the board of directors.

Name.	Residence.	No. of Shares.	Par Value."

The Zelma Oil Company No. 2 was never organized; hence the above notice to the few stockholders who did receive it was misleading and false. But on February 1, 1916, President Houghton, of the Zelma Oil Company, organized the Nemo Oil Company and became its president. On February 20th the following notice of sale of the Zelma Company's property was published in the Tulsa World:

"Oil and Gas Lease for Sale.

"Notice is hereby given that the Zelma Oil Company, a corporation, of Oklahoma City, Oklahoma, will receive written bids for the purchase of its leasehold interest, and all of its personal property, the said leasehold interest being upon the east one-half of the southeast quarter of section twenty (20), township seventeen (17) range thirteen (13), consisting of eighty acres more or less, in Tulsa county, state of Oklahoma, together with all the casing, pipes, tanks, and other material belonging to the Zelma Oil Company, now on said lease. The terms of said sale to be cash, and sealed bids will be received at the office of said company, No. 1117 Colcord Building, in Oklahoma City, Oklahoma, up to and including the 23d day of February, 1916, at the expiration of which time said property will be sold to the highest bidder for cash.

"The Zelma Oil Company,
"By H. B. Houghton, Its President."

It is observed from the record that the first publication of the foregoing notice was on February 20th, and that February 23d was the last day for receiving bids. None of the above notices were sent to any of the stockholders, but it appears from the record that the attention of one W. C. Elliott, an oil man of Tulsa, was called to said notice of sale, whereupon Mr. Elliott called up President Houghton over the telephone and asked President Houghton about said notice, with the view of filing a bid. President Houghton discouraged Mr. Elliott in filing a bid and gave him to understand that no bids were wanted. On February 24th President Houghton met Vice President Houghton. It does not appear clearly just where or when they met, nor conclusively that they met at all. But minutes of their meeting, which were dictated June 3d thereafter, purport to show that the following proceedings were had somewhere on February 24th, to wit:

"Special Meeting.

"Now on this 24th day of February, 1916, a meeting of the board of directors of the Zelma Oil Company is held—being present H. B. Houghton and George Houghton.

"Thereupon bids are received as per advertisement in the Tulsa World and the Daily Oklahoman for the sale of the lease located next Bixby, and described as follows, to wit: $8\frac{1}{2}$ of $SE\frac{1}{4}$ of 20-17-13 East of I. M., Tulsa county, Oklahoma, and the personal property, consisting of casing and rig thereon.

"The only bid received is that of H. B. Houghton (consisting of \$6,300.00), as trustee for J.

E. Wright, Geo. Houghton, H. B. Houghton, W. M. Shaver, J. H. Everest, J. S. Twyford, H. L. Houghton.

"Thereupon a motion is made by George Houghton that the meeting adjourn for the purpose of seeing if more money can be received for said property, to which the bidder consented.

"The meeting adjourned.

"H. B. Houghton, President.

"Attest:

George Houghton, Secretary."

It does not appear that any further effort was ever made to obtain a better price, nor does it appear that any one knew anything of such bid, except the two Houghtons. But on April 6, 1916, the \$6,300 note at the American National Bank fell due, and a payment of \$300 was made thereon with money obtained from the sale of the Zelma Company's property, and the balance of the note extended to July 1, 1916.

On May 13, 1916, a well known as the "Franscot well" was brought in a mile east of the Zelma property, production 300 barrels per day. On June 1st, President Houghton issued a call for a meeting of the board of directors on June 14th. On June 13th, a 500-barrel well was brought in on the C. V. Reed lease, which cornered with the Zelma lease. Vice President Houghton was present at the bringing in of said well.

So on June 14, 1916, President Houghton and Vice President Houghton met again somewhere, the minutes of which meeting were dictated and written up on July 3, 1916, the day after a 140-barrel well had been brought in on the Zelma's lease, but which purport to show the following proceedings, to wit:

"Meeting of the Board of Directors.

"On the 14th day of June, 1916, the board of directors, consisting of H. B. Houghton and George Houghton, met pursuant to the call of the president, for the sale of the lease and to pay the debt of the company.

"There being no other bids than the one made February 24th by H. B. Houghton, trustee, for \$6,300.00, it is moved by George Houghton and seconded by H. B. Houghton that the same be accepted, which motion carried.

"Thereupon the officers, to wit, H. B. Houghton and Geo. Houghton, president and secretary of the Zelma Oil Company, were directed by motion to execute and deliver an assignment of the property, to wit, $E\frac{1}{2}$ of $SE\frac{1}{4}$ of 20-17-13 East of I. M., Tulsa county, Oklahoma, to H. B. Houghton as trustee, for and in consideration of \$6,300.00 paid by him to the company, for the purpose of paying off the debts of the company.

"Whereupon the meeting adjourned.

"H. B. Houghton, President.

"Attest:

"George Houghton, Secretary."

But on the day before the above meeting, to wit, on June 13, 1916, President Houghton, acting for the Zelma Oil Company, conveyed to Vice President Houghton, accept-

ing for the Nemo Oil Company, a one-half interest in the Zelma Company's lease. This assignment shows to have been executed in Oklahoma county on said date, notwithstanding the testimony shows that President Houghton was in Tulsa on that date and that Vice President Houghton was at the aforesaid Reed well on said date, and that they both stayed that night at the Tulsa Hotel in Tulsa.

To summarize briefly: President Houghton, on February 24, 1916, bid \$6,300 for the Zelma property, acceptance of which bid was postponed pending future developments. On June 13th, developments being satisfactory, President Houghton assigned one-half of the Zelma Company's property to the Nemo Oil Company, and on June 14th Vice President Houghton accepted the bid of President Houghton made on February 24th and assigned all of the Zelma Company's interest to President Houghton.

Hence at this time the Nemo Company owned a one-half interest in the Zelma Company's property, and President Houghton owned a whole interest in the Zelma Company's property, and the Zelma Company owned nothing. In the meantime another date for the annual meeting of stockholders had passed without a meeting having been held, and without the bona fide stockholders of the company having any knowledge whatever of the affairs of the company, or of the tortuous route of transactions taken by its managers since organization, nor any knowledge that a well had been brought in on the "Franschot" lease in May, nor the one on the Reed lease on June 13, 1916.

Mr. B. L. Brookings, of Tulsa, who had been in the oil business in Oklahoma for the previous 10 or 12 years, engaged during this time in producing oil, operating wells, buying and selling leases, and was well acquainted with the Zelma lease within the Bixby field, testified that after the Franschot well was brought in, in May, the Zelma lease was worth \$20,000 or \$25,000, and that after the Reed well was brought in, on June 13th, this value was doubled.

On June 19, 1916, the Almez Oil Company was chartered, the temporary directors being H. B. Houghton, George Houghton, W. M. Sawyers, and J. M. Hamilton, but no permanent organization of this company nor election of permanent officers was had until after the development of subsequent events. The Nemo Company was at this time drilling a well on the Zelma lease, in consideration of the one-half interest in the Zelma lease, which President Houghton assigned to the Nemo Company on June 13, 1916. On July 2d oil was struck in this well, producing 140 barrels per day.

Mr. B. L. Brookings and other oil men testified that the Zelma lease was worth from \$60,000 to \$75,000 after this well was brought in. On the night of July 2d President Hough-

ton was notified of the bringing in of the well, hence July 3d required many things to be done.

The Almez Oil Company was permanently organized on that day with H. B. Houghton, president. On that day President Houghton, of the Zelma Oil Company, conveyed to the Almez Oil Company a one-half interest in the Zelma's lease. On that day the minutes of the meeting of President Houghton and Vice President Houghton on February 24th were written up, reciting that President Houghton met Vice President Houghton on February 24th and bid \$6,300 for the Zelma's lease. On this day also the minutes of the meeting of President Houghton and Vice President Houghton on June 14th were written up, reciting that President Houghton and Vice President Houghton met somewhere on that day, whereupon the bid made by President Houghton was accepted by Vice President Houghton on June 14th, after the Franschot well had been brought in, which made the Zelma's property worth \$20,000 to \$25,000, and after the Reed well had been brought in which doubled its value, and after the well had been brought in on the Zelma's lease, which raised the value of the Zelma's property to \$60,000 to \$75,000.

It was also very proper and necessary for the various instruments of assignment of President Houghton of one-half interest in the Zelma's lease to the Nemo Company on June 13th, and the assignment of the entire interest of the Zelma Company to President Houghton on June 14th, and the assignment by President Houghton of one-half interest in the Zelma lease to the Almez Company to have been of record on that date; but they had so much to do on July 3d that it seems they just could not get to it, and the next day, July 4th, being a holiday, said instruments of assignment were not placed of record until July 5th.

So on July 6, 1916, the Almez Oil Company found itself duly organized, with H. B. Houghton as president, and possessed of a one-half interest in the Zelma Company's lease, duly recorded. But the Almez Company enjoyed its possessions but a few days. President Houghton began at once to procure from the stockholders of the Almez Company an option on the purchase of their stock in said company, and by July 17, 1916, had procured an option from all of said stockholders, and a release of all their interest in the Almez Company. Whereupon he (President Houghton) conveyed the Almez Company's one-half interest in the Zelma lease to the Nemo Company, and thereupon the Nemo Company, upon motion of its vice president, Geo. Houghton, executed and delivered to each of the Houghtons, viz. President Houghton, Vice President Houghton, and Rev. Houghton, its promissory note for \$1,000, as compensation for the skillful manner in

which the foregoing deals had been "put over."

The Nemo Company now owned all of the Zelma lease, and had H. B. Houghton for its president; so on July 19, 1916, President Houghton borrowed \$6,500 from the Producers' State Bank of Tulsa and mortgaged said lease to said bank to secure the payment of said money; and on July 20, 1916, President Houghton with the money borrowed from the Producers' State Bank paid the balance \$6,000 due on the note to the American National Bank of Oklahoma City. Thus President Houghton's bid of February 24th, accepted June 14th, was paid with the proceeds of the note secured by the lease which the Zelma Company once upon a time had owned, and thus the Zelma Company, after its turbulent existence of more than three years, emerged therefrom out of debt, but without a dollar.

So affairs being seemingly in satisfactory condition, President Houghton took an extended visit to the mountains of Colorado, having first placed the books of the Zelma Company where the stockholders could not get access to them, though several stockholders during this period endeavored to do so. On October 24, 1916, this action was begun. In the latter part of December, 1916, the cause was tried, and on January 20, 1917, a written opinion was rendered against the plaintiffs and the cause comes here upon appeal by plaintiffs.

As stated in the outset, the primary purpose of this action was the cancellation of the drilling contract with Max Moore, and of the various assignments through which the Nemo Company became the owner of the Zelma Company's lease, and that the primary grounds of the suit were the numerous acts of fraud perpetrated upon the bona fide stockholders of the Zelma Company by H. B. Houghton, its president, and Geo. Houghton, its vice president.

The trial court held that no fraud had been shown, at least that not sufficient fraud had been shown to warrant a cancellation of the instruments in question; hence a reversal of the judgment depends upon whether in the opinion of this court fraud sufficient to warrant such cancellation was shown. Fraud, if found at all in this case, must be found in or among the various transactions referred to above. The real character of such transactions may be more clearly reflected by their results.

Whatever may be the contentions of defendants in error as to what the facts are, and whatever the authorities cited as applicable to the facts as they contend them to be, there is one potent condition which stands out, bold, glaring, and uncontrovertible, viz.: That the bona fide stockholders, over 50 in number, invested their money in the stock of this company in good faith, upon the representations made by H. B. Houghton, the

president, and George Houghton, the vice president, and others who went out into the stock-selling campaign, immediately upon the organization of the company. That the said stockholders paid the par value in cash for all the stock issued to them, amounting to \$4,257. That every dollar of their money was either squandered outright, under and through the manipulations of the two Houghtons, or was spent in development of the Zelma Company's lease, and that the Zelma Company finally lost all of its property, and the bona fide stockholders lost all of their money. On the other hand, the two Houghtons, who had purchased their stock with wild-cat leases, which had cost them absolutely nothing, reached the end of this devious route of transactions with more than 9,000 shares in the Nemo Oil Company, which owned the lease which the Zelma Oil Company had formerly owned, and which was worth \$75,000.

In other words, the president and vice president of the Zelma Company, who had invested nothing in said company, came out rich. The bona fide stockholders of the Zelma Company came out with nothing, except their stock in a company which did not own a thing on earth. This result may then throw some light on the character of the foregoing transactions.

[1] Guided by the light of these facts, bearing in mind the rule of presumption, that a person intends to do what he does do, considering the entire history as a whole, and looking upon each transaction as a link in the entire chain, we are quite naturally led to the belief that the incorporators and promoters of the Zelma Company, knowing of the wild-cat leases in McClain county, and that they could be procured for comparatively nothing, conceived the idea of forming a corporation, then procuring as many of such leases as they needed, transferring them to the corporation in exchange for a controlling amount of stock, then selling enough of the remaining stock to whomsoever they could for money enough to reimburse themselves for what they had expended for the wild-cat leases, and then with the balance to either develop such leases or operate in some other field.

At any rate, the company was organized for \$50,000, the wild-cat leases procured, transferred to the corporation, a controlling interest in stock issued to the directors, stock enough sold to bona fide subscribers to reimburse the directors for what they had been out in procuring the leases and to begin developments thereon. And from this time on the affairs of the company were so managed by the Houghtons that in the end the bona fide subscribers had lost all their money, the company had lost its lease, which on the day it was assigned was worth \$60,000 to \$75,000, and the Houghtons, who had invested nothing, owned a major interest in the lease. Thus the character of the transactions which

lead to them is reflected by these results. Transactions which lead to such results are incompatible with good faith; and such results having been reached by the Houghtons, acting in the capacity of trustees of the welfare of the company, and as guardians of the interest of the stockholders, enjoined and intrusted by law, by the sounder policies of business, and by the standards of common honesty to faithfully keep such trust, such results will not be permitted to stand by a court of equity, nor will such trustees be permitted to thus violate their obligations, and profit thereby to the detriment of their cestui que trust.

[2-4] The law is averse to this character of contracts and presumes against their validity, while courts of equity look with suspicion upon them and will sustain them only upon clear proof of good faith and adequacy of consideration.

"A contract between two corporations, effected by the votes of directors who are common to both, is presumptively invalid, and can only be sustained by an affirmative showing of fairness and good faith." 10 Cyc. 819, par. 3—citing *German National Bank of Hastings v. First National Bank*, 55 Neb. 86, 75 N. W. 531; *Wheeler et al. v. Abilene National Bank Bldg. Co.*, 159 Fed. 391, 89 C. C. A. 477, 16 L. R. A. (N. S.) 892, and notes 892 to 895, 14 Ann. Cas. 917; 2 *Pomeroy, Eq.* (3d Ed.) § 958, pp. 1752, 1753; 6 R. C. L. 286, note; 14 Ann. Cas. 921, note; *Bear River Orchard Co. v. Hanley*, 15 Utah, 506, 50 Pac. 611; *Hutchinson v. Sutton Mfg. Co.* (C. C.) 57 Fed. 998; 2 *Cook on Corporations* (6th Ed.) § 653; *Mobile, etc., v. Gass*, 142 Ala. 520, 39 South. 229; *Barry v. Moeller*, 68 N. J. Eq. 483, 59 Atl. 97; *Wardell v. R. R. Co.*, 103 U. S. 651, 26 L. Ed. 509; 4 *Clark & Marshall on Corporations*, §§ 258-260, and cases cited.

In the *Wardell Case*, *supra*, which involved a character of transactions very similar to those involved here, Mr. Justice Field, who delivered the opinion of the Supreme Court of the United States, says:

"The directors of a corporation are subject to the obligations which the law imposes upon trustees and agents. They cannot, therefore, with respect to the same matters, act for themselves and for it, nor occupy a position in conflict with its interest."

In *Stewart v. Lehigh R. R. Co.*, 38 N. J. Law, 505, the court said:

"The vice which inheres in the judgment of a judge in his own cause contaminates the contract; the mind of the director or trustee is the forum in which he and his cestui que trust are urging their rival claims, and when his opposing litigant appeals from the judgment there pronounced, that judgment must fail. It matters not that the contract seems a fair one. Fraud is too cunning and evasive for courts to establish a rule that invites its presence."

Beach v. Miller (Ill.) 17 Am. St. Rep. 301, note, *Guthrie v. Huntington Chair Co.*, 71 W. Va. 883, 76 S. E. 795, *O'Conner v. Coosa Fur-*

nace Co., 95 Ala. 614, 10 South. 290, 36 Am. St. Rep. 251, *Sweeny v. Grape Sugar Co.*, 30 W. Va. 448, 4 S. E. 431, 8 Am. St. Rep. 88, and *Gardner v. Butler*, 30 N. J. Eq. 702, 703, announced the same doctrine. Many other authorities and equally well-reasoned opinions could be cited in support of the doctrine that contracts of this character are voidable, but it is deemed unnecessary to add to the foregoing list. This doctrine was adopted and followed by this court in *Barnes v. Lynch*, 9 Okl. 156, 59 Pac. 995, and has not been departed from.

While there is a seeming divergence of opinion on the point as to whether such contracts are absolutely void or merely voidable (10 Cyc. 808, 809), yet when the most widely divergent opinions are analyzed, and the facts upon which they are based are taken into consideration, there is but little real conflict after all. The views taken by different courts, which seemingly have established two lines of authorities, seem to have been actuated mostly by the particular facts with which they were dealing rather than by distinctly different rules of substantive law. As is said in 10 Cyc. 809, 810:

"But perhaps there is no essential difference between this view and the former."

The authorities are in harmony on the question that the burden of proof in such cases is on the trustee to show that his purchase was in good faith; they are in harmony in holding such contracts void where bad faith is shown; they are in harmony in holding that a director of a corporation or a trustee of any character will not be permitted to purchase the property of his cestui que trust and profit by such purchase to the detriment of his cestui que trust; they are in harmony in holding that, where a director votes for the sale of corporate property to himself, such sales are subject to the severest scrutiny by courts of equity, and that the burden is upon such director to show by clear proof that his purchase was in entire good faith, and they are in harmony in holding that stockholders may maintain an action to set aside this character of contracts.

The drilling contract with *Max Moore* does not seem to have been at all necessary; in fact, from the statement of President *Houghton* himself, it seems to have been wholly unnecessary. The company owned a good drilling outfit, with all the necessary equipment at this time, and in July, about three weeks before this contract was made, President *Houghton* told *R. L. Cummings* that he had plenty of money with which to drill, was going to drill, and would drill on *Cummings'* 40, if *Cummings* would give him \$300 or some acreage, and doubtless would have drilled, had *Cummings* done as the *Gladys Belle Company* had done, and given him the \$300 or the acreage.

[5-7] If the company had plenty of money

at this time, and it should have had the \$3,300 borrowed from the bank, nothing having been done on the lease since the loan had been obtained, there was then no urgent necessity for such a contract. It was for an inadequate consideration; it was made in violation of the by-laws, which provided that the affairs of the company should be controlled by the board of directors; it was made in violation of the resolution passed by the board of directors May 9, 1914, expressly prohibiting the making of any drilling contracts, except by a majority of the board; it was made without the knowledge or consent of, or any authority from, the board of directors or the stockholders; it was not under the seal of the corporation, nor attested by the secretary thereof; and being an instrument affecting real estate (*Duff v. Keaton*, 33 Okl. 92, 124 Pac. 291, 42 L. R. A. [N. S.] 472; *Eldred v. Okmulgee Loan & Trust Co.*, 22 Okl. 742, 98 Pac. 929; *Allen v. Brown*, 6 Kan. App. 704, 50 Pac. 505), and purporting to convey a one-half interest in a lease, affecting real estate, was invalid under section 1187, Rev. Laws 1910, which provides:

"Every deed or other instrument affecting real estate, executed by a corporation, except when executed by an attorney in fact, must be attested by the secretary or clerk of such corporation with the corporate seal attached"

—construed in *Randall Co. v. Glendenning*, 19 Okl. 475, 92 Pac. 158, and also invalid because not acknowledged in substantial compliance with section 1188, Rev. Laws 1910.

Whether such contract was good as between Houghton and Moore is immaterial in this case, and is not decided; but it was not good as against dissenting stockholders, who had no knowledge of its execution, and who were defrauded by reason of it, and may be repudiated and set aside by the company at the instance of a shareholder. 30 N. J. Eq. 702; 38 J. L. L. 505. The trial court, therefore, was in error when it declined to set aside said contract.

As to the other assignments, the initial steps which led to them were taken December 21, 1915, when President Houghton, Vice President Houghton, and Director Wright met and "devised ways and means." At this meeting it was decided to call a stockholders' meeting for December 31, 1915. The by-laws provided that such a meeting could be called upon the written request of a majority of the directors. They had no majority; so upon the advice of President Houghton, who seemed anxious to "devise ways and means," two directors and one stockholder signed the request upon which the meeting was called to be held in the company's offices, 506 American National Bank Building, December 31, 1915. Notices of such meeting were dated December 21, 1915, but only a few stockholders ever received them, or heard of the meeting, and

only a few attended. The meeting was not called to order and no business transacted. At least several witnesses, who were in a position to know, testified to this effect.

It is contended, however by defendants, that the meeting was called to order, and there being no quorum present, it was adjourned until a later date, January 7, 1916, and that minutes to that effect were written in the minute book. On the other hand, there was evidence that between two weeks and a month after the meeting of January 7th the books were examined and found to contain no minutes of either meeting. But it is immaterial, so far as the character of these proceedings is concerned, whether one or the other contention be true. If the meeting was not called to order, and no business transacted, no understanding had as to what would be done in the future, nor where it would be done, then the meeting on January 7th, being without notice to and unknown to any except the few who benefited by the result, was illegal, and all subsequent proceedings had pursuant thereto, and all conveyances made by virtue thereof, were void, as to dissenting stockholders without notice; on the other hand, if the agreement shown by said minutes was in fact reached, then it was secretly reached, and known only to those few who had the affairs in charge, and kept secret from the rest.

The purported minutes of said meeting recite that it was called to order by President Houghton to ascertain whether a legal majority was present. They do not show that the list of stockholders was called, but purport to show only that George Houghton read the number of shares present, in person and by proxy, the owners of which consisted, for the most part, of the three Houghtons and their wives and the directors, but do not show that the name of any other stockholder was called. They do not purport to show that the names of any of the absent stockholders were called, numbering more than 50, nor do they show that the names of any of those who were present and testified at the trial that no proceedings were had were called. They show that only 14,688 shares out of a total of 37,482 were present. They show that by motion the meeting was adjourned to 9 o'clock, January 7th.

Hence, if such proceedings were had, and the minutes actually written up, they serve only to stamp the character of such proceedings with deeper deceit. It is observed that such minutes do not state where the meeting was to be held. If all parties present had known that it actually adjourned to January 7th, they would naturally have presumed that it would be held at the company's offices; but it was not held there. It was held in a different building; hence the minutes themselves constituted deceit upon those present, if they had had actual knowledge of the proceedings. The minutes

of the meeting of January 7th, after reciting that the meeting was called to order and giving a list of the shares present, are as follows:

"Motion was made by Mr. J. H. Everest that the officers and directors of the company be authorized and directed to sell the property of the company, consisting of certain leases near Bixby and personal property thereon, at public or private sale, for the largest sum available, to pay the debts of the company, and that a written notice be given each stockholder of the sale and of this resolution, and each stockholder of the Zelma Oil Company has the right to subscribe for such proportion of stock in the new company as his stock in the old company bears to the paid-up capital in the old company.

"This motion was seconded by Mr. F. M. Archdeacon. Motion being made, seconded, and carried.

"The capital stock of the new company to be \$15,000. The name of the new company to be 'Zelma Oil Company Number Two.'

"Stock to be paid for 50 per cent. cash on organization and 50 per cent. as called in by directors.

"There being no further business, the meeting adjourned."

In reviewing these proceedings, it is noted that the request of December 21, 1915, to the president, was to call a meeting for the purposes only of considering ways and means of paying the debts of the company, and the advisability of selling some or all of the company's property, and that the letter purporting to give notice of such request to the stockholders stated that the meeting would be held for the purpose of considering ways and means of paying the debts of the company, and selling a portion or all of the property of the company, and also authorizing the directors to make such sale, thus going another step further than authorized by the request. It is noted, also, that the letter stated that such request was by a majority of the directors, which was not true.

From this point the significance of Houghton's altering the Sawyers' resignation becomes apparent, as it was necessary to show a majority of directors present and participating at the "devising of ways and means." And at the meeting of January 7th they went still another step further, by agreeing to organize a new company to be known as "Zelma Oil Company Number Two."

The minutes do not show how this agreement was reached, nor do they show that such proposition was ever submitted to the meeting, or that even the few stockholders who were present were given an opportunity to vote on the proposition; hence the agreement to organize a new company was reached on the outside, and not by the stockholders in the meeting. The minutes, however, do show that a motion was adopted which provided that "the officers and directors of the company be authorized and directed to sell the property," and that "a written notice be given each stockholder of the sale," neither

of which provisions were complied with. At any rate there were about 50 stockholders—in fact, practically all of the bona fide stockholders—who never received such notice, knew nothing about either meeting or the intended sale, nor did they know anything of the intended organization of the new company, the "Zelma Oil Company Number Two," which was never organized. Hence, if all of the stockholders had received the notice, they would have been misled and deceived thereby. The notice, set out above, which was published in the Tulsa World, stating that written bids would be received up to and including the 23d day of February, 1916, and stating that said lease would be sold to the highest bidder for cash, was a deceit also, even if the stockholders had seen it, which they did not; but, had they seen it, it was a deceit and fraud, for the reason that said notice was not in any sense complied with. In the first place, the first publication was made February 20th, and the last day for receiving bids was February 23d.

In the second place, it was not sold upon a written sealed bid, nor was it sold for cash. The only man who sought to make a bid, W. C. Elliott, of Tulsa, was discouraged by President Houghton and given to understand that no bids were wanted, and the sale was clandestinely made by one Houghton to the other. On the next day, February 24, 1916, the meeting between President Houghton and Vice President Houghton took place somewhere, the minutes of which were written up five months later, but which showed that President Houghton told Vice President Houghton that he would bid \$6,300. He filed no written bid, nor paid any cash; but Vice President Houghton took President Houghton's word for it, that he would pay \$6,300 for the lease, which it appears he never paid.

It is claimed by defendant in error that he paid the \$6,300 note due the American National Bank, in consideration of which Vice President Houghton assigned the entire lease to President Houghton; but it appears from the record that on February 1st, President Houghton had organized the Nemo Oil Company, and on June 13, 1916, conveyed one-half interest in the Zelma Company's lease to the Nemo Oil Company, which he could not legally do on that date, because he did not then own it. The lease was not in his name on that day. The assignment was not made by Vice President Houghton to him (President Houghton) until June 14th; hence on June 13th, President Houghton had no one-half interest in the lease to convey to the Nemo Oil Company.

But on June 14th Vice President Houghton conveyed the entire lease to President Houghton, and subsequently President Houghton, having organized the Almez Oil Company on June 19th, and conveyed to it a one-half interest in the Zelma Company's lease, conveyed this, the other one-half interest, to the

Nemo Oil Company, and then mortgaged all of said lease to the Producers' State Bank of Tulsa to secure a loan of \$6,500, and with the proceeds of it paid off the \$6,300 at the American National Bank; therefore it was the Zelma Company's lease that paid off the note, and not President Houghton.

So, whether each transaction be viewed separately, or all be taken as a whole, the same result is met. From the day of its organization to the day on which its last property interest passed to the Nemo Company, there was not a step taken, not a turn made, wherein the bona fide stockholders of the Zelma Oil Company had a voice, or were permitted to share in the profits of the transactions. - On the other hand, not a turn was made but which, considered in its relation to subsequent events, resulted in a material advantage to the Houghtons personally, and in a corresponding detriment to the bona fide stockholders. The trial court, therefore, erred in refusing to cancel and set aside the assignments herein sought to be canceled.

The assignment and conveyance from Houghton to Max Moore was invalid, for the reasons above given; likewise the assignments to H. B. Houghton as trustee, the assignment of one-half interest by H. B. Houghton to the Nemo Oil Company, the assignment by H. B. Houghton to the Almez Oil Company, and the subsequent assignment of the same interest by H. B. Houghton to the Nemo Oil Company, were all invalid, fraudulent, and void, as against plaintiffs herein, and other bona fide stockholders like situated, and the trial court should have so held.

It is urged by defendants in error that said assignments are valid, for the reason that at the meetings held on December 31, 1915, and on January 7, 1916, there was a majority of shares present, and that by the majority of shares in the company it was decided to do the things which were subsequently done. This contention is without merit, either under the record or under the law.

In the first place, it is not shown by the record that even the shares that defendants in error claim were present at said meetings were voted on the proposition as to whether the things would be done which were done; on the other hand, it appears from the record, from the minutes of the purported meetings, upon which defendants in error rely, that no formal vote of shares was ever taken. If the meetings were held, and the motion adopted at the January meeting, which the minutes show was adopted, then the sale of the Zelma Company's interest was invalid, because it was made, as above stated, in direct violation of the motion.

In the second place, the contention is without merit under the law, for the reason that the shares which it is claimed were present and constituted a majority of shares were void, under section 39, article 9, of the Constitution, and under the authority

of Lee v. Cameron, 169 Pac. 17, wherein this court, in an opinion by Mr. Justice Rainey, construed section 39, article 9, of the Constitution, and held:

"Watered stock, or fictitiously paid-up stock, is stock which is issued as fully paid-up stock, when in fact the whole amount of the par value thereof has not been paid into the treasury of the company. All stock which has been issued as paid-up stock, but the full par value of which has not been paid into the corporation in money or money's worth, is watered to the extent that the par value exceeds the value actually paid into the treasury. Watered stock is, accordingly, stock which purports to represent, but does not represent, in good faith, money paid into the treasury of the company, or money's worth actually contributed to the capital of the concern, * * * and the stock so issued is void."

Therefore the shares which, as contended by defendants, constituted a majority of the stock of the corporation, were fictitious and void under said constitutional provision, and will not be permitted to be voted and counted in order to constitute a majority of stock, to the detriment of stockholders who have paid par value, and to the advantage of holders of void stock. It was well said by this court in Lee v. Cameron:

"This provision of our Constitution was intended by its framers and the people who adopted it to prevent the issuance by corporations of 'watered or fictitiously paid-up stock.'"

[8] It is also contended by defendants in error that the contract of employment between plaintiffs and their attorneys, Twyford & Smith, attorneys at the trial below, was champertous, and that the action therefore is not maintainable by plaintiffs, and that the judgment of the trial court should be affirmed. At any rate the effect of sustaining such contention would be to affirm the judgment; but this question was not decided by the court below, and is not appealed from. The plaintiffs below are plaintiffs in error here, and have not appealed from the judgment rendered upon this issue; the issue was not pleaded in the trial court, nor plaintiffs given an opportunity to meet such issue nor the trial court given an opportunity to decide such issue, and cannot be raised for the first time here. Hence it is not necessary to decide whether such contract is champertous, nor whether, if it be champertous, the defendants would be permitted to defend against fraudulent conveyances upon this ground.

[9-11] It is also argued by defendants in error that the judgment should be sustained because of the interest of innocent investors in the stock of the Nemo Oil Company, but it does not appear from the record that any person not already a stockholder in the Nemo Oil Company bought it after the assignment to the Nemo Oil Company by the Houghtons of the first one-half interest in the Zelma Company's lease. On the contrary, it ap-

appears from the record that all of the stockholders in the Nemo Oil Company purchased a portion or all of their stock before the Nemo Oil Company acquired its first one-half interest in the Zelma Company's lease; hence this contention cannot be sustained.

It is also contended that large amounts of money had been expended by the Nemo Oil Company in the development of the lease originally owned by the Zelma Company, and while the contention that \$75,000 or \$80,000 had been spent in developing such lease is not sustained by the evidence, yet it is possible that some money was actually expended by the Nemo Oil Company in developing such lease; on the other hand, it appears conclusively that a very considerable amount of oil had been sold off of said lease by the Nemo Oil Company, none of which amount was accounted for to the Zelma Company; hence, if any amount was actually expended by the Nemo Oil Company in developing said lease, such amount, less the amount of oil sold off of said lease, should be paid back to the Nemo Company by the Zelma Company. This would necessitate an accounting, which should have been granted in the first instance by the trial court.

It is also contended that the Zelma Company, having knowledge of the transactions and having participated in the profits thereof, is now estopped from maintaining this action to set aside the instruments of assignment made by it. We are unable to conceive of the foundation upon which this contention is based, except that the trial court held to this effect, though in so holding and deciding it fell into grievous error. As stated above, there was not a transaction made nor a step taken in the affairs of the Zelma Company wherein it was benefited one penny by the transaction, nor a transaction made but the Zelma Company sustained a detriment by reason thereof, and the bona fide stockholders, including these plaintiffs and 41 others, bore the burden of the detriment. Besides, the court erred further by holding this to be a suit by the Zelma Company, and by holding that the right of plaintiffs to recover rested upon the same grounds with the Zelma Company's right to recover.

The facts are that these plaintiffs and other bona fide stockholders knew nothing of the conveyances in question, they were unable to get access to the books of the company, they employed attorneys and went to the offices of the company for the purpose of examining the books, and found that they had been taken away by President Houghton, and that these plaintiffs, and other stockholders like situated, were unable to get the Zelma Company as a company to take any action in the premises. The affairs of the company were under the control of the fraudulently acquired majority interest in the stock, and a few stockholders, including the Houghtons,

who had control of this fraudulently acquired and void stock, were managing the affairs of the company to their own interest personally, and could not be induced to bring suit in the name of the company to cancel conveyances, which they had fraudulently made in the name of the Zelma Company, and by which they were personally benefited.

These, we believe, constitute all the contentions made by defendants in error which it is necessary for this court to pass upon. There are other contentions made—several others; but the conclusions we have herein reached in reference to the matters decided being true, such contentions are necessarily not true.

The judgment of the trial court is reversed, and the court instructed to order a proper accounting by the Nemo Oil Company of the profits derived from the lease and the money expended thereon, and to render judgment in accord with the conclusions herein reached.

All the Justices concur.

(78 Okl. 108)

LUSK et al. v. BANDY. (No. 9127.)

(Supreme Court of Oklahoma. April 29, 1919.
Rehearing Denied Oct. 7, 1919.)

(Syllabus by the Court.)

1. MASTER AND SERVANT \S 256(1)—CASE BY PLEADING AND EVIDENCE WITHIN FEDERAL EMPLOYERS' LIABILITY ACT CONTROLLED THEREBY.

A case which by allegation and proof is brought within Employers' Liability Act April 22, 1908, c. 149, 35 Stat. 65 (U. S. Comp. St. §§ 8657-8665), is controlled by that act, although its provisions may not have been referred to in express terms in the pleadings.

2. COMMERCE \S 27(1, 7)—MASTER AND SERVANT \S 284(1), 288(2), 289(15) — QUESTION OF ASSUMED RISK AND CONTRIBUTORY NEGLIGENCE FOR JURY.

Where a common carrier by railroad while engaged in interstate commerce maintains at one of its division points a roundhouse and turntable, where its engines being used in such commerce are stored in such roundhouse, and the boilers of such engines are washed therein, or on tracks adjacent thereto, and such engines are turned on such turntable, *held*:

(a) That the roundhouse and tracks adjacent thereto and the turntable so used are instrumentalities used by the railroad in interstate commerce.

(b) That an employé of the railroad, whose duties were to wash boilers of the engines of the railroad so used was, while in the discharge of his duties and while in and around such roundhouse and on the premises of the railroad com-

pany adjacent thereto and in going to and from his work when ordered by the foreman of such roundhouse, also engaged in interstate commerce within the provisions of the Employers' Liability Act of Congress of April 22, 1908.

(c) Where suit is brought by the personal representatives of such employé against the receivers of the railroad company and the petition of the plaintiff, by proper allegations and averments, alleges the death of the employé, and alleges that his death was proximately caused by the failure of the defendant to keep its turntable pit lighted, and the evidence was conflicting, though there was evidence reasonably tending to sustain the allegations of the plaintiff, the trial court properly overruled the demurrer of the defendant to the evidence of the plaintiff and the defendant's request for a peremptory instruction and properly submitted the questions of assumed risk by and the contributory negligence of the deceased to the jury, as well as the question of whether or not the deceased was engaged in interstate commerce at the time of the accident resulting in his death.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Interstate Commerce.]

8. MASTER AND SERVANT §204(1)—ASSUMPTION OF RISK UNDER FEDERAL EMPLOYERS' LIABILITY ACT.

Under the federal Employers' Liability Act (U. S. Comp. St. §§ 8657-8665), the law of assumption of risk is, as that of the common law as it existed prior to the passage of said act, except where the common carrier violated some statute enacted for the safety of employées.

4. MASTER AND SERVANT §288(1)—ASSUMPTION OF RISK QUESTION FOR JURY.

On the issue of assumption of risk by a servant who has sustained injuries, where the evidence is harmonious and consistent and the circumstances are such that all reasonable men must reach the same conclusion, the question whether the plaintiff assumed the risk is one of law for the determination of the court; but where the facts are controverted, or are such that different inferences may be drawn therefrom, the question as to the assumption of the risk should be submitted to the jury under proper instructions from the court.

5. MASTER AND SERVANT §204(1) — WHEN RISK ASSUMED UNDER FEDERAL EMPLOYERS' LIABILITY ACT.

Under the federal Employers' Liability Act (Act April 22, 1908, c. 149, 35 Stat. 65 [U. S. Comp. St. §§ 8657-8665]), the servant assumes all the risks of his employment which are known to him, or which could have been known by the exercise of ordinary care of a person of reasonable prudence and diligence in like circumstances. Risks not naturally incident to the occupation, but which arise from the negligence of the master, are not assumed by the servant until he becomes aware of such negligence and of the risks arising therefrom, unless the negligence or risk are so apparent and obvious that an ordinary and careful person would observe the one and appreciate the other.

6. MASTER AND SERVANT §295(1)—ASSUMPTION OF RISK QUESTION FOR JURY UNDER THE EVIDENCE.

Evidence examined, and *held*, that under the facts of this case the question of assumption of risk was properly submitted to the jury.

7. APPEAL AND ERROR §1001(1) — WHERE EVIDENCE SUSTAINS VERDICT IT WILL NOT BE DISTURBED.

In a civil action triable to the jury, where there is competent evidence reasonably tending to support the verdict of the jury, and no prejudicial errors of law are shown in the instructions of the court, or its ruling on law questions presented during the trial, the verdict and finding of the jury will not be disturbed on appeal.

8. TRIAL §260(1)—REFUSAL OF REQUESTED INSTRUCTIONS EITHER ERRONEOUS OR REPETITIONS OF OTHERS PROPER.

Requested instructions of the defendant, which were refused by the trial court, examined, and *held*, that in each instance the instructions either failed to state the question of law involved correctly, or that the same was properly submitted to the jury by the trial court, and that therefore the refusal of the court to give such requested instructions was not prejudicial error.

(Additional Syllabus by Editorial Staff.)

9. DEATH §105 — VERDICT UNDER FEDERAL EMPLOYERS' LIABILITY ACT APPORTIONING THE DAMAGES PROPER.

In an action under the federal Employers' Liability Act of April 22, 1908 (U. S. Comp. St. §§ 8657-8665), for negligent death, the court may receive a verdict apportioning the damages among the beneficiaries.

Error from District Court, Pontotoc County; J. W. Bolen, Judge.

Action by Francis Bandy, née Francis Jones, administratrix of the estate of Clay Jones, deceased, against James W. Lusk and others, receivers of the St. Louis & San Francisco Railroad Company. Verdict and judgment for plaintiff, motion for new trial overruled, and defendants bring error. Affirmed.

W. F. Evans, of St. Louis, Mo., R. A. Kleinschmidt, of Oklahoma City, and Jones & Foster, of Muskogee, for plaintiffs in error. Robt. Wimlish and W. C. Duncan, both of Ada, for defendant in error.

JOHNSON, J. This action was commenced on the 23d day of December, 1915, in the district court of Pontotoc county, by plaintiff, under the name of Francis Jones, as administratrix of the estate of Clay Jones, deceased, to recover of the defendants damages for the alleged wrongful death of the said Clay Jones. The action was instituted under the federal Employers' Liability Act (Act April 22, 1908, c. 149, 35 Stat. 65 [U. S. Comp. St. §§ 8657-8665]). The petition, ex-

§ For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

clusive of caption and formal allegations, is as follows:

"That the defendants are the duly appointed, qualified, and acting receivers of the St. Louis & San Francisco Railroad Company, a corporation, and that said receivership is pending in the District Court of the United States for the Eastern Division of the Eastern District Court of the State of Missouri, and as such receivers the defendants are in charge of the property of said railroad company, said property consisting, among other things, of railroads, cars, stations, shops, roundhouses, turntables, engines, etc. That said receivers are operating said railroad, a line of which passes through the state of Oklahoma in the county of Pontotoc, and a line of which extends from Denison in the state of Texas, to the city of Sapulpa, in the state of Oklahoma, and from the city of Sapulpa in the state of Oklahoma, to the city of Monett in the state of Missouri, and that there are agents of the defendants in Pontotoc county upon which service of summons may be had.

"Second. Plaintiff further alleges that heretofore, to wit, on the 3d day of November, 1915, the plaintiff's decedent, Clay Jones, was in the employ of the defendants receivers in the capacity of a workman and boiler washer in the town of Francis, state of Oklahoma; that on said day and date, and for some time prior thereto, the said decedent was engaged as a boiler washer in washing boilers of engines belonging to the defendants receivers, which said engines were used by the defendants in both interstate and intrastate commerce and traffic from the town of Francis, state of Oklahoma, to the town of Denison, state of Texas, and points within the state of Missouri along defendants' line of railroad, said points being to this plaintiff unknown.

"Third. Plaintiff further alleges that while said decedent was so employed as hereinbefore set out in paragraph 2 of this petition, and for a long time prior thereto, the defendants receivers owned and operated in their yards at Francis, Okl., a turntable; that said turntable was used and operated by the defendants for the purpose of turning defendants' engines, which said engines were used by the defendants receivers in transporting freight and passenger cars from the town of Denison, to the town of Francis, and from the town of Francis to the town of Denison, and to other points both north and south of the town of Francis, which points are to this plaintiff unknown.

"Fourth. Plaintiff further alleges that it was the duty of her decedent, Clay Jones, to work — hours a day for the defendants, and that his day's work terminated at 7 o'clock in the evening, and under the rules and regulations prescribed by the defendants, their agents, servants, and employes, who had supervision of said decedent, it was the duty of said decedent to report to one of the defendants' agents, servants, and employes and to 'register off' for the day's work; that said decedent had been accustomed to making such report and 'register off' on each and every day that he worked for a long time prior to the 3d day of November, 1915.

"Fifth. Plaintiff further alleges that on the said 3d day of November, 1915, at about the hour of 7 o'clock, said decedent had, during all said 3d day of November, 1915, been at work

in the roundhouse or engine house washing boilers of engines belonging to the defendants; said engines having on said 3d day of November, 1915, and a few days prior thereto, been used by defendants in transporting its trains and cars from Francis, Okl., to Denison, Tex., and from Denison, Tex., to Francis, Okl., and it was contemplated by defendants, their agents, servants, and employes to again use said engines for the purpose of transporting and pulling its trains from Francis, Okl., to Denison, Tex., and from Denison, Tex., to Francis, Okl.; and that said night was very dark, and that plaintiff's decedent, upon leaving said enginehouse, fell into the pit in which said turntable was located, striking his head against the cement floor or bottom of said pit, fracturing his skull and breaking his neck, from which wounds said decedent then and there instantly died. Plaintiff further alleges that a short time prior to 7 o'clock, the time prior to which decedent was required to 'register off' for the day, one of the agents, servants, and employes of the defendants receivers notified said decedent that he would be required to return after supper and do extra work in his capacity as a boiler washer for said defendants.

"Sixth. Plaintiff alleges that said turntable was situated north and east of the engine house or place where said decedent was required to work, and about 20 feet therefrom, and that it was necessary for said decedent to pass around and near said turntable in performing his duties and especially in going to the place where he was required by defendants to 'register off' from the day's work.

"Seventh. That the defendants receivers, their agents, servants, and employes, well knew that the said turntable and the pit in which the same was situated was a dangerous place, and that all the defendants' agents, servants, and employes engaged in work similar to the work that said decedent was engaged in necessarily had to pass about, around, and near the said turntable, all of which was known to the defendants receivers, their agents and employes, and that said defendants receivers, their agents, servants, and employes, were guilty of gross neglect towards its workmen, and especially toward said decedent, in failing to keep and maintain any lights of any character in or about said turntable, and in or about the pit in which said turntable was situated, and that said neglect was the immediate and proximate cause of said decedent falling into said pit, and was the immediate and proximate cause of his death.

"Eighth. Plaintiff further alleges that said decedent was comparatively a young man, being at the time of his death about 37 years of age and capable of earning the sum of \$2.50 per day by his labors; that he was attentive to his work and reasonably expected to become more efficient in his services and to earn greater sums of money per day; and that said decedent was a strong, healthy man, and with a reasonable expectancy of living to an old age, to wit, the age of 74 years.

"Ninth. Plaintiff further alleges that this plaintiff, administratrix, is the surviving wife of said decedent, and Myrtle, about the age of 12 years, Alger, about the age of 9 years, and Scott, about the age of 5 years, and Opal, of about the age of 15 months, are the surviving children of

this plaintiff and said decedent, and that the children and this plaintiff are the sole and only surviving heirs at law of said decedent, and that the said decedent contributed his earnings to the support and maintenance of this plaintiff and said children, and would have continued to have contributed to their support for and during the balance of his life.

"Tenth. Plaintiff alleges that by reason of the acts and injuries and negligence of said defendants receivers, their agents, servants, and employes, this plaintiff and her said children have been damaged in the actual sum of \$25,000.

"Wherefore, premises considered, plaintiff prays that said defendants and each of them be cited to answer this petition, and, on final hearing hereof, that she as administratrix have judgment for the sum of \$25,000 for the use of herself individually and her said children, Myrtle, Alger, Scott, and Opal, and that said judgment be declared a lien upon the property and funds of the St. Louis & San Francisco Railroad Company, a corporation, which may be in the hands of the defendants receivers, and that the same be established as a claim against said property and money, and for such other relief to which she may show herself entitled, whether in law or equity."

Thereafter, to wit, on October 2, 1916, the defendants filed their answer to said petition, which answer presented the following defenses, to wit:

First. General denial.

Second. Special denial of negligence, and allegation that the death of said intestate was caused solely and entirely by his own negligence and want of care.

Third. Contributory negligence.

Fourth and fifth. Assumption of risk.

On November 10, 1916, plaintiff filed her reply, consisting of general denial of new matter alleged in the answer.

The cause having been submitted to the jury, they returned into court the following verdict, to wit:

"We the jury drawn, impaneled and sworn in the above-entitled cause, do upon our oaths find for the plaintiff and assess the damages:

For Francis Bandy, formerly Jones.....	\$ 200 00
For Myrtle Jones the sum of.....	1,000 00
For Alger Jones the sum of.....	1,200 00
For Scott Jones the sum of.....	1,400 00
For Opal Jones the sum of.....	1,800 00

\$5,600 00

"W. C. Lee, Foreman."

Thereafter, on the 1st day of December, 1916, and within three days after the rendition of this verdict, the defendants filed in said cause their motion for new trial, which said motion was by the court overruled, and defendants excepted. Thereupon case-made was duly prepared, served, and settled as required by law, and the cause was brought to this court for review by petition in error. The errors relied upon are as follows:

First. The court erred in overruling defendants' demurrer to plaintiff's evidence.

Second. The court erred in overruling defendants' motion for peremptory instructions.

Third. The court erred in refusing to give to the jury the several written instructions requested by defendants and in refusing to give each of said instructions separately and severally.

Fourth. The court erred in giving to the jury the several instructions to which defendants excepted at the time and in giving each of said instructions separately and severally.

Fifth. The court erred in receiving the verdict of the jury apportioning the damages among the widow and minor children.

Sixth. The court erred in rendering judgment on the verdict of the jury and in rendering separate judgments in favor of the widow and minor children.

Seventh. The court erred in overruling the defendants' motion for a new trial.

[6] The testimony in this case shows, in substance, that the railway company at the time of the accident, and for a number of years prior thereto, maintained a division at the town of Francis, Okl., where the accident occurred, at which it maintained and used, as facilities and instrumentalities in operating its trains, a roundhouse, turntable, and numerous tracks for the handling of its locomotives, and that engines coming from the north and south, respectively, were disconnected from the trains and stored in the said roundhouse and tracks and then others sent from said roundhouse and tracks to be used in place of the one stored, and that said line of railway extended from the town of Francis, Okl., south to Denison, Tex., and points further on in the state of Texas, and from Francis, Okl., north to Monett, in the state of Missouri, and other destinations north and beyond Monett, and that the deceased had been an employe of the said railway company at Francis, Okl., for about two years prior to the accident which resulted in his death, in the capacity of boiler washer. For about one year after he began working for the company, he was on the night shift, and that about one year prior to the accident he had been upon the day shift, and that while upon the day shift he worked eleven hours, beginning at 6 a. m. and quitting at 7 p. m., and that the company had installed in a room adjoining the roundhouse a clock where employes were required to register on coming on duty and going off duty; that the deceased on the 2d day of November, 1915, the date of the accident, registered as follows; Morning, in, 6:41, out, 12:02, afternoon, in, 12:41, out, 7:07. His time card for that day also shows, hours, 11, amount, \$2.00, and bears the indorsement: "Examined and distribution is correct. J. H. Huckins, Foreman."

J. H. Huckins, foreman of the roundhouse, testified:

"Last time I saw him on the 2d, night of the 2d, when found him next morning, morning of the 3d, and he and I put a switch engine out together about 5:03 p. m. I handled the engine and he held the table for me, and we went to the coal shed and got some coal, and back to the water tank, and he taken water on the engine, and he throwed the switch for me, and I back out on what was called the out-bound track after this engine was set out for night service. I never saw him any more after that until next morning. I told him after we got through with this switch engine that I wanted him to come back and wash the pile driver that was coming in off the road for a washout, but we would call him when the pile driver got in, that I did not know what time they would get in, might be 12 o'clock and might be 1 o'clock. Did not have him called for that work, but told Mr. Johnson, the night foreman, about what I told the deceased about 8:30 or 9 o'clock, and told him to have deceased called."

E. C. Johnson, night foreman, testified:

That the deceased was supposed to work in the roundhouse and by the side thereof. Once in a while they washed boilers by the side of the roundhouse over by the old rip track. Saw deceased about 7 p. m. in the clock room; seemed to be checking out. The foreman told me about 7:15 or 7:20 the deceased would be back that night to wash the pile driver boiler; suppose the deceased was then out around the roundhouse. He told me he was coming back to wash the pile driver boiler. I said, "All right." The last time I saw him was about 9 o'clock. About that time he went out the west door of the roundhouse. The pile driver came in something like 9 o'clock. The deceased was there then. Did not give him any instructions about washing the pile driver and never did have him called for it. I did not have him wash it, because I thought he was drinking. That he (Johnson) and his brother washed the pile driver.

This was contradicted by Marvin Johnson, who said:

He and Bob Scoggins washed it about 11 or 12 o'clock; that they used torches for light, which they got in the storehouse where they kept them for use by employes; that there were no lights on the turntable that night; the pile driver was on the old rip track; used a hose that was connected to fountain No. 1 inside the roundhouse through a window on east side about 10 steps to where the pile driver stood, or hardly so far. It was about 20 steps from an oil lamp on a post, which light sometimes burned and sometimes did not, but could not get light from it if it had been burning. We used torches for light. Was dark around the roundhouse before I went to work. The storeroom, with the clock room in controversy, was at the southeast corner of the roundhouse.

The evidence places the deceased going out of the west door of the roundhouse at about 9 o'clock at night after the pile driver was in and set on the old rip track east of the roundhouse about 10 steps, or maybe less, and about 20 steps southeast of the turntable and pit, which was not lighted, and it was dark in and around there. The turntable

was 20 feet north of the roundhouse. There were four tracks from the turntable into the roundhouse, six north and west thereof, one east. If the deceased had started from the point where last seen alive to his house, north and east, his route lay northwest, over the tracks from the turntable, and the distance from where his dead body was found in the pit would vary from, say, 50 to 100 feet. If he were going from that point to clock and storeroom to begin his work, his route would be around between the roundhouse and turntable over the tracks to the west side of the roundhouse. The jury was warranted from the evidence to draw either inference.

The testimony showed that the railway company's turntable was situated about 20 feet east from the east side of its roundhouse; that there were four tracks leading from the turntable into the roundhouse, one track leading from the turntable to the east of the roundhouse, six tracks leading from the turntable north and west therefrom, and some four tracks leading from the east on to the turntable; that the turntable revolved in a pit varying in depth from about 5 feet at the edge thereof, to 6½ feet at the center thereof, and the same was built of concrete and it had a solid concrete bottom; that the deceased was seen alive by the witnesses at about 9 o'clock p. m. on November 2d, and was at the time in and around the roundhouse, and especially the clock room thereof, which room was at the southwest corner of the roundhouse, which had a door that opened to the south; that there were two doors entering the roundhouse, one of which was near the northwest corner and the other near the southwest corner; that the rip track, upon which the pile driver engine was set for the purpose of having its boiler washed, was about 20 feet south of the roundhouse, and where the engine set at the time was a little to the southeast of the doors of the clock room and the roundhouse; that the deceased lived some distance northeast from the roundhouse; and that his route home was from the northwest door of the roundhouse in a northeasterly direction, and in going to and from his home to the roundhouse would not be required to pass over but one or two of the tracks of the railway company, and would intersect a public traveled road about 150 feet north of the turntable, and at which point his hat was found at about 6:30 of the morning of November 3d, and his body was found in the pit near the north edge thereof and about 150 feet from where his hat was found. He was dead, his neck having been broken and his skull fractured, and there was a pool of blood near his head.

This testimony was very much in conflict as to whether or not the premises in and around the company's turntable and tracks leading thereto were kept lighted in the nighttime, and especially on the night of the 2d of November, some of the witnesses testifying that

on that occasion there were no lights to the turntable, and had not been for several months prior thereto; that sometimes an oil lamp was kept burning and sometimes two, neither of which were sufficient to light the turntable itself and the tracks surrounding; that frequently neither light was kept burning; that numerous trains arrived in the nighttime from the north and south, engines were changed, and boilers washed. While other witnesses testified that the premises were kept lighted at all times in the night, and were so lighted in the night of November 2d.

The witness Homer Kellogg testified that the deceased worked on several engines, washing the boilers on the date of his death, and that about 6 p. m. of said day he assisted the deceased in handling a passenger engine; the deceased changing the water, and he (Kellogg) building the fire therein.

The witness Marvin Johnson testified that he and one Bob Scoggins washed the boiler of the pile driver on the night of November 2d, at about 11 or 12 o'clock; that the deceased did not assist them; that there were no lights at the turntable or where they washed the boiler, for they used torches to furnish them light; that he worked on the night shift; that when they washed the boiler of the pile driver it was setting on the old rip track on the east side of the roundhouse, about 10 steps therefrom; that it was the custom of the boys working on the night shift to knock around over the roundhouse grounds and turntable; and that no objections were ever made by the foreman or the man in charge. The same condition had existed for three or four months prior to the accident.

Barney Bernard, an employé of the railway company, testified that the pile driver in question was used in driving piling out on the Frisco road, of the branch line running from Denison, Tex., to Sapulpa, Okl.; that the tracks were used for the transportation of freight and passengers over the country from points both within and without the state. He testified that the engine No. 1247 was handled by the deceased on the day preceding his death; that it came from the south going north, and pulled 21 loads and a caboose; and that the loads came from Hugo, and some from Sherman, and they were going to St. Louis, and they started from Sherman on that day; also, he handled engine No. 3704, which was a switch engine, and it hauled all of aforesaid cars brought in by engine No. 1247; that engine No. 628 was the engine that was set in for that night, and took out the pile driver the next morning.

J. T. Bryant, an employé of the railway company, testified that he was an engine wiper; that he knew the deceased; and that the deceased washed the boiler of engine No. 3704 that evening.

The defendants' third and fourth assignments of error, are that the court erred in re-

fusing to give certain requested instructions and in giving instructions to which the defendants objected and excepted at the time, which assignments will be here considered together.

We find that the defendants' requested instructions which were refused by the court and excepted to by the defendants, 1 to 8, inclusive, in effect requested that the court charge the burden of proof upon the plaintiff to establish all material allegations in her petition, including the allegation that both the railway company and the deceased were engaged in interstate commerce at the time of the accident complained of, by a preponderance of the evidence, and while said requested instructions substantially, for the most part, correctly stated the law, and were called for by the pleadings and evidence in the case, yet we find that the court covered the points by his instructions to the jury, and hence, under the decisions of this court, no reversible error was committed in refusing to give the requested instructions in the form asked by the defendants.

[1] From an examination of the record we think that, by both the allegations and proof in this case, it is clear that the same is brought within the provisions of the act as hereinafter quoted, and is controlled by that act, although its provisions may not have been referred to in express terms in the pleadings.

[2] There was testimony reasonably tending to show that the railway company and the deceased, at the time of the accident complained of, were engaged in interstate commerce. This being true, it therefore follows that the trial court did not err in overruling the defendants' demurrer to plaintiff's evidence, and defendants' request for peremptory instructions. *St. Louis & S. F. Ry. Co. v. Snowden*, 48 Okl. 115, 149 Pac. 1083; *North Car. Ry. Co. v. James A. Zachary*, 232 U. S. 248, 34 Sup. Ct. 305, 58 L. Ed. 591, Ann. Cas. 1914C, 159; *Choctaw, O. N. & G. R. Co. v. McDade*, 191 U. S. 64, 24 Sup. Ct. 24, 48 L. Ed. 96; *Hayes v. Mich. C. R. Co.*, 111 U. S. 228, 4 Sup. Ct. 369, 28 L. Ed. 410.

The plaintiff alleged in her petition that the defendants owned and operated in their yards at Francis, Okl., a turntable for their use, and operated by the defendants for the purpose of turning its engines, which engines were used by the defendants in transporting freight and passenger cars from the town of Denison, Tex., to the town of Francis, Okl., and from the town of Francis, Okl., to the town of Denison Tex., and other points both north and south of the town of Francis, Okl., which points were to the plaintiff unknown.

The acts of negligence of the defendants complained of by the plaintiff were the defendants' failure to keep and maintain any lights of any character in or about said turn-

table, and in or about the pit in which said turntable was situated, and that said negligence was the immediate and proximate cause of the deceased falling into said pit, and was the immediate and proximate cause of his death.

The Act of Congress of April 22, 1908, provided:

"Every common carrier by railroad while engaging in commerce between any of the several states * * * shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employé, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employé, * * * dependent upon such employé, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employes of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment."

"Sec. 3. That in all actions hereafter brought against any such common carrier by railroad under or by virtue of any of the provisions of this act to recover damages for personal injuries to an employé, or where such injuries have resulted in his death, the fact that the employé may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employé: Provided, that no such employé who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employes contributed to the injury or death of such employé."

"Sec. 4. That in any action brought against any common carrier under or by virtue of any of the provisions of this act to recover damages for injuries to, or the death of, any of its employes, such employé shall not be held to have assumed the risks of his employment in any case where the violation by such common carrier of any statute enacted for the safety of employes contributed to the injury or death of such employé."

The defendants complain because the court refused requested instructions Nos. 9 to 16, inclusive. Nos. 9 and 10 go to the question of assumed risk and in substance and effect advise the jury that this action was brought under the federal Employers' Liability Act, and that under the act the assumption of risk by the employé was a complete defense, and that if the deceased was familiar with the defendants' premises, and went upon the same in the dark, and in consequence of such darkness fell into such pit and was killed, then he would be held as a matter of law to have assumed the risk, and that the plaintiff would not be entitled to recover damages for his death, leaving out of the situation entirely the question of the defendants' negligence and the purpose for which the deceased went upon the premises at the time of the accident.

No. 11 instructed the jury that if the de-

fendants maintained a roundhouse, engine pits, and turntables, and that the same were necessary appliances to the conduct of their business, and was constructed and maintained in accordance with the standard ordinarily maintained by the railroads in the country, such act would not constitute negligence on the part of the defendants. We find that the question there presented was substantially submitted to the court in paragraphs 5 and 6 in the general charge to the jury, and that the court's failure to give requested instruction No. 11, as requested by the defendants, was not error.

Requested instruction No. 12 informed the jury that if the jury believed from the evidence that, during the time the deceased was employed by the defendants, no material change had been made in the methods of maintaining such turntable pit, and in lighting the premises adjacent thereto, the deceased would be held as a matter of law to have assumed the risk and the verdict of the jury should be for the defendants. This was the same proposition involved in requested instructions 9 and 10 and was likewise correctly stated in the court's general charge to the jury, and that the court committed no error in refusing the instruction asked for the reason heretofore stated.

Requested instruction No. 13 was in effect the same as No. 12, and the court committed no error in refusing the same for reasons heretofore stated.

Requested instruction No. 14 instructed the jury that if it found from the evidence that the deceased left the defendants' roundhouse by the west door thereof with the intention of going to his home, and that in order to reach his home he would have to proceed along a public street or highway, passing said roundhouse in the direction of his home, and if the jury further believed from the evidence that the turntable pit into which he fell was not situated so near said highway as to constitute substantially a part thereof, defendants would in that case owe deceased no duty with reference to the maintenance or the lighting of said pit.

The questions there, as stated, would have been highly confusing to the jury because the same was not applied to the facts in evidence and because the route of travel defined would neither have proceeded along a public street or highway nor would it pass the roundhouse, as the evidence showed that the turntable pit was situated at a point some 50 feet at a right angle from the direct line described in the instruction, and such instruction entirely ignored the question as to why the deceased was upon the premises at the time of the accident, whether he was there properly in the discharge of his duties to the defendants, or as a naked trespasser, and hence there was no error committed in refusing such instruction.

Defendants' requested instructions Nos. 15

and 16 cover the question as to the reason why the deceased was upon the premises at the time of the accident complained of, whether he had reported there in the discharge of his duties, or as to whether his services had been completed for the day, and whether he had completed his day's work and was upon the premises for purposes other than in the discharge of his duties, and while there received his injuries.

[8] These questions, we think, were properly submitted to the jury by the court in its general charge, and that there was no error in refusing the requested instructions Nos. 15 and 16.

This court has frequently held that, even though the requested instructions state the questions of law correctly, there is no error in refusing the same when the court properly submits the questions in his general charge to the jury, and, when taken as a whole, fairly submit to the jury all the law applicable to the case. *Citizens' Bank of Wakita v. Garnett et al.*, 21 Okl. 220, 95 Pac. 755; *Finch et al. v. Brown*, 27 Okl. 217, 111 Pac. 391; *Higgins v. Street*, 19 Okl. 45, 92 Pac. 153; *Coalgate v. Hurst*, 25 Okl. 588, 107 Pac. 657.

We think that the turntable, as the same was shown from the evidence to have been constructed and maintained by the railway company, was one of the instrumentalities used by the railway company in the business of interstate commerce, and was included in the provisions of the act of Congress of April 22, 1908, in which it is provided that every common carrier by railroad, while engaged in commerce between the states, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employé, to his or her personal representatives for the benefit of the surviving widow and children of such employé for such injury or death resulting wholly or in part from the negligence of any of the officers, agents, or employé of such carrier, or by reason of any defect or insufficiency due to its negligence in its cars, engines, appliances, machinery, tracks, roadbeds, works, boats, wharves, and other equipment, and the negligence charged by the plaintiff as a violation of the provisions above quoted is that it failed to keep and maintain any lights of any character in or about the turntable or in or about the pit in which said turntable was situated, and that such negligence was the immediate and proximate cause of the injury complained of, charging, in effect, a violation of the duty imposed upon the defendants by the terms of the act referred to, which act of violation was charged to be the proximate cause of the death of the plaintiff's decedent. So under section 3 of the act of Congress:

"That in all actions hereafter brought against any such common carrier by railroad under or by virtue of any of the provisions of this act to recover damages for personal injuries to an employé, or where such injuries have resulted in his death, the fact that the employé may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employé: Provided, that no such employé who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employé contributed to the injury or death of such employé."

And section 4 provides:

"That in any action brought against any common carrier under or by virtue of any of the provisions of this act to recover damages for injuries to, or the death of, any of its employé, such employé shall not be held to have assumed the risks of his employment in any case where the violation by such common carrier of any statute enacted for the safety of employé contributed to the injury or death of such employé."

[3] The law applicable to the defense of assumption of risk under the federal Employers' Liability Act is that of the common law as it existed prior to the passage of said act, except where the common carrier has violated some section of the statute enacted for the safety of employé.

[4, 5] On the issue of assumption of risk by a servant who has sustained injuries, where the evidence is harmonious and consistent and the circumstances are such that all reasonable men must reach the same conclusion, the question whether plaintiff assumed the risk is one of law for the determination of the court; but where the facts are controverted, or are such that different inference may be drawn therefrom, the question as to the assumption of risk should be submitted to the jury under proper instructions from the court. 26 Cyc. 1479; 18 R. C. L. § 166, p. 676.

Upon these issues the court instructed the jury as follows:

"(5) If you find by a preponderance of the evidence that the deceased was engaged in interstate commerce and that he was on the yards of the defendants preparatory to commencing actual work, and that the defendants kept and maintained a pit in said yards, and by for any reason in the discharge of his said duties, to go in, around or near said pit or excavation, if you find such pit or excavation was kept, and that the defendants negligently failed to keep said pit lighted, and the deceased fell into said pit and lost his life, and that the negligence of the defendants in failing to maintain lights to light said pit was the proximate cause of the injury to the deceased, then your verdict will be for the plaintiff, unless you find for the defendants under other instructions herein given."

(Defendants except. Exceptions allowed.)

"(6) You are further instructed that if you find that from the evidence in this case that the pit alleged was open, and that the location of the same was known to the deceased, and that said pit was an instrumentality of his employment, then you are instructed that the deceased assumed the risk of the danger connected with said open pit.

"On the other hand, if you find that said pit was disconnected and was not incident to the discharge of the duties of the deceased, and was not one of the instrumentalities incident to his employment, then the deceased should not assume such risk."

(Defendants except. Exceptions allowed.)

"(7) You are further instructed that in case you find that the negligent acts of the deceased, if any, contributed to his death, that such negligence, if any, on the part of the deceased would not entirely relieve the defendants of liability for his death, provided you find by a preponderance of the evidence that the defendants were guilty of negligence in keeping and maintaining such unlighted excavation or pit, but that such contributory negligence of the deceased diminishes his right to recovery in proportion to the amount of negligence attributable to said deceased employé; therefore, if you reach that point in your deliberations where you find it necessary to consider the defense of contributory negligence, that negligence of the deceased is not a bar to recovery, but that the damages shall be diminished by the jury in proportion to the negligence of the deceased as compared with the combined negligence of himself and the defendants."

(Defendants except. Exceptions allowed.)

The issue as to whether or not, at the time of the accident complained of, the deceased was engaged in interstate commerce in the sense that his status was such as to bring him within the provisions of the federal Employers' Liability Act, was made by both the pleadings and the evidence, and that issue was submitted to the jury by the court in paragraph 4 of his charge, which is as follows:

"You are instructed that if you find a preponderance of the evidence in this case that the deceased on the 2d day of November, 1915, was engaged as boiler washer in the town of Francis, Okla., in washing boilers used to haul commerce from the state of Oklahoma to another state, or from another state to the state of Oklahoma, and that he register off about 7 o'clock p. m., and that he was requested to return to wash the boiler of the pile driver, which boiler was used in hauling said pile driver, or commerce from the state of Oklahoma to another state, or from another state to the State of Oklahoma, and that in obedience to said duty he returned to the defendants' yards in Francis preparatory to entering upon the duty of washing said boiler, and that while there, waiting to further engage in said duties as boiler washer, in that event he would be engaged in interstate commerce."

(Defendants except. Exceptions allowed.)

We think this instruction sufficiently informed the jury as to the law upon the question involved, and that the court committed no error in giving the same.

The defendants' requested instructions which were refused by the court 9 to 15, inclusive, were upon the question of assumed risk and contributory negligence.

The rule in the United States courts is that a servant assumes all the ordinary risks of his employment which are known to him, or which could have been known to him with the exercise of ordinary care by a person of reasonable prudence and diligence under like circumstances, and that risks which are not naturally incident to the servant's occupation, but which arise from the negligence of the master are not assumed by the servant until he becomes aware of such negligence and of the danger arising therefrom, unless the negligence and the risks are so apparent and obvious that an ordinarily prudent person would, under the circumstances, observe the one and appreciate the other. *O. & R. I. & P. Ry. Co. v. Ward*, 173 Pac. 212; *C. & R. I. & P. v. Hughes*, 166 Pac. 411; *Dickinson, Rec'r, v. Granbery, Adm'r*, 174 Pac. 776; *Gila Valley G. & N. Ry. Co. v. Hall*, 232 U. S. 94, 34 Sup. Ct. 229, 58 L. Ed. 521; *Seaboard A. L. R. Co. v. Horton*, 233 U. S. 492, 34 Sup. Ct. 685, 58 L. Ed. 1062, L. R. A. 1915C, 1, Ann. Cas. 1915B, 475; *M. O. & G. R. Co. v. Overmyre*, 58 Okl. 723, 160 Pac. 933; *K. O. & O. Ry. Co. v. Roe*, 180 Pac. 371, decided April 15, 1918, not yet officially reported.

[9] The defendants complain in their fifth and sixth assignments of error that the court erred in receiving the verdict of the jury apportioning the damages among the widow and minor childreu, and in rendering judgment upon the verdict.

We hold that there is no merit in these contentions, as a procedure in that respect has been approved in the following cases: *St. L. & S. F. R. Co. v. Clappitt*, 53 Okl. 686, 154 Pac. 40; *Central Vermont Railway Co. v. White*, 238 U. S. 507, 35 Sup. Ct. 865, 59 L. Ed. 1433, Ann. Cas. 1916B, 252; *Norfolk & W. R. Co. v. Stevens*, 97 Va. 631, 34 S. E. 525, 46 L. R. A. 387; *I. & G. N. R. Co. v. Lehman* (Tex. Civ. App.) 72 S. W. 619.

[7] The defendants complain of the ruling of the court in admitting and rejecting testimony upon the trial of this case.

We have examined the record and fail to find wherein prejudicial error is shown in the ruling of the court upon the law questions presented during the trial. The evidence in this case was conflicting, and in such cases where there is competent evidence reasonably tending to support the verdict of the jury, and no prejudicial error is shown in the instructions of the court and its rulings upon the law questions presented during the trial, the findings of the court will not be disturbed on appeal. *Bunker v. Harding et al.*, 174 Pac. 749; *Blasdel et al. v. Gower*, 173 Pac. 644; *Shawnee National Bank v. Pool*, 167 Pac. 994; *Chicago, R. I. & P. Ry. Co. v. Pruitt*, 170 Pac. 1143.

The judgment is affirmed.

(78 Okl. 36)

BALDRIDGE et al. v. SMITH et al.
(No. 6690.)

(Supreme Court of Oklahoma. Sept. 23, 1919.)

*(Syllabus by the Court.)***1. QUIETING TITLE —4—RIGHT OF ACTION BY PURCHASER AT ADMINISTRATOR'S OR GUARDIAN'S SALE.**

A purchaser at an administrator's or guardian's sale cannot maintain an action to quiet title, and thereby attempt to indirectly defeat the right of appeal of minors, especially where the effect of it is merely to subject the same parties to repeated litigation over the same subject-matter.

2. JUDGMENT —443(1)—MOTIONS —59(1)—JURISDICTION OF DISTRICT COURTS TO VACATE JUDGMENTS OF OTHER COURTS FOR FRAUD.

The district courts of this state, in exercising their equitable jurisdiction, have power to vacate and annul orders or judgments of other courts in a proceeding brought for that purpose for fraud in inducing or entering into such order or judgment, where such fraud is extraneous to the issues in the proceeding attacked, and especially where the court has been imposed upon by such fraud.

3. INFANTS —78(1), 112—FAILURE TO APPOINT GUARDIAN AD LITEM DOES NOT SUBJECT JUDGMENT TO COLLATERAL ATTACK.

Under section 4957, Mansfield's Dig. Ark., the failure to appoint a guardian ad litem for an infant defendant, when properly served, is not such a jurisdictional defect as will render the judgment void, but at most is voidable; and hence the judgment remains in full force and effect until it is reversed on appeal or error, or set aside by direct proceedings, but is not subject to collateral attack.

4. EXECUTORS AND ADMINISTRATORS —380(3)—SUFFICIENCY OF EVIDENCE TO JUSTIFY CANCELLATION OF ADMINISTRATOR'S DEED.

The evidence has been examined, and held, that it is sufficient to warrant the court in the exercise of its equitable powers to cancel deed made by the administrator to certain lands, and to annul the order of the county court confirming the same.

*(Additional Syllabus by Editorial Staff.)***5. APPEAL AND ERROR —1012(1)—REVIEW IN CASE TRIED BEFORE COURT.**

If the judgment in a case triable before the court is not clearly against the weight of the evidence, it should be approved by the court; but if it is clearly against the weight of the evidence, the court, after examination of the whole record, should render such judgment as court below should have rendered.

6. JUDGMENT —410—TITLE BASED ON DECREE OBTAINED BY FRAUD INEFFECTIVE AS TO SALE OF MINOR'S PROPERTY.

A judgment based upon a decree of court, which was a fraud in the selling of minor's property, will convey no new right or any additional benefit, and will not strengthen a party's

title, nor prevent the minor from appealing or attacking the judgment for fraud.

Kane and Johnson, JJ., dissenting.

Appeal from District Court, Wagoner County; R. C. Allen, Judge.

Action to quiet title by Nathan W. Smith, revived in the name of Earl E. Baldridge, his personal representative, and his heirs, against Frank Smith and others, minors, and their guardian, W. D. Fly, with answer and cross-petition by defendant Frank Smith against Nathan W. Smith. Judgment for defendant Frank Smith on cross-petition, and plaintiffs appeal. Reversed in part, and affirmed in part.

Jesse W. Watts and Charles G. Watts, both of Wagoner, and Alvin F. Molony, of Muskogee, for plaintiffs in error.

Bailey, Wyand & Moon, of Muskogee, for defendants in error.

MCNEILL, J. This action was commenced on the 15th day of June, 1911, in the district court of Wagoner county, by Nathan W. Smith (who after the commencement of the action died, and the same has been revived in the name of his administrator and his heirs) against Hiram Smith, and Beulah Smith and Frank Smith, minors, and their guardian, W. D. Fly, as defendants (wherein, after the commencement of the action, but before judgment, Hiram Smith died, leaving as his heirs the defendants Frank Smith and Beulah Smith, and prior to the trial of the case Beulah Smith became of age and refused to prosecute, leaving the issues to be tried between Frank Smith, a minor, and the plaintiff Nathan W. Smith). Said action was brought to quiet title in Nathan W. Smith to lots 9 and 11 in block 340, and block 512, all in the town of Wagoner, Okl.

The defendant Frank Smith, through her guardian, filed an answer and cross-petition, alleging that she was the owner of a one-half interest in said property. She further alleged: She was the child of Frank Smith and Kittie E. Smith. That Frank Smith, her father, died in March, 1899, and her mother died in February, 1901. That all of said land was the property of her father and mother, and after the death of her mother the patents to said land were issued to the heirs of Kittie E. Smith. That prior to the time of issuing the patent Nathan W. Smith was appointed administrator of the estate of Kittie E. Smith, and by certain fraudulent acts and transactions sold all of block 512 and a one-half interest to lots 9 and 11, block 340, by proceeding in the United States probate court sitting at Wagoner, while he was administrator, but that said sale was fraudulent. She asked to have the administrator's deed and the order confirming the sale of

said property set aside and held for naught. She further alleges: That there was a conspiracy existing between Andeline J. Smith, the mother of the plaintiff herein, and the plaintiff, whereby he allowed a large indebtedness purporting to be owing to said Andeline J. Smith against said estate for the purpose of selling and disposing of said property. That thereafter Andeline J. Smith filed suit in the United States District Court at Wagoner, wherein she brought suit against the defendant to complete the title to said premises in Andeline J. Smith, and that the same was a part of the original fraud entered into between Andeline J. Smith and Nathan W. Smith to cheat the defendant out of her property, and asked that said judgment in the United States District Court be set aside and held for naught. She further alleges that after the plaintiff, as administrator and as guardian of said estate, sold the premises to Andeline J. Smith, and when the title was perfected in Andeline J. Smith, she reconveyed the same to Nathan W. Smith. The plaintiff answered, denying all of said facts and setting up the different records in the United States probate court and the judgment in the United States District Court. Upon the trial of the case, the court found the issues in favor of the defendant on her cross-petition, and against the plaintiff, and made certain findings of facts; the material ones being as follows:

That Hiram Smith and defendants Frank Smith and Beulah Smith are the children and only heirs at law of F. E. Smith, who departed this life in March, 1899, and Kittie E. Smith, his wife, who departed this life February 4, 1901.

That lots 9 and 11, block 340, in the city of Wagoner, being a part of the land involved in this suit, were scheduled to Ernest E. Smith and Nathan W. Smith, administrator of the estate of Kittie E. Smith, deceased, on the 23d day of August, 1901.

That block 512, of said city, the remainder of the property involved in this suit, was scheduled to Nathan W. Smith, administrator of the estate of Kittie E. Smith, deceased, on the 23d day of August, 1901, all of which schedules were approved by the town-site commission.

On the 7th day of June, 1904, a patent was issued, conveying to the heirs of said Kittie E. Smith, deceased, lot 9 in block 340, city of Wagoner, which was approved by the Secretary of the Interior February 2, 1905, and filed for record the 13th day of February, 1905.

That on October 15, 1904, a patent was issued conveying to the heirs of Kittie E. Smith lot 11, block 340, which was also approved by the Secretary of the Interior.

The court further found that Hiram Smith, after the institution of this suit, died intestate, and left as his only heirs the de-

fendants Frank Smith and Beulah Smith, and that Beulah Smith is now of age, and is not prosecuting her suit, and by reason of her not prosecuting the same the court held that Nathan W. Smith was the owner of an undivided one-half interest in all of said property, being the interest that she would have inherited.

The court further found that the plaintiff, Nathan W. Smith, who was a brother of the father of these children in this action, was appointed administrator of the estate of Kittie E. Smith, deceased, and guardian of the three minor children.

The court further found: That pursuant to the order of the United States District Court of the Northern District of Indian Territory sitting at Wagoner, Nathan W. Smith, as administrator of the estate of Kittie E. Smith, undertook to sell an undivided one-half interest in lots 9 and 11, block 340, and all of block 512. That at the sale Andeline J. Smith bid in said property, and the sale was confirmed in Andeline J. Smith on August 2, 1904.

The court further found that Andeline J. Smith had reconveyed or sold all of said property to the plaintiff, Nathan W. Smith. The court further found that the sale by Nathan W. Smith, administrator, to Andeline J. Smith, was fraudulent. The court further found that in the suit instituted in the United States District Court by Andeline J. Smith against Ernest Smith, Hiram Smith, Beulah Smith, and Frank Smith, the latter of whom were minors, the plaintiff, Nathan W. Smith, who was the guardian of said minors, failed to file any answer or make any defense in said action, and that no guardian ad litem was appointed, and by reason of said fact said decree was null and void as to the defendant Frank Smith. The court then rendered judgment in favor of Frank Smith against Nathan W. Smith for an undivided one-half interest in and to all of said property and judgment for certain rents and profits due therefrom. From said judgment Nathan W. Smith has appealed, and alleges eight separate and distinct assignments of error.

[1] The first assignment of error is as follows:

"Under the facts in this case as disclosed by the record the plaintiff cannot maintain this action, and his petition ought to be dismissed as against the defendant Frank Smith; neither can said defendant maintain her cross-action against the plaintiff, and her cross-petition ought also to be dismissed; and the costs ought to be equally divided between the parties."

As to the first portion of assignment No. 1, plaintiff in error admits that under the rule adopted in the case of *Sawyer v. Ware*, 36 Okl. 139, 128 Pac. 273, the plaintiff has no standing in court to quiet title against the defendant, and his action should be dismiss-

ed. With this we agree. Under the rule adopted in the above-entitled case, plaintiff could not maintain his action to quiet title against the minors to correct the probate proceedings, or prevent them from bringing a direct proceeding to set aside said proceedings on the ground of fraud, or from appealing, during the time provided by statute.

[2] Now the second proposition, that the defendant cannot maintain her cross-petition against the plaintiff, and her cross-petition ought to be dismissed: With this we cannot agree. The cross-petition of the defendant was a direct proceeding to set aside the order and judgment in the probate proceedings, and also to set aside a certain judgment in the United States District Court, upon the ground of fraud. The rule laid down by this court is as follows: The court may set aside and annul a judgment on the ground of fraud, and an independent action for that purpose, in the nature of an equitable proceeding, is a direct, and not a collateral, attack upon such judgment. Such powers may be exercised by cross-petition on the part of the defendant. *City of Guthrie v. McKennon*, 19 Okl. 306, 91 Pac. 851; *Estes v. Timmons*, 12 Okl. 537, 73 Pac. 303; *Brown v. Trent*, 36 Okl. 239, 128 Pac. 895; *Johnson v. Filtsch*, 37 Okl. 510, 138 Pac. 165; *Elrod v. Adair*, 54 Okl. 207, 153 Pac. 660; *Brewer v. Dodson*, 159 Pac. 329.

The second, third, fourth, and fifth specifications of error are to the effect that the defendants' cross-petition is a collateral attack on the probate proceedings, and that the allegations of fraud are not sufficient to support a direct attack upon the probate proceedings but the same amounts to a collateral attack. It is also argued under these assignments of error that the evidence does not sustain the findings that fraud was committed. As to this being a collateral attack, we have disposed of this question by referring to the decisions heretofore cited.

[5] The next question is: Was the evidence sufficient to sustain the finding in regard to fraud? The rule to be applied in a case triable before the court is, if the judgment is not clearly against the weight of the evidence, then the judgment should be approved by the court; but if the judgment is clearly against the weight of the evidence then it is the duty of the court to render such judgment, after the examination of the whole record, as the court below should have rendered. *Schock v. Fish*, 45 Okl. 12, 144 Pac. 584; *Wimberly v. Winstock et al.*, 46 Okl. 645, 149 Pac. 238; *Mendenhall et al. v. Walters et al.*, 53 Okl. 598, 157 Pac. 732.

[3, 4] From an examination of the record, it is evident that a portion of the evidence to establish the fraud relied upon, were matters that appear on the record, showing certain proceedings to be irregular. These proceedings though irregular, could not be the foundation of this kind of an action, but

would be reviewable on appeal, unless there was some fraud connected with the same.

The first irregularity we have presented is the note for approximately \$5,000, signed by F. E. Smith and Kittie E. Smith, payable to Mrs. Andeline J. Smith. The proof of claim was signed by Alma E. Smith, and stated that the annexed claim was a claim against the estate of F. E. Smith. The next was a note signed by F. E. Smith and Kittie Smith, payable to N. W. Smith, on which there was approximately \$3,000 due. This claim was sworn to by I. J. Smith, administrator of the estate of N. W. Smith, stating that the same was a claim against the estate of F. E. Smith. Then there was a note of approximately \$700, signed by F. E. Smith, payable to M. J. Hays, and the proof of claim stating that it was a claim against the estate of F. E. Smith, deceased.

All of these notes were allowed against the estate of Kittie E. Smith by the administrator, and the real estate was sold for the purpose of paying this and a few smaller items of indebtedness. It is the contention of the defendants in error that the two large notes were not properly proved against the estate of Kittie E. Smith; that the proper affidavit was not filed, and the allowance was irregular; that this was a part of the fraud being perpetrated by Nathan W. Smith, administrator, to allow said claims, in order to have the property sold, and then bid the same in, in the name of Andeline J. Smith, and as soon as the title was completed and perfected in Andeline J. Smith that she should reconvey the same to him.

The plaintiffs in error argue that the irregularities in allowing the claims appear on the face of the proceedings and could not be the foundation for an action on direct attack. If this was the only evidence or circumstance, that would be true; but, in addition to this, the record and the evidence dehors the record discloses Andeline J. Smith purchased the interest of the minors in all three of these properties. Further, she purchased one-half interest in the drug stock and also 10 shares of capital stock of the First National Bank. Her total purchases amounted to \$7,750. This all appears on the record. As to items paid out, the record disclosed the following items:

Andeline J. Smith (on notes, stone building)	\$2,100 00
Andeline J. Smith (on store building)	750 00
Andeline J. Smith (on notes stock of Drugs)	2,000 00
Andeline J. Smith (on notes Bank Stock)	1,800 00
Andeline J. Smith (on notes dwelling house)	1,100 00
Andeline J. Smith (on notes)	1,821 00

—making a total of over \$9,500 that was purported to have been paid to Andeline J. Smith. The only claim that Andeline J. Smith filed against the estate was one for \$4,735, and that was, as the affidavit stated, a claim against the estate of F. E. Smith. While it is true there was a note of approximately \$3,000 purported to be due the estate

of N. W. Smith, it might be presumed that these payments were to pay the claim of Andeline J. Smith, and also the claim to the estate of N.W. Smith; but the evidence does not disclose this.

We gather from the evidence of Nathan W. Smith, the plaintiff in this case, that Andeline J. Smith never attended the administrator's sales. He stated several times that he looked after her matters. We conclude from his evidence that he purchased all of the valuable property for her at his own sale. It does appear that he owned the drug stock a short time after it was sold to Andeline J. Smith. He stated he looked after all his mother's business, and he admits that he has received deeds from his mother to all the real estate. He also has become the owner of all the property supposed to be purchased for his mother, of any value, unless it is the bank stock, and the record does not disclose what became of the same after purchase by Andeline J. Smith. While it is true the parties at this time claim that the estate of Kittle E. Smith was bankrupt, still we notice the assets of the estate amount to over \$12,000. In this appears a note dated April 7, 1899, from E. E. Smith for \$2,245. This was practically one-half of what the drug stock was appraised at, and what it sold for. We also find, January 1, 1900, N. W. Smith, the plaintiff in this case, gave a note for \$877 to Kittle E. Smith. The notes appear in the assets of the estate in 1901. Nathan W. Smith is the administrator of the estate and guardian of the children. A few years thereafter the estate is closed, the property has all been sold to Andeline J. Smith. As soon as the title is completed in her, it is conveyed to Nathan W. Smith.

While there may not be any fraud connected with these transactions, it may be that all of said transactions were in the best of faith, and the administrator was only attempting to do for these minors what he thought was best; but the courts look with suspicion upon transactions of this kind and character. The statutes specially provide that the administrator cannot directly or indirectly purchase the property at administrator's sale. Then we have a transaction that involves some \$10,000 or \$12,000 of minors' property; notes are presented and irregularly allowed to the grandparents of the minors; the property is all purchased by the administrator at the administrator's sale in the name of his mother. As soon as the sale is completed and the title perfected, the property all reappears as the property of the administrator in his individual name, who at the commencement of the administration was indebted to the estate; the estate is closed, and he is the owner of all the property, and the estate bankrupt. While we do not know of a similar case that has been before this court, yet the same rule of law would apply as to transactions of this kind as between guard-

ian and ward, parent and child, and is ably discussed in the case of *Daniel v. Tolon*, 53 Okl. 666, 157 Pac. 756. While this kind of a transaction was not involved in the case above cited, but in a transaction where an administrator or guardian is participating in or first selling the property and then acquiring the same back, comes within the same class and character of cases and the same rule of law applies, to wit: The burden rests heavily upon the guardian or administrator to prove all the circumstances and prove they are free from fraud, and that the transaction was fair in all respects.

In the case at bar the plaintiff, Nathan W. Smith, has not overcome the burden that was placed upon him as a matter of law. The only record that he ever paid for the drug stock or for the different pieces of property is that there is a mortgage upon said property executed by him to Andeline J. Smith. We think the circumstances in this case are such that the burden of proof rested heavily upon the plaintiff in error, and, assuming this burden, he failed to satisfy the trial court, and we cannot say that the finding of the court was contrary to or against the clear weight of the evidence. It therefore follows that the judgment of the court, canceling the probate sale and the confirmation of the sale to Andeline J. Smith and the deed to Andeline J. Smith, is sustained.

The third question presented is: Did the court err in holding that the judgment and decree of the United States District Court in the case where Andeline J. Smith was plaintiff and the minors were defendants was void? It is admitted that the minors were served with summons, but that no guardian ad litem was appointed, nor did Nathan W. Smith, their guardian, defend for them; it being admitted that no defense was made on their behalf. The rule laid down in 22 Cyc. 641, is as follows:

"But the failure to appoint a guardian ad litem for an infant defendant is not such a jurisdictional defect as will render the judgment void, and hence the judgment remains in full force and effect until it is reversed on appeal or error, or set aside by direct proceedings, and is not subject to collateral attack."

The Arkansas law was in force and effect at the time the judgment was rendered in the United States District Court sitting at Wagoner, and the courts of that state uphold that rule in the following cases: *Trapnall's Adm'x v. Bank*, 18 Ark. 53; *Boyd v. Roane*, 49 Ark. 397, 5 S. W. 704. We must therefore hold that the court committed error in holding that the judgment was void for that reason; but the petition in the present case charges that this suit was a part of the fraud existing between Nathan W. Smith and Andeline J. Smith in attempting to defraud the minors out of their property. The suit in the United States District Court and

the judgment rendered therein was twofold: First, the judgment decreed that an undivided one-half interest in lots 9 and 11, block 340, was originally the property of E. E. Smith, having been scheduled to him, and that he had sold his interest therein to Andeline J. Smith, and that the patent issued to the heirs of Kittle E. Smith as to this one-half of the property was an error and mistake. The patent to one-half interest in this property should have issued to E. E. Smith and one-half interest to the heirs of Kittle E. Smith. This much of the judgment the United States District Court had jurisdiction of, and decreed that the patent, in so far as it described the interest of Kittle E. Smith, was in error. This was a final judgment by the United States District Court, and is only subject to be reviewed upon appeal, or set aside in that case, unless there was some allegation of fraud, attacking said judgment. There is no allegation in the petition, nor any evidence to show, that the schedule of an undivided one-half interest of the property to E. E. Smith was fraudulent; there being no allegation of fraud contained in the petition, and no evidence of fraud or circumstances upon which this portion of the judgment could be founded. In respect to the decree of the United States court, holding that portion of the judgment void is error, as the judgment would at most be only voidable.

We then come to the other portion of the decree, wherein the decree recites that Andeline J. Smith had purchased the interest of the minors at probate sale and the sale was confirmed, and after the sale had been confirmed the patent was issued to these heirs, and it was ordered that the master of chancery execute a deed to her. The foundation of this portion of the cause of action is based upon the probate proceedings, and if the probate proceedings were fraudulent, this portion of the judgment would also be fraudulent. The plaintiff could acquire no greater right by this proceeding than was obtained in the probate proceeding. The plaintiff could not defeat the right of the minors to appeal, nor prevent them from attacking the probate proceedings on the ground of fraud by this kind of an action, as was decided in the case of *Sawyer v. Ware*, supra. While the court did commit error in holding the judgment of the United States District Court void, yet in so far as it pertained to a one-half interest that was claimed to be owned by E. E. Smith, the same would at most be only voidable, and, there being no allegations of fraud as to that portion of the judgment, the same could not be reviewed in this action.

[6] As to the decree pertaining to the land of the minors, which was sold by probate proceedings, the decree in the United States District Court would give the plaintiff no new right or additional interest in the premises, other than that which was obtained at probate sale. A judgment based upon a decree of court, which was a fraud in the selling of minors' property, will convey no new right, nor will the party derive any additional benefit therefrom, nor can he strengthen his title by such a procedure, nor prevent the minor from appealing or attacking the judgment by fraud.

From the conclusion reached, the judgment of the district court, awarding to the defendant in error a one-half interest in and to block 512, will be sustained; that the judgment of the district court in awarding to the defendant one-half interest in lots 9 and 11, block 340, will be modified and affirmed, awarding to the defendant, an undivided one-fourth interest in and to lots 9 and 11, block 340, being the interest that the plaintiff inherited from her mother, and from her deceased brother, that was sold through the probate proceedings; that the judgment of the court awarding to the defendant \$400 for rents on lot 9, block 340, will be modified, and judgment rendered for \$200, from the fact that plaintiff only acquired a one-fourth interest in said property, instead of a one-half interest in the same; that as to the judgment for the rents on lot 11, block 340, and block 512, in the sum of \$1,100, will be reversed and remanded—the court made no separate findings as to the amount due on each lot, and it is impossible to ascertain the amount of rent due on block 512 and the amount due on lot 11, block 340—with directions for the court to ascertain the amount of rent due on block 512 and the amount due for the undivided one-fourth interest in lot 11, block 340, and render judgment for said amount. The judgment of the district court, in so far as it attempts to decree to the defendant an interest, in the undivided one-half interest in lots 9 and 11, block 340, that was scheduled to E. E. Smith, and purchased by Andeline J. Smith from E. E. Smith, wherein the United States District Court decreed that the patent issue to the heirs of Kittle E. Smith, was an error and mistake, and will be reversed and remanded.

OWEN, C. J., and HARRISON, PITCHFORD, and HIGGINS, JJ., concur.

KANE and JOHNSON, JJ., dissent as to that portion of the opinion and judgment of the court wherein the judgment of the district court is reversed.

(16 Okl. Cr. 453)

WRIGHT v. STATE. (No. A-3258.)
(Criminal Court of Appeals of Oklahoma. Oct.
18, 1919.)

(Syllabus by the Court.)

INDICTMENT AND INFORMATION \Leftrightarrow 114—IN-
FORMATION UNDER HABITUAL CRIMINAL
ACT SHOULD ALLEGE SECOND VIOLATION AND
FORMER CONVICTION.

"An information, in order to charge a crime under the Habitual Criminal Act, should contain allegations of fact, setting forth that the offense charged is a second or subsequent violation of the law, and that the person charged has been convicted in a court of competent jurisdiction. In this respect, the information must be definite and certain."

Appeal from District Court, McCurtain County; C. E. Dudley, Judge.

John W. Wright was convicted of a second offense of violating the prohibitory liquor law, and he appeals. Reversed.

Claud P. Spriggs and John C. Earl, both of Idabel, for plaintiff in error.

S. P. Freeling, Atty. Gen., and W. C. Hall, Asst. Atty. Gen., for the State.

PER CURIAM. Plaintiff in error was tried upon an information which charged as follows:

"The said John W. Wright did in said county on or about the said 11th day of November, 1916, unlawfully, willfully and feloniously have in his possession about seven gallons of whisky, the exact amount of which is to this informant unknown, with the unlawful intent on the part of him, the said John W. Wright, to dispose of the same in violation of the prohibitory laws, he the said John W. Wright having been heretofore convicted and served sentence for the same offense, contrary to," etc.

The jury rendered the following verdict:

"We, the jury drawn, impaneled, and sworn in the above-entitled cause, do upon our oaths find the defendant, John Wright, guilty as charged in the information herein, and fix his punishment at a fine of fifty dollars and imprisonment in the penitentiary for the period of three years."

To reverse the judgment rendered in pursuance of the verdict the defendant appeals.

Upon the record in this case, the sole question which is presented for the decision of this court is the sufficiency of the evidence to sustain the verdict and judgment of conviction. It appears that the only proof of a former conviction in this case was evidence introduced by the court clerk, identifying an information filed in the county court of said county, charging the defendant with the unlawful possession of intoxicating liquor, and the verdict of the jury rendered thereon.

The state failed to offer in evidence the judgment of conviction.

In answer to the defendant's brief, the Attorney General has filed a confession of error in part as follows:

"We agree with counsel that under the ruling in the cases of *Fowler v. State*, 14 Okl. Cr. 316, 170 Pac. 917, and *Tucker v. State*, 14 Okl. Cr. 54, 167 Pac. 637, the information and verdict contained in the record in connection with the former conviction were inadmissible in evidence in this case. In the *Fowler Case*, supra, this court held that an information containing an allegation of a plea of guilty by the accused, was not an allegation of a 'conviction,' and that it was necessary to plead and prove the judgment of conviction in the previous case. A verdict of a jury arises to no higher legal plane than a plea of guilty, and eliminating from this case the verdict and information erroneously admitted in evidence, there is nothing left in the way of proof showing that this defendant had previously violated the prohibition laws. It appears that the prosecution was given permission to introduce in evidence the judgment roll, or journal entry of the county court showing this conviction; but the record fails to show what it was, or that it was introduced.

"Counsel for defendant did not direct their demurrer to the evidence on this ground of total failure of proof pertaining to the prior conviction, but raised a separate and distinct question already briefly disclosed. However, in view of the *Tucker* and *Fowler Cases*, supra, and what seems to be the almost universal rule of all the courts, that these strictly statutory crimes pertaining to offenses strictly *malum prohibitum*, as to the essential ingredients thereof, 'no intent, inference or implication will be indulged in' to sustain the validity of a conviction had under these wise, but not seldom drastic, statutes, we admit that the evidence was fundamentally insufficient, and therefore defendant's failure to demur on that ground, or request the court for a peremptory instruction, did not cure the defect, and that the judgment in this case should be reversed."

After a careful examination of the record, the conclusion which we reach is that the confession of error is well founded. While no objection was made to the information, it may be well for us to say here that the same is insufficient to properly charge a crime under the Habitual Criminal Act, Laws 1910-11, c. 70, § 18. In the case of *Fowler v. State*, supra, it is held:

"An information, in order to charge a crime under the Habitual Criminal Act, * * * should contain allegations of fact, setting forth that the offense charged is a second or subsequent violation of the law, and that the person charged has been convicted in a court of competent jurisdiction. In this respect, the information must be definite and certain."

Because the evidence is insufficient to show a former conviction, the judgment is reversed.

(55 Utah, 126)

**BOARD OF EDUCATION OF GRANITE
SCHOOL DIST. v. STILLMAN et al.
(No. 3384.)**

(Supreme Court of Utah. Sept. 8, 1919.)

**SCHOOLS AND SCHOOL DISTRICTS §—101 —
TAX LEVY LIMITED TO SEVEN MILLS, IN-
CLUDING SCHOOL SITES.**

Tax levies for county school districts of the first class should be made without regard to the proviso of Comp. Laws 1917, § 4624, which is void for making discriminatory classifications of property valuation in regulating maximum assessment for any year, but should be made in accordance with Laws 1911, c. 135, amending Comp. Laws 1907, § 1891x27, limiting the assessment to 5½ mills, with an additional 1½ mills exclusively for purchase of school sites and erection of buildings.¹

Application by the Board of Education of Granite School District for a writ of mandate to compel the defendants Charles F. Stillman and others, as the Board of County Commissioners of Salt Lake County, and J. E. Clark and others, as county officers to levy a tax assessment of approximately 7.2 mills on a dollar of the assessed valuation of such district. Defendants' demurrer to plaintiff's petition overruled, and peremptory writ of mandate issued.

Carlson & Carlson, of Salt Lake City, for plaintiff.

Richard Hartley, Co. Atty., and D. A. Skeen, Asst. Co. Atty., both of Salt Lake City, for defendants.

CORFMAN, C. J. The plaintiff board of education of Granite school district filed its application in this court for a writ of mandate to issue against the defendants, Charles F. Stillman, Joseph Lindsay, and W. B. Hughes, as the board of commissioners of Salt Lake county, and J. E. Clark, as county clerk, James E. Lynch, as assessor, W. W. Barton, as treasurer, and M. C. Iverson, as auditor, of said county, to require them to levy taxes in accordance with a statement and estimate made by the plaintiff on April 28, 1919, for the support and maintenance of the schools in their charge for the year 1919, under the provisions of section 4624 (1891x27) of the Compiled Laws of Utah of 1917. According to the allegations of plaintiff's petition the estimate of the plaintiff of the amount necessary to be raised was as follows: For the support and maintenance of schools, \$286,600; for the purchase of school sites and the erection of buildings, \$62,500; for the payment of interest on bonds, \$29,460; and for a sinking fund for the payment and

redemption of bonds, \$12,760—the aggregate amount being \$391,320, which sum, less the sum of \$113,500 to be received from the state high school fund and the state district school fund and the state land rental and interest fund, was to be raised by levy upon the assessed valuation of the property of said school district.

The defendants refused to levy a tax on the property of said Granite school district in excess of 4.2 mills, which levy it is alleged will not raise an amount sufficient for the purposes mentioned in the estimate. Said Granite school district is a county school district of Salt Lake county of the first class, and has an assessed property valuation for the year 1919 of approximately \$38,623,740, thus requiring an assessment of approximately 7.2 mills on the dollar of the assessed valuation to meet said estimate and statement of the plaintiff.

An alternative writ was issued on plaintiff's petition, requiring the defendants to show cause on a day certain why they should not make a levy of 7.2 mills to meet the requirement of plaintiff's estimate and statement. The defendants appeared and filed a general demurrer to plaintiff's petition and the same has been argued and submitted.

Section 4624 (1891x27) Comp. Laws Utah 1917, provides:

"The board of education shall, on or before the 1st day of May of each year, prepare a statement and estimate of the amount necessary for the support and maintenance of the schools under its charge for the school year commencing on the 1st day of July next thereafter, and for the purchase of school sites and the erection of school buildings, also the amount necessary to pay the interest accruing during such year, and not included in any prior estimate, on bonds issued by the said board; also the amount of sinking funds necessary to be collected during such year for the payment and redemption of said bonds; and shall forthwith cause the same to be certified by the president and clerk of said board to the officers charged with the assessment and collection of taxes for general county purposes in the county in which the district is situated, and such officers, after having extended the valuation of property on the assessment rolls, shall levy such per cent. as shall, as nearly as may be, raise the amount required by the board: * * * Provided, that the tax on all taxable property of the said district for the support and maintenance of schools, the purchase of school sites, and erection of school buildings shall not exceed in any one year, in any district whose assessed valuation is \$20,000,000 or more, 4.2 mills on the dollar; and in any district whose assessed valuation is more than \$15,000,000 and less than \$20,000,000, 4.7 mills on the dollar; in any district whose assessed valuation is more than \$10,000,000 and less than \$15,000,000, 5.2 mills on the dollar; and in any district whose assessed valuation is more than \$5,000,000 and less than \$10,000,000, 5.5 mills;

¹ Board of Education v. Hunter, 48 Utah, 373, 159 Pac. 1019; Board of Education v. Hanchett, 60 Utah, 289, 187 Pac. 686.

and in any district whose assessed valuation is less than \$5,000,000, 6 mills on the dollar."

It will therefore be seen that the question raised is whether or not, in view of the provisions of the foregoing statute, an assessment of more than 4.2 mills on the dollar may legally be assessed upon the taxable property of Granite school district, having an assessed valuation of \$38,623,740, for the support and maintenance of schools, the purchase of school sites, and erection of school buildings for the district.

Precisely the same question as now raised was involved in the cases of Board of Education v. Hunter, 48 Utah, 373, 159 Pac. 1019, and Board of Education v. Hanchett, 50 Utah, 289, 167 Pac. 686, in which this court held that as a basis for the determination of a tax levy the discriminatory classifications of property values made under similar statutes, viz. section 1891x27 of chapter 111, Laws of Utah 1915, as amendatory to section 1891x27 of chapter 78, Laws of Utah 1915 (passed by the same Legislature, but providing they should become effective on different dates), as amendatory to section 1891x27 of chapter 96, Laws of Utah 1913, as amendatory to section 1891x27 of chapter 135, Laws of Utah, 1911 (in which latter section the objectionable classification is not contained), are illegal. It therefore appears, and the decisions of this court both in the Hunter and Hanchett Cases, *supra*, are to the effect, and therefore controlling here, that the tax levies for county school districts of the first class should be made without regard to the objectionable proviso above quoted, found in section 4624, Comp. Laws Utah 1917. To do so it necessarily follows that such assessments, in order to be legally made, should be in accordance with section 1891x27, chapter 135, Laws of Utah 1911, which provides:

"That the tax for the support and maintenance of such schools shall not exceed in any one year five and one-half mills on the dollar upon all taxable property of said district, and shall not exceed one and one-half mills additional on the dollar in one year, to be used exclusively for the purchase of school sites and erection of school buildings, but in case any funds collected for support or maintenance are not used within the school year for which they were raised, they may be used for building purposes."

It is therefore ordered that the demurrer to plaintiff's petition be overruled, and that

the peremptory writ of mandate applied for be issued.

FRICK, WEBER, GIDEON, and THURMAN, JJ., concur.

(55 Utah, 124)

BOARD OF EDUCATION OF DAVIS COUNTY SCHOOL DIST. v. SMITH et al.
(No. 3389.)

(Supreme Court of Utah. Sept. 8, 1919.)

Application by the Board of Education of Davis County School District, a municipal corporation, for writ of mandate to require D. F. Smith and others, as County Commissioners of Davis County and Seth C. Jones and others, as officers of said county, to levy taxes in accordance with a certified estimate of the school board. Prayer of complaint granted, and peremptory writ of mandate ordered issued.

Carlson & Carlson, of Salt Lake City, for plaintiff.

WEBER, J. The board of education of Davis county school district has filed its application in this court for a writ of mandate to require defendants to levy taxes in accordance with the certified statement and estimate of the school board, and to make such a levy as will raise \$148,150, less \$57,150 that will be received from the state and state high school funds.

The assessed valuation of Davis county for 1919 is approximately \$17,216,020. The defendants refused to levy or fix a tax on the property in the school district in excess of 4.7 mills for the support and maintenance of schools in said district and the purchase of sites and erection of buildings for the school year beginning July 1, 1919. It is alleged by plaintiff, and is not denied, that the levy of 4.7 mills would not produce sufficient revenue for the needs of the school district, and that the amount certified by the school board is necessary in order to maintain the schools during a period of nine months, and that it is estimated that a levy of 6 mills is required for the support and maintenance of the schools and the purchase of school sites and erection of buildings in the district.

Upon authority of Board of Education, etc., v. Stillman et al., 184 Pac. 159, Board of Education v. Hunter, 48 Utah, 373, 159 Pac. 1019, and Board v. Hanchett, 50 Utah, 289, 167 Pac. 687, the prayer of plaintiff's complaint is granted, and the peremptory writ of mandate applied for is ordered to be issued. Plaintiff to recover costs.

CORFMAN, C. J., and FRICK, GIDEON, and THURMAN, JJ., concur.

(55 Utah, 54)

STATE v. DAVIS et al. (No. 3356.)

(Supreme Court of Utah. Aug. 30, 1919.)

1. INTOXICATING LIQUORS \S 240—AUTOMOBILE ILLEGALLY TRANSPORTING LIQUOR SUBJECT TO FORFEITURE.

In view of Comp. Laws 1917, § 5839, requiring the provisions of the Revised Statutes to be liberally construed, and the Prohibition Law, § 1, requiring liberal construction of the act, under Comp. Laws 1917, § 3359, an automobile used in the illegal transportation of liquor into Utah may be seized and forfeited as other things and other property may be forfeited in accordance with the various provisions of the Prohibition Law, the rule of ejusdem generis not applying in the construction of the section.¹

2. INTOXICATING LIQUORS \S 251—CLAIMANT OF SEIZED AUTOMOBILE MUST SHOW OWNERSHIP AND IGNORANCE OF USE.

When intoxicating liquors have been found illegally in an automobile used for their transportation it is prima facie evidence that the car was being used illegally, and one desiring to recover the car must establish by a preponderance of the evidence, not beyond a reasonable doubt, the fact of his ownership, and that he had no knowledge of the illegal use.

3. INTOXICATING LIQUORS \S 251—CLAIM BY PARTIAL PAYMENT VENDOR OF AUTOMOBILE SUSTAINED.

Where an automobile is sold on installments, if the vendor or his assignee has no knowledge or information of the car's intended use in the illegal transportation of intoxicating liquors he is entitled to reclaim it when seized by the sheriff for forfeiture.

4. INTOXICATING LIQUORS \S 251—ON SEIZURE OF STOLEN AUTOMOBILE OWNER MAY RECLAIM.

If an automobile is stolen and used by the thief for the illegal transportation of intoxicating liquors, in which enterprise it is seized by the sheriff and sought to be forfeited, the owner is entitled to reclaim it.

Frick, J., dissenting.

Appeal from District Court, Morgan County; A. W. Agee, Judge.

Search and forfeiture proceedings by the state of Utah against A. F. Davis, seven hundred and forty-four pints of whisky, two cases of gin, one Paige automobile, and certain other property unlawfully used, Mrs. F. B. Ferrand, and Charles McSwine. From judgment of forfeiture, defendants Ferrand and McSwine appeal. Judgment reversed, and cause remanded with directions to vacate judgment and to grant appellants new trial.

P. P. Jenson, of Salt Lake City, and George Halverson, of Ogden, for appellants.

Dan B. Shields, Atty. Gen., and O. C. Dalby, H. Van Dam, Jr., and James H. Wolfe, Asst. Attys. Gen., for the State.

WEBER, J. On December 12, 1918, the sheriff of Weber county, Utah, arrested defendant A. F. Davis, who was then in charge of an automobile containing 744 pints of whisky and two cases of gin. The arrest was made in Morgan county. Thereafter proceedings were instituted to forfeit the liquor and the automobile. The automobile was claimed by Mrs. F. B. Ferrand by virtue of a contract of purchase between her and the Paige Sales Company, she having purchased the machine on the partial payment plan. Charles McSwine also claimed an interest in the automobile by virtue of a title retaining note which had been transferred from the Paige Sales Company to one N. W. Miller, and by Miller to McSwine, who was the owner of the note at the time of the seizure.

Mrs. Ferrand maintained that if the automobile was used for transporting liquor it was without her knowledge or consent. She testified that the machine had been taken from her garage in Salt Lake City during the nighttime without her knowledge or consent. McSwine also asserted that he had no knowledge or information of the use to which the automobile was being put.

The case was tried in the district court to a jury, who returned the following verdict:

"* * * That on the 12th day of December, 1918, H. C. Peterson, sheriff of Weber county, state of Utah, seized the seven hundred and forty-four pints of whisky and the bottles containing the same, and twenty-four quarts of gin in two cases, with the bottles in which the same was contained, and the Paige automobile described in the return of the said H. C. Peterson, in the county of Morgan and state of Utah, and that at the time of said seizure the said whisky and gin were being unlawfully used and transported in said county and state in violation of the law of this state prohibiting the transportation, use, and possession of intoxicating liquors.

"We, the jury, further find that at the time of the seizure of said liquors they were being transported in the Paige automobile described in the return of the sheriff herein, and that said automobile was at said time kept and used in violation of the law of this state prohibiting the transportation, use, and possession of intoxicating liquors."

On this verdict a judgment of forfeiture was entered by the court. Defendants F. B. Ferrand and Charles McSwine appeal.

While not controlling, the principal and most important question in this case is whether the district court had power to forfeit the automobile which had been seized by the sheriff.

The purpose of the Prohibition Law is not only to prevent the traffic in intoxicating liquors, but also to prevent transportation and to make the state what is termed "bone dry." Comp. Laws Utah 1917, § 3343, says:

"Except as hereinafter provided, the manufacture, sale, keeping, or storing for sale in

\S For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

184 P.—11

¹ Kolb v. Peterson, 50 Utah, 450, 168 Pac. 97.

this state, or offering or exposing for sale, or importing, carrying, transporting, advertising, distributing, giving away, exchanging, dispensing or serving of liquors, are forever prohibited in this state. It shall be unlawful for any person within this state knowingly to have in his or its possession any intoxicating liquors, except as in this title provided."

"How can the objects of the law be attained and how shall the law be construed? The statutes of Utah contain the answer. Comp. Laws Utah 1917, § 5839, says:

"The Revised Statutes establish the law of this state respecting the subjects to which they relate, and their provisions and all proceedings under them are to be liberally construed with a view to effect the objects of the statutes and to promote justice."

Not satisfied with this mandate as to the construction of statutes, the Legislature, in the first section of the Prohibition Law, emphasized the subject by adopting this imperative provision:

"This entire title shall be deemed an exercise of the police powers of the state for the protection of the public health, peace, and morals, and all of its provisions shall be liberally construed for the attainment of that purpose."

The case of Kolb v. Peterson, 50 Utah, 450, 168 Pac. 97, involved the construction of the following section of the Prohibition Act:

"Any person who shall in any street or alley, public place, store, restaurant, hotel lobby or parlor, or in or upon any passenger coach, street car, or upon any other vehicle commonly used for the transportation of passengers, or in or about any depot, platform, waiting station or room, or at any public gathering, drink any intoxicating liquors of any kind, or shall be drunk or intoxicated shall be deemed guilty of a misdemeanor." Comp. Laws Utah, 1917, § 3361.

The court, speaking through Mr. Justice Thurman, said:

"It is also contended by the petitioner that there is no statute at all making drunkenness a crime except in the places specifically enumerated. It is admitted by respondent that there is no statute making drunkenness a crime outside of such places, unless respondent's construction of the statute in question is adopted. This contention on the one side and admission on the other presents a question of more than ordinary importance to the people of Utah.

"The history of the prohibition propaganda in this state leading up to the passage of the law in question is so recent and fresh in the minds of the people as to be a matter of common knowledge. Every political party in the state, in the political campaign of 1916, declared unequivocally in its convention in favor of absolute state-wide prohibition. The Governor and every member of the Legislature, before the election, was solemnly pledged to give force and effect to these platform declarations as soon as practicable after the Legisla-

ture convened. The purpose and object of the legislation which the people demanded was the suppression of drunkenness and intoxication in the state of Utah. The prohibition of the sale and traffic in intoxicating liquors, except under the strictest and most rigid regulation, was but means to the end that drunkenness and intoxication should cease to exist in every part of the state. The Legislature, by the law in question, even went so far as to make it unlawful for any person within the state to knowingly have in his possession any intoxicating liquors, except as provided in the law itself. In view of these conditions and circumstances, it seems strange and unreal, and almost unbelievable, that the Legislature could have purposely omitted to make drunkenness a crime in every part of the state, wherever it might occur, whether in the streets or other public places named in the section of the statute in question or otherwise. The suppression of drunkenness and intoxication, as above stated, was the ultimate end to be accomplished and the primary purpose for which the law was enacted. It would, indeed, be a severe impeachment of the intelligence of every member of the Legislature, the Governor and his legal advisers, if it should develop that, after all, the law fails to make drunkenness a crime except in the places specifically mentioned. * * *

"We are unanimous in our opinion that the statute in question makes drunkenness and intoxication by the use of intoxicating liquors a crime, wherever and whenever it may occur at any place in the state."

[1] No precedent is cited in that opinion, but one is made. The rules of statutory construction are not resorted to, none of them except the one cardinal rule that statutes should be so construed as to carry out the will of the people as declared by the Legislature, and in accord with the object, purpose, and spirit of the law. In the Kolb Case technicalities were brushed aside, and the court refused to emasculate the statute by resorting to technical rules of strict construction. Guided by the same spirit—with the determination not to depart from the plainly declared intention of the Legislature—we should consider the question now before us. No rule of construction should be invoked except as it may be necessary to ascertain the legislative intent, and no rule should be applied so as to devitalize a statute enacted for the public good. Our Prohibition Law is copied to a large extent from that of Oklahoma. At the time the present law was being discussed and enacted, section 3617, Revised Laws Oklahoma 1910, provided:

"When a violation of any provision of this chapter shall occur in the presence of any sheriff, constable, marshal, or other officer having power to serve criminal process, it shall be the duty of such officer, without warrant, to arrest the offender and seize the liquor, bars, furniture, fixtures, vessels, and appurtenances thereunto belonging so unlawfully used, and to take the same immediately before the court

or judge having jurisdiction in the premises, and there make complaint, under oath, charging the offense so committed, and he shall also make return, setting forth a particular description of the liquor and property seized, and of the place where the same was so seized, whereupon the court or judge shall issue a warrant commanding and directing the officer to hold the property so seized in his possession until discharged by due process of law, and such property shall be held and a hearing and adjudication on said return had in like manner as if the seizure had been made under a warrant therefor."

Comp. Laws Utah 1917, § 3359, is as follows:

"When a violation of any provisions of this title shall occur in the presence of any sheriff, constable, marshal, police officer, or other officer having power to serve criminal process, it shall be the duty of such officer, without warrant, to arrest the offender and seize the intoxicating liquors, vessels, and other property so unlawfully used, and to take such offender or offenders immediately before the court or judge having jurisdiction in the premises, and there make complaint under oath, charging the offense so committed; and he shall make return, setting forth a particular description of the liquors, vessels, and other property seized, and of the place where the same were seized; whereupon the court or judge shall issue a warrant commanding and directing the officer to hold safely the property so seized in his possession until discharged by due process of law; and such property shall be held in like manner as if the seizure had been made under a warrant therefor. If any peace officer shall have probable cause to believe any person has on or about his person in any kind of receptacle, or in any vehicle under his control, liquors in any quantity, in violation of any of the provisions of this title, such peace officer shall have authority to examine such vehicle and receptacle and the contents thereof, and the finding of any liquors in the possession of any such person, or under his control, not bearing a permit of a justice of the peace or a tag or label of the Attorney General, shall be prima facie evidence that such liquors were kept for an unlawful purpose, and such person shall be forthwith arrested by such officer."

Why did the Utah legislators, instead of copying the words "liquors, bars, furniture, fixtures, vessels, and appurtenances thereunto belonging so unlawfully used," use the words, "intoxicating liquors, vessels and other property so unlawfully used"? If instead of "other property" the word "appurtenances" had been used, it might be a close question as to whether an automobile should be included as an "appurtenance"; but the words "other property" are used in their ordinary sense, and with the evident intention of including all property that could be used for unlawful transportation. Remembering that transportation of intoxicating liquors is just as much a violation of law as the sale or possession thereof, section

3359, supra, when applied to illegal transportation of intoxicating liquor, can and should be read as follows:

"When the *illegal transportation of intoxicating liquor* shall occur in the presence of any sheriff, constable, marshal, police officer, or other officer having power to serve criminal process, it shall be the duty of such officer, without warrant, to arrest the offender and seize the intoxicating liquors, vessels, and other property so unlawfully used in the *illegal transportation of such intoxicating liquors*."

"Other property so unlawfully used" means what? Does it not mean "other property so used in illegal transportation"? What other property can be used in illegal transportation? The answer is, wagons, carriages, automobiles, and vehicles of every kind so unlawfully used.

It is said that an automobile can be enjoined as a nuisance, and that proceedings can be instituted under section 3350 of the Prohibition Act, which declares all premises, buildings, boats, and other places where intoxicating liquors are manufactured, sold, bartered, kept, stored, or given away, and all liquors, bottles, glasses, kegs, pumps, bars, and other property used in connection therewith, to be common nuisances. The same section provides that any person guilty of maintaining said nuisance shall be guilty of a misdemeanor, and in the following section provision is made for enjoining and abating such nuisance by suits in equity. The sections referred to have reference to the injunction and abatement of nuisances at a fixed or definite place, so that a boat on which liquors are stored, or from which they are sold, is a place, and an automobile is, under the law, deemed a place, when used as a place of storage or sale. The provisions as to nuisance and injunctions were never intended to apply to "blockade running" automobiles. To enjoin the use of an automobile engaged in illicit transportation of intoxicating liquors would be ineffectual and abortive, and would be a proceeding not within the purview of the statute.

Counsel contend that the rule of ejusdem generis should be invoked in construing the statute. That rule is that, when general words follow words that are particular, the former should be construed as applying to words and things of the same kind or species designated in the particular words. But this is only one of the rules of construction, and, like rules of punctuation and grammar, it has no application where the intent of the legislative act is clear. It is a rule of strict construction. Black. Interp. Laws, p. 217. The Prohibition Law itself commands of us a liberal construction. It is only by strict construction, and by applying a strict and technical rule of construction, that it can be said that the words "other property" and "other things," occurring

In different sections of the law, mean that "other property" or "other things" are of the same kind or species as liquors, vessels, bars, etc. The Legislature has enacted into law the common-sense rule that words and phrases are to be construed according to the context and the approved use of the language. Comp. Laws Utah 1917, § 5848. Using the words "other property" in their ordinary sense, and ignoring the strict technical rules of construction because there is no necessity for invoking them when the language of the law is clear and unambiguous, there is no difficulty in arriving at the conclusion that "other property" embraces all things that may be illegally used in the transportation of contraband liquor, and that an automobile may be seized as it was by the sheriff in this case. And if lawfully seized, it may be forfeited as "other things" and "other property" may be forfeited in accordance with the various provisions of the prohibition law.

Were there no other assignments of error save that relating to the power of the court to forfeit the automobile we would affirm the judgment in this case.

[2] Among other instructions given by the court was the following:

"I further charge you, gentlemen of the jury, that, where liquors are transported or used in violation of the laws of this state, such liquors or other property so used are subject to forfeiture; and if any person claims said liquors or other property, and that the same were being used without his or her knowledge or consent, against his will or her will, the burden is upon the party so claiming to prove his or her innocence in that matter; that is to say, that the said liquors or other property were so unlawfully used without his or her knowledge and consent, and against his or her will, beyond a reasonable doubt."

It is urged that it was the intention of the Legislature that trials of this kind should partake of the character and be the same substantially as criminal prosecutions, and that the burden is upon the state to prove the guilt of the accused beyond a reasonable doubt. This position is untenable. The action of forfeiture under the prohibition law is in the nature of a proceeding in rem. The persons claiming the property are really not defendants, as they are designated in the statute, but are claimants, and the burden of proof is upon them. When intoxicating liquors have been found to be illegally in an automobile or other vehicle used for transportation of intoxicating liquors, it is prima facie evidence that the automobile or other vehicle was being used illegally, and any one desiring to recover the automobile is required to establish by a preponderance of the evidence the fact of ownership, and that he had no knowledge or information regarding the use to which the

automobile was being put, and that the same was not used for the illegal transportation of liquor with the consent of such claimant or owner. But we cannot agree with the learned judge of the district court that, in order to recover the property, the burden is upon the defendant to prove beyond a reasonable doubt that the same was used without his knowledge or consent. The authorities cited by the Attorney General to sustain the instruction are not convincing. It was prejudicial error to require defendants to establish their claims or their defense by proof beyond a reasonable doubt.

[3] Another instruction given by the court was the following:

"So far as the claim of the defendant Charles McSwine is concerned, if you find that he allowed the defendant Ferrand to hold possession of the automobile and to use the same as she might choose, or to control the use of the same, then it is immaterial for the purposes of this trial whether or not he knew for what purpose said automobile was being used, since, having intrusted the defendant Ferrand with full possession and control thereof, he would be bound by her acts, and by any knowledge or notice, if any, that she may have had as to the purpose for which said automobile was being used."

We cannot accede to the doctrine that one who buys an automobile on the installment plan becomes the agent of the vendor who retains title. If the vendor had knowledge of the intended use of the automobile he would not be entitled to relief from forfeiture, but the vendor or his assignee who, without such guilty knowledge, transacts business in the usual course of trade, should be protected in his property rights. There is no element of agency in the contract between vendor and purchaser nor between the vendor's assignee and the purchaser. It was therefore prejudicial to give the above instruction.

[4] Among the instructions requested by the defendants was the following:

"If you find from the evidence that some person other than the owner or lawful claimants thereof wrongfully took said automobile from the possession of the claimants, or one of them, and without their knowledge or consent, you cannot find for the plaintiff in this action for the forfeiture of said automobile."

If a person's automobile is stolen, and is used by the thief for the illegal transportation of intoxicating liquors, it certainly would be an act of injustice that was never contemplated by the Legislature to forfeit the owner's property. In our opinion defendants were entitled to the requested instruction.

Because of the errors in the instructions above referred to and the refusal to give the requested instruction the judgment is reversed. The cause is remanded to the district court of Morgan county, with direc-

tions to vacate the judgment and to grant appellants a new trial.

THURMAN, J. There is no difference of opinion among the members of the court as to the purpose and intent of the Prohibition Law. The purpose and intent of the law is to prevent the unlawful use of intoxicating liquors in the state of Utah. It is expressed in Comp. Laws Utah, 1917, § 3343, quoted by Mr. Justice WEBER in his separate opinion, in which I heartily concur. Everything prohibited by the provisions of that section comes equally within the penalties of the law, whether the penalty is by a fine, imprisonment, or forfeiture of property. The only question upon which we disagree is as to the power of the court under the law to adjudge the forfeiture of the automobile used in the unlawful transportation of the liquor.

It must be conceded that the transportation, carrying, or importing of intoxicating liquor for unlawful purposes within this state is prohibited to the same extent as is the manufacture or sale thereof. It is a crime of equal degree, and entails upon the wrongdoer the same penalties and forfeitures. The general intent and purpose of the law being indisputable, I see no reason for considering in detail any of its provisions except those directly pertinent to the facts of this particular case. The gist of the offense is the illegal transportation of intoxicating liquor. The instrumentality used in the unlawful transportation was the automobile in question. The order of the trial court adjudging that it be forfeited and sold is the matter complained of. The question is, was the automobile the subject of forfeiture within the purview of the law? We have already referred to the section declaring what is unlawful and prohibited. We there find that transporting intoxicating liquors for unlawful purposes is forbidden. As before stated, it is made a crime of equal magnitude with every other forbidden act. The unlawful transportation of the liquor in this case occurred in the presence of the sheriff of Weber county. He arrested the defendant, who was in charge of the automobile which at the time was carrying 744 pints of whisky and a quantity of gin. The sheriff took the automobile, whisky, and gin into his possession and held them subject to the order of the court. The court ordered that the automobile be sold and the liquor destroyed.

Comp. Laws 1917, § 3359, also quoted by Mr. Justice WEBER, in part provides that when the violation of any provision of the act occurs in the presence of any one of the officers named, such officer may, without warrant, arrest the offender and seize the intoxicating liquors, vessels, and other property so unlawfully used. (Italics mine.) The

remainder of the section, and other sections of the act, provide for the disposition of the property. No question is raised against the procedure adopted for disposing of the automobile if the terms of the statute authorize a forfeiture.

The doctrine is fundamental, and I assume there is no dissent, that in arriving at the intention of the Legislature the courts must give effect to the plain meaning of the language used to express the intention, and, furthermore, where the language is plain, unambiguous, unequivocal, and void of technical terms, there is no occasion for resorting to technical rules of construction. The plain and obvious meaning of the language must be adopted; anything else would be an unwarranted assumption of legislative authority.

If, then, the purpose is to ascertain the intention of the Legislature in a given case, and it is found that the Legislature has used plain, ordinary language, free from ambiguity and uncertainty, such as any intelligent layman might comprehend, we need go no further in search of the legislative intent. The Legislature has expressed it in its own language, and that is the supreme test. This I also assume is a proposition as to which there is no dissent. Mr. Justice FRICK, who has filed an opinion dissenting from the views of Mr. Justice WEBER, refers to the rule above stated as the simplest canon of interpretation, and relies on it primarily in support of his dissenting views.

We come now to a consideration of the language used by the Legislature—the language which constitutes the bone of contention in this proceeding. Bearing in mind that the act provides that the transportation of liquor for unlawful purposes is a crime, and also bearing in mind that the officer caught the defendant in the very act of committing the crime, using the automobile as an instrumentality, the section last referred to provides:

“ * * * It shall be the duty of such officer, without warrant, to arrest the offender and seize the intoxicating liquors, vessels, and other property so unlawfully used.”

What is the plain, obvious meaning of the language? The intoxicating liquors and vessels are specifically enumerated. What other property was being unlawfully used in furtherance of the crime of illegally transporting the liquor? The most potent instrumentality in the perpetration of the crime was the automobile by means of which the crime was committed. We are now discussing the plain, obvious, meaning of the language used. Is there any ambiguity or uncertainty? If we will keep out of mind technical rules which, as before suggested, should only be resorted to when the mean-

ing is obscure, is there any doubt as to what the Legislature intended? I frankly confess my inability to see any ambiguity in the language used or any obscurity as to its plain meaning and intent. These views, as far as I am concerned, amount to an absolute conviction. That, however, does not imply that I may not be mistaken. Other lawyers and judges, abler perhaps than I, with equal tenacity cling to the opposite view. If I could conceive this to be a case in which it was my duty to resort to technical rules of construction, I could no doubt find much to say in opposition to the views herein expressed. I believe I am reasonably familiar with the various rules of construction resorted to by jurists and courts in attempting to arrive at the meaning of statutes and other kinds of written or printed instruments. But I also believe that to resort to them, when without them the language is plain and the meaning is obvious, tends more to confuse than to enlighten. It befogs the mind and leaves it in a state of perplexity, whereas without resorting to such rules there would be no substantial reason for doubt.

From what has been said upon this subject it must not be conceived that the writer considers rules of construction as matters of small importance. On the contrary, I regard them as matters of the highest importance when the language of the instrument is such that its meaning is doubtful and uncertain. But, when the language of the instrument is plain and its meaning unmistakable, it is the duty of the courts to adopt the meaning thus expressed. It is just as much a disregard of duty on the part of the courts to resort to technical rules of construction when the Legislature itself has clearly expressed its intention as it is for the courts to read something into the statute which the Legislature did not intend. In effect, the result is ordinarily the same. In every case the probable effect is a distortion of the real meaning of the language used and consequently a perversion of the actual intention. Nevertheless, technical rules have been invoked by the appellant, and confidently relied on in this case, and therefore this attempt to express my views upon the important question under review would not be satisfactory, even to myself, if I did not make more specific reference to some of the rules in question.

The first, and perhaps most important, of the technical rules of construction to be used when the meaning of the language is in doubt, is the doctrine of *ejusdem generis*. This is especially invoked by appellant in this case and relied on as being conclusive. The meaning of the term is clearly expressed in the separate opinions of both Mr. Justice WEBER and Mr. Justice FRICK. I restate it, however, in substance only, to bring it to

immediate attention in connection with these remarks. The rule is: "Where general words follow the enumeration of particular classes of persons or things, the general words will be construed as applicable only to persons or things of the same general nature or class as those enumerated." Applying that rule to the present case, it is contended that the words "and other property" contained in section 3359, *supra*, being general words following an enumeration of particular things, are limited to things of the same general nature as those enumerated. In other words, it is contended that the language "and other property" means nothing more than things generally of the nature of intoxicating liquors and vessels, which are the particular things enumerated. The vice of the contention, however, rests in the fact that the language of the statute in question falls within the exception to the rule instead of within the rule itself. It will not be disputed by appellant, or any one seeking to apply the doctrine of *ejusdem generis* to the present case, that a fundamental exception to the doctrine exists where the particular things enumerated are greatly different from one another. Another exception exists where the things enumerated are exhaustive of all things of a like nature so that there is nothing left to which the general words can apply. The doctrine covering both of these exceptions is stated in 36 Cyc., commencing on page 1121, in the following language:

"* * * Nor does the doctrine apply where the specific words of the statute signify subjects greatly different from one another, nor where the specific words embrace all objects of their class, so that the general words must bear a different meaning from the specific words or be meaningless."

See, also, 2 Words and Phrases (2d Ed.) 226.

The words of the statute in question here disclose the fact that the specific things enumerated differ greatly from one another, and also embrace all the objects of their class, so that it is necessary to give the general words a different meaning in order to give them any meaning at all. What things could differ more widely from one another, if we consider them separately and apart from each other, than the thing called "intoxicating liquor" and the things called "vessels"? A vessel has no similarity to intoxicating liquor, and from no point of view can it be considered of the same general nature or in the same class. A vessel is far more similar in its general nature to an automobile than it is to intoxicating liquor. So that we might, by a strained construction, contend that the words "and other property" include an "automobile" when it is used for carrying liquor, because in that respect, in a general way, there is some

resemblance to a vessel. However, I make no such contention in this case. There is no necessity for it, and it might suggest the appearance of grasping at straws in order to uphold what I believe to be the correct view of the law. I do maintain, however, that intoxicating liquor as a thing is so widely different from "vessels" as "things" as to bring the case squarely within the first exception noted in the excerpt quoted from Cyc. The reasons for this exception to the doctrine of ejusdem generis is so apparent as to render it unnecessary to do more than barely mention it. When the specific things enumerated are so greatly different in their nature one from the other it is impossible to conceive of the general words following being held to apply only to things of the same general nature. In such case, therefore, the doctrine of ejusdem generis cannot apply. The second exception noted in the excerpt quoted from Cyc. is equally conclusive. The word "vessels" embraces every possible thing of the same kind and nature. The same may be said of the words "intoxicating liquors." They embrace and represent every kind of intoxicating liquor. If the specific things enumerated preceding the general words embrace everything of the same kind and nature, it follows that the general words "and other property" must be applied to other kinds of property or treated as meaningless. That the court has no right to do if it is possible to give the words some effect within the purview of legislative intent.

If I am correct in my analyses and right in my conclusions it must be conceded that the doctrine of ejusdem generis has no place in the case at bar. If it has no application here, for the reasons stated, it necessarily follows that another rule relied on by defendants has no application. If the doctrine of ejusdem generis has no application, the general words following the specific words may be applied to things superior to those enumerated as well as to things of the same general nature. If the general words were not intended to be limited to things of like nature to those enumerated in the preceding words, then the general words must be given their plain, ordinary meaning. In this case the plain, ordinary meaning of the words "and other property" embraces and includes any species of personal property in any manner used in connection with the illegal transportation of the liquor, which, as before stated, is the gist of the offense. Sutherland, Stat. Const. § 278.

The writer has had but little occasion to cite authority in support of the views herein expressed. The propositions advanced are in the main elementary. The section just cited from Sutherland, and the next succeeding section of the same work, in my judgment, state the law in a nutshell concern-

ing the rules of construction applicable to the present case.

It is manifest from the position here taken that it would be inconsistent and illogical for me to digress from the course of reasoning adopted, and attempt to indulge in a discussion of authorities cited in support of appellant's contention. The authorities in the main uphold the doctrine of ejusdem generis and in a proper case are unobjectionable. Some of them, as might be expected, apply the doctrine to cases in which it should not be applied; others carry it to such an extreme as to bring reproach upon the doctrine itself as a rule of construction. Take, for instance, the case of *People v. Edelstein*, 81 App. Div. 447, 86 N. Y. Supp. 861. This case arose under the Sanitary Code of the city of New York. It provides as follows:

"No person owning * * * any stable or other premises, shall keep * * * therein any dog or other animal which shall by noise disturb the quiet or repose of any person therein or in the vicinity, to the detriment of the life * * * of any human being."

The court held that the law did not apply to a horse kept in a stable for the reason that a horse and dog are not ejusdem generis. If the court had decided the question upon the theory that a stable is ordinarily constructed for the very purpose of housing a horse, and that a horse in any event is not accustomed to making offensive or disturbing noise, the decision would have been more logical and from my point of view far more satisfactory. But the court, as is often the case, seemed to forget the real purpose of the law and the correct principles of interpretation and resorted to technical rules of construction. It unnecessarily and improperly applied the doctrine of ejusdem generis, and excluded the horse from the list of prohibited animals because it was a different type of animal, and also because it was supposed to be of superior caste. On the same principle the court would undoubtedly have excluded the braying donkey or a bawling cow, than which nothing in the form of noise made by an animal could be more disquieting or offensive. If the real purpose of the ordinance had been kept in view, it seems to me the court would at least have sought for other grounds upon which to decide the case than upon the doctrine of ejusdem generis. For the reasons stated, I am not impressed with the case referred to as an authority entitled to serious consideration. Many of the other cases relied on by appellant are afflicted with a similar infirmity. They cannot stand the test of reason. But, as before stated, it is not my intention to enter upon a review of the cases relied on by appellant, however strong the temptation.

It has been suggested, however, that the

penalties of fine and imprisonment provided in the prohibition law are so drastic in themselves as to preclude the idea of forfeiting the automobile by which the liquor was transported. The contention carried to its logical conclusion would exclude the idea of any forfeiture whatever in any case under the act. If the penalties of fine and imprisonment are so drastic as to preclude the idea of forfeiting an automobile used in the commission of one of the crimes designated in the act, why should they not preclude the idea of forfeiting vessels, furniture, and fixtures oftentimes of greater value than an automobile. But even conceding they were of less value, what has value to do with the question? I find no such distinction or discrimination in the act itself, and this court has no right to assume legislative functions. The logic of such contention, in its last analysis, would take away the power to forfeit any property in any case arising under the act, no matter what might be the nature of the crime committed or character of the property used in its commission.

Near the beginning of these remarks I expressed the opinion that it was not necessary, in order to ascertain the legislative intent, to refer in detail to any of the provisions of the act except such as are clearly pertinent to the facts of the case. These provisions are found in the sections already referred to, 3343 and 3359, *supra*. I am still of the opinion that these two sections construed together disclose the actual intent and purpose of the law applicable to the facts of this case in ordinary and plain language, the meaning of which is unmistakable.

It is contended, however, with a force which implies conviction, that other sections of the law should be considered. Section 2354, Comp. Laws Utah 1917, is especially relied on as limiting the character of the offense in connection with which the property may be seized, and also limiting the character of the property that may be seized. This section limits the offenses to unlawful possession, manufacturing, selling, bartering, giving away, or otherwise furnishing liquor or keeping it for any of such purposes. The things that may be seized are described as liquors, vessels containing them, implements, furniture and fixtures used or kept for such illegal acts. It is conceded by me that this section does not include the unlawful transportation of liquors among the crimes enumerated, nor does it include automobiles or other means of transportation among the kinds of property that may be seized. The reason, however, why it does not include transportation as an offense, or vehicles used in transportation among the things that may be seized, is, to the mind of the writer, perfectly obvious. The section which is quoted by both of my Associates whose names have been mention-

ed refers exclusively to offenses at some particular place where fixtures and furniture, as well as liquors, vessels, and other implements, are supposed to exist. The idea of transportation of liquor and the means of transportation are not within the terms of the language used, because in the very nature of things they have no connection with the matter which the Legislature had in mind in drafting that particular section. If this had been the only provision authorizing the seizure of property connected with violations of the law, the position of appellant would be irrefragable. But is it to be conceived that the Legislature, after having made the transportation of liquor a crime the same as other forbidden acts mentioned in the law, and after having provided for the forfeiture of other kinds of property used in connection with such crimes, to which they were peculiarly adapted, should deliberately omit to provide for the forfeiture of such instrumentalities as are used as a means of unlawfully transporting liquor and which are peculiarly adapted thereto? Of course, if the Legislature did omit to make such provision, and only provided for seizure in the cases referred to in the section we have just considered, that would be the end of controversy, however much one might wonder at the omission. But the Legislature did not, in my judgment, make any such omission. The law to which reference has been so frequently made, which provides that the officer, without warrant, when any offense under the law is committed in his presence, may arrest the offender and seize the intoxicating liquor, vessels, and other property so unlawfully used, plainly and explicitly authorizes the officer not only to seize the liquor and vessels, but to also seize any other property then and there used in committing the crime. This consideration makes the act harmonious as a whole. It gives consistency to the legislative intent. Instead of singling out one or more offenses for which forfeitures may be declared, and one or more kinds of property which may be forfeited when used in connection with crime, it provides the penalty of forfeiture for every offense under the law, all of which are equally pernicious and of equal magnitude. It says, in effect, no matter where the crime occurs, whether at some fixed place in a building or other structure or on one of the highways or byways of the state, the property used in connection with the crime is subject to forfeiture in order to effectuate the intent and purpose of the law. To take the provisions of section 3354, *supra*, with its limitations as to the offenses named and the kind of property that may be forfeited, and undertake to incorporate them into section 3359, *supra*, so as to limit the words "and other property" to mean only the kind of property mentioned in the former section,

would, in my opinion, be nothing short of legislation. It would be to read something into the law which is not there, and hence be opposed to all the canons of construction with which I am familiar.

It having been established by the evidence beyond a reasonable doubt that the automobile was used for an unlawful purpose, it was incumbent upon the party claiming ownership of the property to not only prove his claim by a preponderance of the evidence, but likewise his ignorance of the illegal purpose for which it was used. Comp. Laws 1917, § 3357, clearly places this burden upon the party claiming ownership of the property. However, I agree with my Associates in the opinion that he is not required to establish these facts beyond a reasonable doubt. If in good faith he proves by a preponderance of the evidence that he did not consent to the illegal use of the property and had no knowledge thereof, it should not be the subject of forfeiture, whatever may have been the means by which it was procured.

I concur in a reversal of the judgment.

CORFMAN, C. J. I concur in the opinion of Mr. Justice WEBER, and in the reasons assigned by him as to why the seizure of the automobile in question was legal, and for holding that the district court had the authority and power under the statute to order a forfeiture to the state. I am also in accord with the views expressed by Mr. Justice THURMAN, in his separate opinion, that the meaning of the statute is plain and unambiguous, and that there is no occasion to resort to technical rules of construction in order to arrive at the legislative intent.

Statutes designed, as this statute was and is declared to be, "for the protection of the public health, peace, and morals," are to be given the most liberal construction by the courts in order to attain the purpose of their enactment. Moreover, as has been pointed out by my associate Mr. Justice WEBER, the statute under consideration expressly directs that "all of its provisions shall be liberally construed for that purpose." Experience, both before and since the enactment of the statute, has taught—and it is now conceded by all members of this court—that the automobile, when employed in the transportation of intoxicating liquors within the state, is the most effective and most often used instrumentality for the evasion of the law. As to the legal right to seize and forfeit to the state the automobile, when used for the transportation, furnishing, and disposition of intoxicating liquors in violation of law, sections 3354 and 3359 give the unqualified right to seize, and section 3357, as I interpret and construe its meaning to be, clearly provides for the forfeiture. For the enforcement of the law forfeitures of property used in the

evasion of statutes of the character of the one we now have under consideration are not new or untried remedies. They have been imposed and upheld by the courts of England, from whence our jurisprudence was taken, since the enactment of the statute of 12 Edw. II, A. D. 1318; and in our own country under federal laws in matters pertaining to revenue for more than half a century; and by the courts of all the states since the enactment of laws regulating and prohibiting the sale, manufacture, possession, and use of intoxicating liquors. I am not unmindful that, generally speaking, forfeitures of property are not favored by the courts; that they are held to be additional penalties imposed upon the wrongdoer or violator of the law; and that such penalties are not to be imposed unless there is some statutory authorization for so doing. While express mention is not made in the statute we are now considering of automobiles, among other things enumerated as subject to seizure and forfeiture, in my judgment it would be indulging in a very violent presumption to say that it was not intended that they should be included in the expression "other property," as used in the statute in designating what may be seized and forfeited. More especially is this so when experience, both before and since the passage of the act, has taught—and it is, and has been, generally conceded—that the automobile employed in the transportation of intoxicating liquors is the most effective and most often used instrumentality for the evasion of the purpose of the statute we have under consideration. It is a matter of common knowledge that if the statute is to be made effective, and is to accomplish the purpose of its enactment, property used for the illegal transportation of intoxicating liquors within the state should be forfeited. A reading of the statute gives a deep-seated conviction that its provisions were intended to be both drastic and comprehensive in prescribing remedies for the evils it seeks to eradicate and for imposing effective penalties on those who violate, or seek to violate and evade, its provisions. To the end that the object of its enactment may be attained, the courts and the officers of the law are expressly enjoined to give all of its provisions a liberal, not a strict, construction. In this respect I regard it as mandatory, more especially upon the courts. To deny the power of the court under this statute to forfeit automobiles used in the unlawful transportation and furnishing of intoxicating liquors is to say either that the automobile bears no relation to the evils sought to be eradicated by the statute, or that the legislative body that enacted the law had no regard whatever, when providing for its enforcement, for the well-known artifices adopted and used by those who might seek to render the act inoperative. As suggested by Mr. Justice FRICK

in his dissenting opinion: "Let it be remembered that all laws of this state must be liberally construed and so as to effectuate their purposes. That has always been the rule and policy of this court."

The well-known text-writer, Henry Campbell Black, in his work on Interpretation of Laws, at page 132, lays down the following as a rule of construction:

"It is presumed that the Legislature intends to impart to its enactments such a meaning as will render them operative and effective, and to prevent persons from eluding or defeating them. Accordingly, in case of any doubt or obscurity, the construction will be such as to carry out these objects."

And in this connection this learned author further says:

"In construing a statute, of whatever class it may be, an interpretation must never be adopted which will render the act ineffectual or defeat its purpose, if it will admit of any other reasonable construction; but, on the contrary, the legislative intention to make an efficient and enforceable law must be presumed, and the construction must be such as to give it force and effect, and accomplish the purposes for which it was designed."

I very much appreciate what has been said by my learned and highly esteemed associate Mr. Justice FRICK, that under our system of jurisprudence the courts should never assume legislative functions. I have the conscientious conviction that the statute before us, both in spirit and letter, directs the seizure not only of liquors and vessels, but "other property," in which must be included the automobile or any other instrumentality used by violators of the law in the illegal transportation, furnishing, and disposition of intoxicating liquors within our state. As I view it, any other construction would be rendering the words "other property" meaningless. As a court acting within its proper sphere, we have no better right to read words out of a statute, when placed there with legislative intent and for the purpose of affording an effective means of enforcement of the statute, than we have to read words into the statute when not there nor intended to be by the lawmaker. In either case as a court we would be assuming purely legislative functions, and would not be administering the law as we find it.

GIDEON, J. On the question of the power of the court to order a forfeiture of the automobile in question, which may be designated as the paramount or important question for decision, I agree in both the reasoning and the results reached by Justices WEBER and THURMAN. I concur in the reversal of the judgment for prejudicial error on the part of the trial court in its instructions to the jury. On that point I understand there is no division of opinion.

FRICK, J. (dissenting). I regret that, after most careful reflection and consideration, I am unable to concur in either the reasoning of my associate Mr. Justice WEBER, or the conclusions reached by him upon the question of the right to confiscate or forfeit the automobile in which the intoxicating liquors in question in this proceeding were found and seized, and upon the question that the proceedings in question must be more liberally construed because they partake of the nature of civil proceedings, as hereinafter explained.

In view of the importance of the question, and in view that in my judgment some of the most elementary and important rules of interpretation, as well as some of the controlling provisions of the Prohibition Act, have either been disregarded or misapplied by my Associate in construing the act, I feel constrained to set forth my views, as briefly as may be under the circumstances, why I cannot yield assent to the conclusions reached. For me to merely express a general dissent would, in my judgment, amount to a disregard of duty.

In order to afford the reader a better understanding of the real differences between myself and my Associate, it becomes necessary for me to refer to the various provisions of the act much more fully than he has seen fit to do. Indeed, from the very meager outline of the provisions of the act in the opinion of Mr. Justice WEBER I cannot conceive how any reader of the opinion can well arrive at any satisfactory conclusion with respect to whether the construction he has given the act is or is not the correct one.

While the act is of great length, covering 20 pages of the 1917 Laws, and for that reason it is utterly impractical to set it forth at length in an opinion, yet, in my judgment, it contains certain controlling provisions which must be constantly kept in mind if a correct interpretation is to be obtained. Those provisions should, and can, be stated in an opinion. For the purpose, therefore, of giving the reader an opportunity to pass upon the controlling provisions of the act, I shall herein set forth as many of them as I deem necessary to a full understanding of them. In doing so I shall refer to the original act, which constitutes chapter 2 of the Laws of Utah 1917. While I shall refer to the original sections of that chapter, I shall, however, also, in parenthesis, give the corresponding numbers of the sections of the act as they now exist in Comp. Laws Utah 1917.

Mr. Justice WEBER has given section 1 (3341) of the act in full, to which I shall refer later. Section 2 (3342) consists of definitions merely. Section 3 (3343) is copied in full in the opinion of Mr. Justice WEBER. Section 4 (3344) relates to the enforcement of the act, and section 5 (3345), among other things, provides that a "violation of any of

the provisions" of the act, if not otherwise provided, shall be punished by the imposition of "a fine of not less than \$50 nor more than \$299, or by imprisonment in the county jail for not less than thirty days nor more than six months, or both such fine and imprisonment." It is, however, also provided that a second offense against any of the provisions of the act, except becoming intoxicated and drinking intoxicating liquors in a public place, etc., constitutes a felony, and subjects the offender to imprisonment "in the state prison at hard labor for not less than three months nor more than two years." Section 6 (3346), section 7 (3347), section 8 (3348), and section 9 (3349), while containing some matters indicating the purpose of the act, yet the provisions therein contained have no material bearing upon the real questions involved here, and hence those provisions need no further consideration. Section 10 (3350), so far as material here, provides:

"All premises, buildings, vehicles, boats, and all other places where intoxicating liquors are manufactured, sold, bartered, kept, stored, or given away, or used in violation of law, or where persons are permitted to resort for the drinking of intoxicating liquors as a beverage, or where intoxicating liquors are kept for use, sale, barter, or delivery, in violation of law, * * * are hereby declared to be common nuisances."

"Common nuisances" may be enjoined and abated by actions in equity and the property disposed of or sold as provided in section 11 (3351). Section 12 (3352) makes all leases void in case the premises are used contrary to the provisions of the act, and section 13 (3353) makes the owner of the premises guilty if he knowingly permits them to be used contrary to the provisions of the act.

Coming now to the more important sections of the act, I must set them forth more in detail.

Section 14 (3354), among other things, provides:

"If any district, county, city, or town attorney or any peace officer or any other person has probable cause to believe that liquors are possessed, manufactured, sold, bartered, given away, or otherwise furnished in violation of this title, or are kept for the purpose of selling, bartering, or giving away or otherwise furnishing in violation of law, it shall be the duty of any such officer or person to file with the judge of the district court or justice of the peace written information of the facts, and the informant aforesaid "shall describe as particularly as may be the place, and the names of the persons, if known, participating in such unlawful act."

It is further provided that a warrant shall issue which shall command the officer to search the place or places described in the warrant, and if he finds—

"Liquors in unlawful possession or use, to arrest persons found therein in such place and

bring them before said court; and to seize the said liquors with the vessels containing them and all implements, furniture, and fixtures used or kept for such illegal acts, and keep the same securely until final action be had thereon."

That section further provides that, if no person is found in possession of the place searched, the officer shall, nevertheless, seize and "shall securely keep all liquor and other things so seized," etc.

Section 15 (3355), among other things, provides:

"When any liquor, vessels, property, or other things shall have been seized by virtue of any such warrant, the same shall not be discharged or returned to any person claiming the same by reason of any alleged insufficiency of description in the warrant, of the liquor, property, or place," etc.

It is, however, provided that any claimant shall have the right—

"To be heard on the merits of the case; and final judgment of conviction in such proceedings shall in all cases be a bar to all suits for the recovery of any liquors or other things seized, or of the value of same, or for damages alleged to arise by reason of the seizing and detention thereof."

Section 16 (3356) merely provides that the payment of internal revenue to the United States shall be prima facie evidence of certain facts.

Section 17 (3357) is another very long section, which, among other things, provides that, in case any warrant is issued by a justice of the peace which shall be returned showing "that liquors, vessels, or other things used for purposes of selling, or otherwise disposing of such liquors contrary to law," were found, the jurisdiction of the justice of the peace shall cease, and he shall forthwith "certify the record and all files to the district court of the county in which said premises are situated," and said district court is then required to proceed to final judgment. When the papers are filed in the district court the clerk thereof "shall fix a time for hearing said matter," and shall cause a notice "to be left at the place where said liquors were seized," and if a person is described in said warrant notice must be left at his "last known and usual place of residence." All persons claiming any interest in the things seized may, after such notice, appear "and show cause, if any they have, why said liquors, together with the vessels in which the same are contained, and other property should not be forfeited." The section further provides: "Whether any person shall so appear or not, said court shall, at the time fixed, proceed to the trial of the case, and the county or district attorney shall appear before said court and prosecute said information, and show cause why said liquors, vessels, or other property should be

adjudged forfeited." It is then further provided that "the trial of such case may be the same substantially as in the cases of criminal prosecutions before such courts." It is further provided that if any person shall appear and shall make written claim that "said liquors, vessels, or other property, or any part thereof, claimed by him, were not owned or kept with intent to be used in violation of the law, such party defendant may demand a jury to try the issue," and if the issue is found against him "the said court shall render judgment that said *liquors, vessels, or other property, or any part thereof, be forfeited.*" It is then provided that any person appearing may appeal from the judgment.

Section 18 (3358) provides: "Whenever it shall be finally decided that the *liquors, vessels or other property seized as aforesaid are forfeited,*" the court shall issue a written order directing the officer "forthwith publicly to destroy said liquors, vessels, or other property; provided, however, that if some of such property except liquors, can be used for lawful purposes," such property may be sold and the proceeds paid into the county treasury. If it is finally decided that the "liquors or other property so seized are not liable to forfeiture," the same shall be restored to the claimant, etc.

Section 19 (3359) being the one under which the automobile involved in this case was taken, I give it in full:

"When a violation of any provisions of this title shall occur in the presence of any sheriff, constable, marshal, police officer, or other officer having power to serve criminal process, it shall be the duty of such officer, without warrant, to arrest the offender and seize the intoxicating liquors, vessels, and other property so unlawfully used, and to take such offender or offenders immediately before the court or judge having jurisdiction in the premises, and there make complaint under oath, charging the offense so committed; and he shall make return, setting forth a particular description of the liquors, vessels, and other property seized, and of the place where the same were seized; whereupon the court or judge shall issue a warrant commanding and directing the officer to hold safely the property so seized in his possession until discharged by due process of law; and such property shall be held in like manner as if the seizure had been made under a warrant therefor.

"If any peace officer shall have probable cause to believe any person has on or about his person in any kind of receptacle, or in any vehicle under his control, liquors in any quantity, in violation of any of the provisions of this title, such peace officer shall have authority to examine such vehicle and receptacle and the contents thereof, and the finding of any liquors in the possession of such person, or under his control, not bearing a permit of a justice of the peace or a tag or label of the Attorney General, shall be prima facie evidence that such liquors were kept for an unlawful purpose, and such person shall be forthwith arrested by such officer."

The italics in the foregoing quotations are all mine, and are used merely to direct the reader's attention to what, in my judgment, are some of the controlling provisions of the act.

The other 23 sections of the act, while important in many respects, nevertheless have no bearing upon the real question here involved, namely, the power of a court to forfeit automobiles and other instrumentalities used as a means in transporting liquors contrary to the provisions of the act.

In view of the foregoing, I unhesitatingly assert that if the courts of this state have the power to confiscate or forfeit automobiles or any other property which may be used as a means of transporting or carrying intoxicating liquors within this state contrary to the provisions of the act, such power must be implied from what is said in those portions of the act which I have quoted from in this opinion. Certainly no one will, nor, in my judgment, could, consistently contend that such a power is expressly conferred in the act. In view of that fact it becomes necessary to carefully examine the language used in the act, and from what is there said determine, if possible, the intention of the Legislature.

In order to arrive at such intention I shall invoke the simplest canon or rule of interpretation first. This rule or canon merely requires that the language used be applied and limited to the subject-matter under consideration by the lawmakers, and, unless technical terms are used, give the words employed their usual and ordinary meaning, and, if possible, give each sentence, phrase, or word used due consideration and effect. In this connection it is important to keep in mind that vehicles were clearly in the minds of the legislators in passing the act. That fact is clearly and conclusively established by referring to sections 10 (3350) and 19 (3359) of the act. In the section first referred to the term "vehicle" is, however, clearly used as designating a place and nothing else. It is therefore impossible, under any rule of construction, to associate the term "vehicle," as used in that section, with the idea of its use as an instrument or means of transportation. We may therefore lay section 10 out of consideration. The word "vehicle" is next used in section 19 (3359), and it is there used in connection with the right of the officer to "examine" it for the purpose of determining whether there is any intoxicating liquor in such vehicle. There is absolutely no mention or reference, either directly or indirectly, to any vehicle in any other part of the act or in connection with any use or purpose except such as I have just mentioned. Nor was it necessary to speak of or mention vehicles in the other portions of the act for the simple reason that the subject-matter of those sections (which is made manifest from the excerpts I have quoted) is the unlawful manufacture,

possession, sale, giving away, or other disposition of intoxicating liquors. The property, therefore, that is spoken of in those sections, as is clearly indicated by the language used therein, was the property used in connection with the illegal manufacture, possession, sale, giving away, or other disposition of intoxicating liquors. The word "disposition," as here used, certainly, cannot refer to transportation. No one, I think, can or will so contend. There is not a word in any of those sections which refers to property of any kind or character that may be declared forfeited except such as is used in connection with the unlawful purposes I have just mentioned. This fact is clearly established by the language that is used in the act authorizing the seizure and forfeiture of certain property. The language there used in those sections, in and of itself, refutes the contention that automobiles and all other instrumentalities that may be used as a means of transporting or carrying intoxicating liquors contrary to the provisions of the act are subject to confiscation or forfeiture.

What, then, is the property that the act expressly authorizes to be seized? The officer is directed to seize only "the said liquors with the vessels containing them and all the implements, furniture and fixtures used or kept for such illegal acts." There is thus an express limitation respecting the character of property that may be seized, which is liquors, the vessels containing them, and all implements, furniture, and fixtures kept and used for such illegal acts. What are the illegal acts referred to? They are "that liquors are possessed, manufactured, sold, bartered, given away, or otherwise furnished in violation of this act, or are kept for the purpose of selling, bartering, or giving away or otherwise furnishing in violation of law." Those are the acts referred to, and the things named are the things that may be seized. What is said respecting the court's power to declare a forfeiture is absolutely limited to the things I have enumerated and can refer to nothing else. It is manifest that whatever terms may be used in the act in referring to the sale or forfeiture of the property seized must be limited strictly to the property authorized to be seized. What is there in the act, therefore, which authorizes the confiscation or forfeiture of automobiles or any other instrumentality that may be used merely as a means of transportation? I unhesitatingly assert that there is absolutely nothing.

But, as I understand Mr. Justice WEBER, he specially relies on section 19 (3359) as authorizing the seizure and forfeiture of automobiles and all other instrumentalities used as a means of transportation. Again, I most respectfully submit that there is nothing in that section which, under any rule or canon of construction, justifies such conclusion. That section, at most, authorizes the officer to "seize the intoxicating liquors, vessels and

other property so unlawfully used," etc. That section, however, also authorizes such officer, in case he has probable cause to believe that any person has "in any kind of receptacle or in any vehicle under his control, liquors in any quantity, in violation of any of the provisions of this act, such peace officer *shall have authority to examine such vehicle and receptacle and the contents thereof*," and if he finds any liquor without a permit from a justice of the peace, or having the tag or label of the Attorney General, the possession constitutes prima facie evidence that the liquors so found are "kept for an unlawful purpose, and such person *shall be forthwith arrested by such officer*." Now, what is there in that section which authorizes the seizure, much less the confiscation or forfeiture, of the vehicle mentioned therein, whether it be a wagon, a carriage, an automobile, or what not? Here the term "vehicle" is thus expressly used, but in connection therewith the act expressly limits the right of the officer to "examine said vehicle" for the sole purpose of ascertaining whether any intoxicating liquors are contained therein. If he finds such liquors, the act expressly directs what he shall do. There is therefore nothing, either in section 19 (3359) or in any other section of the act, which confers power or authority to seize and confiscate any vehicle or automobile. A careful examination of all the provisions of the act, therefore, irresistibly leads to the conclusion that the confiscation of automobiles is not authorized.

If, in addition to the foregoing, some of the most elementary, yet important, rules of interpretation and construction are applied, the same result follows. I now refer to the general rule that when the enumeration of a special class of subjects or things is followed by a general clause in which subjects are enumerated which are not enumerated in the special class, the subjects or things that are enumerated in the general clause must be limited to such subjects or things as partake of the same nature as those which are enumerated in the special class. This doctrine is commonly known as the doctrine of *ejusdem generis*. The doctrine is frequently applied, and, under circumstances like those in this case, I may say has universally been applied. The following are a few of the numerous well-considered cases which might be cited where the doctrine has been illustrated and applied, and the exceptions stated, to which I shall refer again later: *City of St. Louis v. Laughlin*, 49 Mo. 559; *State v. South*, 136 Mo. 673, 38 S. W. 716; *Transportation Co. v. Tobin*, 19 App. D. C. 469; *Ambler v. Whipple*, 139 Ill. 311, 28 N. E. 841, 82 Am. St. Rep. 202; *Phillips v. Christian County*, 87 Ill. App. 481; *State v. Walsh*, 48 Minn. 444, 45 N. W. 721; *Ex parte Williams*, 7 Cal. Unrep. 301, 87 Pac. 565; *People v. Edelstein*, 91 App. Div. 447, 86 N. Y. Supp. 861; *Alabama v. Montague*, 117 U. S. 602, 6 Sup. Ct.

911, 29 L. Ed. 1000; *Renick v. Boyd*, 99 Pa. 555, 44 Am. Rep. 124; *State v. Schuchmann*, 138 Mo. 111, 112, 33 S. W. 35, 34 S. W. 842; *State v. Jackson*, 168 Ind. 384-389, 81 N. E. 62; *American, etc., Co. v. Virginia, etc., Co.*, 91 Va. 272, 21 S. E. 466.

In *Phillips v. Christian County*, *supra*, the rule is stated in the following words:

"It is a familiar rule in the construction of statutes that the enumeration of a special class of subjects, followed by a general clause intended to embrace subjects not enumerated, the general clause will be construed to include only subjects that partake of the same nature as those already mentioned."

In connection with the rule just stated there is another which is that in case any number of subjects are enumerated, which enumeration is followed by a general statement, such as "other property" or "other things," etc., the property or things contained in the general statement cannot be of a class superior to those stated in the special enumeration. The rule is well stated in *Ambler v. Whipple*, 139 Ill. at page 317, 28 N. E. at page 842, 32 Am. St. Rep. at page 206, as follows:

"It is also a general rule of statutory construction that general words, following an enumeration of particular cases, apply to cases of the same kind and description; and [such enumerated] things inferior shall not, by general words, be construed so as to extend to and embrace those which are superior."

It is also illustrated in *People v. Edelstein*, *supra*, in the following words:

"The sanitary code of the city of New York (section 195), providing that no person owning a stable or other premises shall keep therein any dog 'or other animal' which shall, by noise, disturb any person in the vicinity, does not apply to horses kept in stables, but only to dogs and other animals of the same kind."

The only exception to the rule is that if all the inferior subjects are enumerated, and such enumeration is followed by a general statement referring to other things or other property, then, in order to give the general statement force and effect, the other things or other property may be of a class superior to those specially enumerated. If such were not the case the other things or other property mentioned would be entirely excluded from consideration, which would result in violating another cardinal rule of construction, namely, that all that is said in a statute must, if possible, be given force and effect. This latter rule has no application in this case, because when "other things" or "other property" are mentioned in the act they always refer to property used in connection with the possession, manufacture, sale, etc., of intoxicating liquors, as I have already pointed out. See, also, *Black, Interp. Laws* (2d Ed.) 207.

In any view, therefore, there is no escape

from the conclusion that, in using the terms "other property" or "other things," the legislators did not and could not have intended to include automobiles, wagons, carriages, cars, and other instrumentalities used as a means of transportation, all of which instrumentalities must be included if automobiles shall be.

But there is another cogent reason why automobiles may not be included in the terms used in the act. As I have pointed out, the act provides for drastic penalties for the violation of any of its provisions. The transportation or carriage of intoxicating liquors is prohibited by the act, and in case its provisions are violated in that regard the penalty for the first offense is a fine of not less than \$50 nor more than \$299, while a second offense subjects the offender to imprisonment at hard labor in the state prison. The penalties for unlawfully transporting intoxicating liquors are therefore precisely the same as for any other offense under the act, except the offense of drinking intoxicating liquors or becoming intoxicated, for which offenses the lesser penalties only are permitted. It was not necessary, therefore, to impose forfeiture upon the ground that the act of transporting liquors would go unpunished or insufficiently punished. The punishment in that regard is drastic, and neither the prosecuting officers nor the courts are given any discretion, and in case any violation of the act is committed prosecution must follow, and if the evidence justifies it, and it is a second offense, the offender must be sentenced to a term in the state prison.

Mr. Justice WEBER, however, insists that the act in question in terms provides that its provisions shall be liberally construed, and that the purpose of the act is to make this state what he is pleased to term "bone dry." He also refers to Comp. Laws 1917, § 5839, which provides that the Revised Statutes shall be the law of this state upon the subjects covered by them, and their provisions shall be liberally construed, etc. He also insists that the act must be construed as though it read that all "other property so unlawfully used in the illegal transportation of such intoxicating liquors" shall be forfeited. Let it be remembered that all laws of this state must be liberally construed and so as to effectuate their purposes. That has always been the rule and policy of this court. The Prohibition Act is therefore no exception to the general rule. Liberal construction, however, to carry into effect the provisions and penalties as they are expressed in the law, is one thing, while "liberal construction" by which terms and conditions are read into a law is quite another thing. To construe the provisions of the law liberally, so as to effectuate its purposes, is not only legitimate, but is wholesome and commendable. To read terms and conditions into law is, however, not construction, but amounts to legislation, and, when

attempted by the courts constitutes usurpation pure and simple. To do the latter, while always objectionable, becomes doubly so in enforcing penalties, confiscation, and forfeitures. Under the American system of jurisprudence no penalties, confiscation, or forfeitures can be imposed except such as are clearly expressed in the statute itself. The court may not, under the guise of "liberal construction," impose penalties not expressly provided for in the statute. To do that is quite as pernicious as to enforce them by *ex post facto* law. *Ex post facto* construction differs but little from *ex post facto* legislation. Indeed, *ex post facto* construction is far more objectionable, because, in addition to that vice it also constitutes usurpation by the courts. Let it not be assumed that because it is desirable to prevent the traffic in intoxicating liquors in this state, and to thus make the state "bone dry," and that such a result can better or only be effectively attained by confiscating or forfeiting the instrumentalities used in transporting or carrying liquors, that such a result, however laudable or desirable, justifies this court to read something into the Prohibition Act, or any other act, which is not found therein. Neither does the fact that the members of this court may think that the Legislature intended to accomplish such a result justify this court in supplying any penalty that may be omitted from the act. All persons have a right to know in advance precisely what the penalties are in case any law is, or any of its provisions are, violated. They can only know that, if the penalties are clearly expressed in the law itself. In that regard courts have no power to go beyond the penalties expressed in the law for the violation of any of its provisions. If there is one principle that the courts of England and of this country have adhered to with more tenacity than any other, it is the one that no penalties can be imposed as a punishment for any prohibited act except such as are expressed in the law itself. I shall only refer to a few of the scores of cases that could be cited on this most important subject. Among the very large number of well-considered cases which illustrate and fully support the foregoing statements, I refer to the following: *St. Louis, etc., Co. v. United States*, 110 C. C. A. 63, 188 Fed. 181; *People v. Cohen*, 94 Misc. Rep. 355, 157 N. Y. Supp. 591; *United States v. Weitzel*, 246 U. S. 533, 38 Sup. Ct. 381, 62 L. Ed. 872; *Pennsylvania Ry. Co. v. Fucello*, 91 N. J. Law, 476, 103 Atl. 988; *U. S. Assurance Ass'n v. Frederick*, 130 Ark. 12, 195 S. W. 691; *St. Louis, etc., Ry. Co. v. State*, 125 Ark. 40, 187 S. W. 1064; *State v. Palanque*, 133 La. 36, 62 South. 224; *Kitts v. Kitts*, 136 Tenn. 314, 189 S. W. 375.

It must be remembered, as I have heretofore pointed out, that the provisions of the act are highly penal, and that the penalties,

other than confiscation or forfeitures are quite drastic. In referring to the question now under consideration, the court in *St. Louis Ry. Co. v. United States*, supra, said:

"A penal statute which creates and denounces a new offense, and the act under consideration is such a statute, should be strictly construed. A man ought not to be punished unless he falls plainly within the class of persons specified as punishable by such a law. *The definition of offenses and the classification of offenders are legislative and not judicial functions,*" etc. (Italics mine.)

In *People v. Cohen*, supra, the Supreme Court of New York, in commenting upon a statute which, like the one in question, imposes penalties for the violation of its provisions, observed:

"In giving a construction to this section, we must bear in mind the statute makes penal the doing of something not before forbidden by law. While the language employed should be given a reasonable construction for the purpose of carrying into effect the purpose of the Legislature in framing the statute, *it cannot be enlarged so as to make penal what is not plainly written in the statute itself.* Words employed in such a statute should be given that [their] ordinary and usual meaning, and should not be so construed as to make out a crime by implication." (Italics the writer's.)

This states the law as it is enforced by all the courts of this country. If, for instance, a trial court should undertake to impose a penalty of \$300 where the statute permits only \$299, this court would, on appeal, reverse the judgment as being excessive and unauthorized. Here, however, automobiles that may be worth several thousand dollars are permitted to be confiscated upon the bare statement that they come within the designation of "other property" or "other things."

While it is true that the district court based its power to forfeit the automobile in question upon the word "implement" as found in the statute, holding that the automobile constituted an implement yet, as I understand Mr. Justice WEBER, he does not base the court's authority upon that ground, but upon the ground that automobiles are comprehended within the phrase "other property" or "other things." Mr. Justice WEBER, therefore, does not agree with the district court in respect of the basis of authority to declare a forfeiture of automobiles. I am not surprised, however, that Mr. Justice WEBER was not impressed with the district court's basis of authority, since it is too clear for argument that the word "implement" as used in the act refers to property which is used for purposes other than transportation.

Neither does Mr. Justice WEBER agree with the dissenting member of the Supreme Court of Oklahoma in the case of *One Cadillac Automobile v. State (Ok.)* 172 Pac. 62. The dissenter there found the basis of

authority to forfeit in the term "appurtenance" used in the statute. These differences between the several distinguished jurists most strikingly illustrate the wisdom of the rule of construction which has prevailed in all English speaking courts for centuries, that only such penalties as are clearly expressed in a statute should be enforced by the courts.

Before leaving the subject, however, I desire to quote a little further from the cases cited above.

In *United States v. Weltzel*, supra, the Supreme Court of the United States, in concluding the opinion, says:

"Statutes creating and defining crimes are not to be extended by intendment because the court thinks the Legislature should have made them more comprehensive." Citing cases.

I most respectfully, yet earnestly, insist that the vice of reading something into a penal statute because in his judgment the Legislature should have included it, is just what Mr. Justice WEBER is following in his opinion under the guise of what he is pleased to call "liberal construction."

The case of *Pennsylvania Ry. Co. v. Fucello*, supra, is precisely like the case last cited. In *U. S. Assurance Ass'n v. Frederick*, supra, the rule is stated thus:

"Statutes providing penalties are strictly construed, and the penalty is not charged in any case unless there is express statutory authorization."

A moment's reflection should suffice to convince any one that this is the only safe course to follow as a guide in construing and enforcing penal statutes, and especially in confiscating or forfeiting an offender's property in addition to the imposition of a fine or imprisonment, or both, as provided for in the statute.

To the same effect is *St. Louis, etc., Ry. Co. v. State*, supra.

In *State v. Palanque* supra, the rule is stated in the first headnote thus:

"The courts will not apply a penal statute to a case, not within the obvious meaning of the language employed, even though it be within the mischief to be remedied. What the Legislature, through inadvertence or otherwise, omits from such a statute, the courts cannot supply; their duty being to interpret, not to amend, the law."

Kitts v. Kitts, supra, is to the same effect.

In *State v. Le Blanc*, 115 Me. 142, 98 Atl. 119, it is said:

"A criminal offense cannot be created by inference or implication, nor can the effect of a penal statute be extended beyond the plain meaning of the language used."

In *Marter v. Repp*, 80 N. J. Law, 530, 77 Atl. 1030, a penal statute is defined thus:

"A 'penal statute' is one which enforces a forfeiture or penalty for transgressing its provisions or doing a thing prohibited. 'Penal' is a

much broader term than 'criminal,' and includes many statutory enforcements of police regulations the violations of which are in no sense crimes."

As a matter of course, all the acts for which penalties provided for in the act here in question, including forfeitures, are imposed constitute crimes under our statute. Indeed, a repetition of any prohibited act, except as hereinbefore stated, constitutes a felony. In view therefore, that there can be no forfeiture except in connection with the commission of a crime, the provisions of the act in question, within the definition of the Supreme Court of New Jersey, necessarily are both penal and criminal.

In *U. S. Fidelity & G. Co. v. Marks*, 37 Nev. 306, 142 Pac. 524, it is said:

"Penalties or forfeitures in addition to those stated in the statute should not be implied or imposed by the court."

Manifestly that is both good law and good sense.

See, also, *People v. Doyle*, 13 Cal. App. 611, 110 Pac. 458; *Price v. Board of Com'rs*, 22 Colo. App. 315, 124 Pac. 353; *Symmes v. Sierra Nevada M. Co.*, 171 Cal. 427, 153 Pac. 710.

Recurring now to the proposition that it is just as objectionable to impose penalties by ex post facto construction as it is to do so by ex post facto laws, the Circuit Court of Appeals of the Eighth Circuit, in *Martin v. United States*, 168 Fed. 198, 93 C. C. A. 484, states the law thus:

"A penal statute which creates and prescribes punishment for an offense committed by a specific class must be strictly construed. One who was not, beyond reasonable doubt, within the class by the express terms of the statute, may not be brought within it after the event by interpretation. Ex post facto law by judicial construction is as pernicious as ex post facto legislation."

In the foregoing case the judgment entered in the lower court, which is reported in 7 Ind. T. 451, 104 S. W. 678, is reversed.

I refrain from citing further cases. In case, however, the reader desires to pursue the subject further, he will find numerous cases in which the doctrine stated in the foregoing quotations is illustrated and applied by reference to the subject "Statutes" in volume 44 Cent. Dig. §§ 322-323, and to the same subject in Dec. Dig. (Key-No.) § 241.

Lest I may be misunderstood, I desire to again state that I do not contend that the old rule of strict construction of criminal and penal statutes applies in this state, nor do I refer to the foregoing cases for that purpose. The act in question should receive a fair, a reasonable, and a liberal construction so as to effectuate its purpose. What I most earnestly contend for, however, is that this court cannot, by construction or implication, extend the penalties nor the forfeitures to

persons or property not expressly mentioned in the act. To do that is to impose penalties in excess of those mentioned in the statute, which all the courts hold cannot legally be done, regardless of the doctrine of liberal construction.

It is, however, insisted by Mr. Justice WEBER that the proceedings in question are civil and not criminal, and for that reason a different or more liberal rule in declaring forfeitures applies. In making that statement I respectfully submit that he has fallen into the same error as he has in assuming that, because the act provides for liberal construction, therefore the ordinary rules of law in imposing penalties do not apply. The act, however, in terms, provides what the nature of the proceedings shall be. It provides: "The proceedings in the trial of such case may be the same substantially as in the case of criminal prosecutions before such [district] courts." The proceedings referred to are the proceedings in which forfeitures may be declared, and it is too manifest for argument that they can refer to no others. It certainly will not be contended that a person may be convicted and sentenced to the state prison for a felony in a civil proceeding; hence the proceedings referred to in the statute refer to the proceedings relating to the forfeiture of property and not to the conviction of the offender. The proceeding to forfeit is one in rem. In applying the rules of construction for which I contend, however, it is utterly immaterial whether the forfeiture proceedings are deemed civil or criminal, since the contention that a different rule of construction and procedure applies whether the proceeding be civil or criminal is thoroughly exploded by the Supreme Court of the United States in the case of *United States v. Chouteau*, 102 U. S. 611, 26 L. Ed. 246, where Mr. Justice Field, in speaking for that court, said:

"Admitting that the penalty may be recovered in a civil action, as well as by a criminal prosecution, it is still a punishment for the infraction of the law. The term 'penalty' involves the idea of punishment, and its character is not changed by the mode in which it is inflicted, whether by a civil action or a criminal prosecution. * * * To hold otherwise would be to sacrifice a great principle to the mere form of procedure, and to render settlements with the government delusive and useless."

That, I think, effectively disposes of the proposition that the rule of construction in enforcing penalties is different in civil cases from what it is under criminal statutes. But, as already pointed out, the act in question is both criminal and penal. Moreover, no property is subject to confiscation unless it is used in violation of the provisions of the act, and any violation of the act constitutes a crime, and if repeated a felony. The result in any case is therefore highly penal, and where the possession is known and prosecu-

tion follows it must likewise be criminal, since the prosecuting officers have no discretion, but must prosecute, and, if the evidence shows a violation of the act, the court must sentence if conviction follows prosecution.

The case of *Kolb v. Peterson*, 50 Utah, 450, 168 Pac. 97, is referred to as a precedent upon the question of liberal construction. The *Kolb* Case has, and can have, no bearing upon the real question involved in the case at bar. It very often happens that a court not only is justified in construing, but, as a matter of common justice, should construe, an act so as to enforce its general spirit and purpose, although the language employed therein may be obscure and unsatisfactory respecting some of the provisions of the act. That is what happened in the *Kolb* Case. We are, however, not now dealing with such a case. Here the question is not what is the general purpose of the act, but it is what are the penalties that are prescribed in case its provisions are violated in certain particulars. The general purpose of the act cannot be looked to for the purpose of determining what penalties shall be inflicted for a violation of its provisions. Nor is the intention of the Legislature in that regard of any consequence unless expressed in the act. It is utterly immaterial what penalties the Legislature had in mind so long as it failed to state them in the act itself. This is the logic, purport, and the spirit of all of the cases I have hereinbefore cited. The fallacy of my Associate lies in the assumption that penalties can be created by the courts by the application of the doctrine of "liberal construction." If that doctrine be once applied to the enforcement of unexpressed penalties the precedent so established will, I am sure, be "more honored in the breach than in the observance."

Finally, it is urged that merely to apply the remedy of enjoining the use of automobiles, and thus prevent the illegal transportation of intoxicating liquors by them, would be "ineffectual and abortive," etc. The question is not whether the Legislature has or has not provided for these penalties to prevent the transportation of intoxicating liquors, but the question is, what are the penalties it has provided? If this court supplies, by construction and intendment, what the Legislature omitted, it necessarily transcends its powers. To do that is far more mischievous in its consequences than it would be to permit automobiles to escape forfeiture. The Legislature can cure the latter evil if it be such at any time, while the evil lurking in imposing unexpressed penalties by construction or intendment will become a precedent which may easily result in disregarding one of the most fundamental principles of our jurisprudence.

I concur most heartily in the statement that the confiscation of automobiles, when used as a means for the unlawful transportation of intoxicating liquors, would go very

far in preventing, if it did not entirely prevent, the illicit traffic in such liquors. What I insist upon, however, is that the Legislature, and not the courts, should authorize their confiscation. I also unhesitatingly agree with the proposition that courts should not so construe and apply statutes as to "devitalize" them. In this connection I desire to state, however, that courts cannot well "devitalize" what never had vitality. Moreover, if forsooth a court should err in construing and applying the penal provisions of a statute, and should erroneously refuse to enforce any penalty except such as are clearly expressed therein, although the penalty in a particular case could be implied, the mischief in making such an error would, nevertheless, be infinitely less than what would necessarily result from the establishment of a precedent by the court of last resort which would authorize the courts to apply omitted penalties merely because a statute was "enacted for the public good," and unless assumed penalties are enforced the statute will lose some or much of its effectiveness. To err with regard to the first proposition constitutes a mere error of judgment, and violates no fundamental principle of jurisprudence; while to do the latter constitutes usurpation, and violates the underlying principles of common justice, as well as the principle upon which rests the doctrine that the state governments are divided into three independent, co-ordinate branches, neither of which may trench upon the trust and powers conferred upon any of the others. It is for the reason last stated that the courts of this country universally shrink from supplying defects in laws, and especially refuse to enlarge upon or to enforce penalties which are not clearly expressed in the statute. If, however, the court fails in the enforcement of certain statutory provisions because in its judgment they are indefinite and uncertain, the remedy is clear and within easy reach. The Legislature can supply the alleged defect, just as was done by the Legislature of Oklahoma after the Supreme Court of that state in the case hereinbefore referred to held that the Prohibition Act of that state did not authorize the confiscation of automobiles. What the Supreme Court of Oklahoma did in that case I submit this court ought to do in this. It is then up to the Legislature to say precisely to what extent property may be confiscated and forfeited for a violation of the act in question.

I have shown that in this case the court cannot err if it follow the act as written; that the act provides in explicit terms just what property may be confiscated or forfeited; that vehicles, which necessarily include automobiles, are expressly mentioned in the act, and when they are mentioned it is always in connection with something other than their use as a means of transportation, and entirely foreign to the subject of confis-

cation and forfeiture. Under every rule of construction, therefore, the ruling of the district court in declaring the automobile forfeited is manifestly erroneous.

Since writing the foregoing both the CHIEF JUSTICE and Mr. Justice THURMAN have handed me their opinions, in which they set forth their views for concurring with Mr. Justice WEBER. While I have the highest regard for the views of both of my Associates yet I respectfully submit that there is practically no reason assigned in either opinion which is not expressly or inferentially covered by what is said by Mr. Justice WEBER, except, perhaps, that the CHIEF JUSTICE has added something in his concurring opinion in the statement that "sections 3354 and 3359 give the unqualified right to seize, and section 3357, as I interpret it and construe its meaning to be, clearly provides for the forfeiture." I expressly copied all the essential parts of those sections for the purpose of showing that section 3354 expressly limits the right to seize the property used for purposes other than for transportation; that section 3357 again expressly limits the confiscation or forfeiture of property that is used for other purposes; and that, in view of the language of section 3359, the term "other property" cannot be construed to mean automobiles, for the reasons: (1) Because the phrase "other property" clearly refers back to the enumerated articles theretofore mentioned in the act, and is thus given full force and effect; and (2) because in that section the term "vehicle" cannot be held to come within the phrase "other property," because "vehicle" is expressly mentioned, and the power that the officer may exercise with respect thereto is expressly defined and limited. Why provide that the officer "shall have authority to examine such vehicle" when he already had plenary authority to seize it? If the officer is empowered to seize the vehicle, and therefore an automobile, such power was conferred upon him, and it existed when the Legislature conferred the authority to examine it, and specially provided what he shall do, as I have pointed out in my opinion. It is therefore manifestly fallacious to say that in order to give the phrase "other property" any meaning we must allow confiscation and forfeiture of automobiles. The phrase "other property" is given full meaning and effect wholly independent of the right of confiscation, and therefore the rule of ejusdem generis should apply precisely as I have contended for.

In this connection I also feel constrained to remark that, in view that what I have said respecting the drastic nature of the penalties imposed in the act for violation of its provisions respecting the transportation of intoxicating liquors was merely said to point out that the Legislature had not overlooked that matter, and hence there was no necessity for

the court to assume that the Legislature must have intended to impose some penalty for the violation of all of the provisions of the act, I fail to grasp either the necessity or the utility of Mr. Justice THURMAN'S remarks upon that subject. This is especially true if the fact is kept in mind that I, like all other citizens, am bound by the decision of the majority. What I may say, however, binds no one, and I am doing no more than exercising the right and discharging my duty to give reasons why in my judgment, by what is said in, as well as by what is omitted from, the act, the construction placed upon it by my Associates respecting the right to confiscate automobiles is not justified. Be that as it may, however, the important fact still remains that all that is, or can be, relied on by my Associates in declaring the right to confiscate automobiles and all property that may be used for transporting or carrying intoxicating liquors contrary to the provisions of the act, which includes all property from a railroad car to a woman's handbag, is the term "other property," as that term is used in section 19 (3359). In view of that fact I can only submit what I have said to the members of a fair and impartial profession, who, in view of their knowledge of the law, are capable of forming an intelligent and just conclusion respecting the soundness or unsoundness of my views. My views as herein expressed are based on my best judgment and enforced conviction, and those are my only guides. Notwithstanding the views of my Associates, therefore, I must still insist, and I submit in all candor, that if all that is said in the act, and if the subject-matter concerning which particular language, phrases, or expressions therein used, be kept in mind, then there is not only nothing in the act from which a court can legally declare the confiscation of automobiles, but there is ample reason why such confiscation should not be judicially declared.

While, therefore, my judgment and convictions prevent me from concurring with my Associates respecting the right of the confiscation of automobiles and all other property that may be used as a means of transportation of intoxicating liquors contrary to the provisions of the act, I most cheerfully join them in a hearty *pax vobiscum*.

I concur in the reversal of the judgment upon the other ground stated by Mr. Justice WEBER.

(55 Utah, 50)

STATE v. JENSON et al. (No. 3749.)

(Supreme Court of Utah. Aug. 30, 1919.)

1. INTOXICATING LIQUORS \S 250—IN FORFEITURE PROCEEDINGS CREDIBILITY OF WITNESSES FOR JURY.

In search, seizure, and forfeiture proceedings under the Prohibition Act, against certain

intoxicating liquors, vessels, and an automobile used to transport them into the state, the credibility of the witnesses was peculiarly within the province of the district court, which was not bound by the statements of defendants, particularly where the inferences deducible from the undisputed facts were contrary to such statements.

2. INTOXICATING LIQUORS \S 246—AUTOMOBILES IN ILLEGAL TRANSPORTATION FORFEITED TO STATE.

The Prohibition Act confers upon the courts of Utah the power to declare forfeited to the state all automobiles used for the illegal transportation of intoxicating liquors.¹

Frick, J., dissenting.

Appeal from District Court, Weber County; A. W. Agee, Judge.

Search and forfeiture proceedings by the state of Utah against Hyrum Jenson, certain intoxicating liquors, vessels, and other property unlawfully used, one Hudson automobile, C. H. Reilly, and P. B. Ryan. From the judgment forfeiting the property, defendants Reilly and Ryan appeal. Affirmed.

Dan B. Shields, Atty. Gen., and O. O. Dalby, H. Van Dam, Jr., and James H. Wolfe, Asst. Attys. Gen., for the State.

Soren X. Christensen and Thomas Ramage, both of Salt Lake City, for appellants.

FRICK, J. This is an appeal from a judgment of the district court of Weber county. The proceeding culminating in said judgment was commenced and prosecuted on behalf of the state pursuant to chapter 2, Laws Utah 1917, commonly known as the Prohibition Act.

The questions involved all arise out of the search, seizure, and forfeiture clauses contained in the act aforesaid.

The proceedings had in the district court in this case are fairly reflected in the findings of fact and conclusions of law made by the district court, and hence it is only necessary to set forth the findings and conclusions of law, which are as follows:

"(1) That on the 1st day of November, 1918, in the county of Weber and state of Utah, and at a point in Weber canyon near what is known as Devil's Gate, the said sheriff seized 515 pints of intoxicating liquor, to wit, whisky, which was then in the possession of the defendant Jenson, as it was being transported by him in the Hudson automobile mentioned in the return or report of the said sheriff; that upon the seizure of such intoxicating liquor and automobile the said sheriff filed in this court his return and report of such seizure, stating the time and place and the reason for such seizure, and describing the said whisky and the said automobile, and that thereupon an order was issued by the judge of this court directing the sheriff to hold safely the said property so seized in his possession until it was disposed of by due process of law; that thereafter

\S For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

¹ State v. Davis, 124 P. 151.

the clerk of this court fixed the 12th day of December, 1918, as the time for hearing the said matter, and caused a notice thereof to be given to the defendant and other persons as required by law; that thereafter, on the 9th day of December, 1918, the said defendant C. H. Reilly appeared and filed his petition or pleading in this matter, claiming to be the owner of the said automobile by virtue of a certain note which is in words and figures as follows (setting forth a copy of the note), and alleging that he had no knowledge concerning the use of the said automobile in any unlawful business, and claiming ownership thereof and demanding the possession thereof; that after the evidence in the said matter had been introduced, and the court had heard the argument of counsel, the said P. B. Ryan asked and was given leave to file a complaint in said matter, claiming the ownership of said automobile.

"(2) That the said claimant, C. H. Reilly, has no right, title, or interest to or in said automobile, and that the note, a copy of which is set out in his pleading, was not given to him, but was given to his father, who is now dead, and that the said claimant has no right or title to said note or interest therein, as payee or assignee or otherwise.

"(3) That the said P. B. Ryan, at the time of the seizure of the said automobile, was the owner thereof, and that the said automobile was being used by the defendant Jensen in and about the business of the said Reilly, and that the intoxicating liquor in said automobile was being transported in said automobile with the knowledge and consent of and for the said Ryan, and that the said liquor, to wit, 515 pints of whisky, contained in pint bottles, was also the property of the said Ryan, and had been brought into this state from Evanston, Wyoming, for said Ryan, and for the purpose of being used and sold by the said Ryan in Salt Lake City, Salt Lake county, Utah.

"(4) The court further finds that the bottles containing the said whisky and the said automobile can be used for lawful purposes, and that the public interest would be served by selling instead of destroying the same."

From the foregoing findings of fact the court states the following conclusions of law:

"That said whisky and said automobile were owned and kept by the said P. B. Ryan with intent to be used in violation of law, and that the said whisky was brought into this state from the state of Wyoming by the said Ryan, with the intent upon the part of the said Ryan of selling and disposing of the same in violation of the law, and that the said automobile was used as an appliance or implement for the accomplishment of the said purpose, and as an end or means to enable the said Ryan to bring said whisky into this state and to dispose of the same in violation of law; and that the state of Utah is entitled to a judgment forfeiting the said whisky and the said automobile to the state of Utah, and for costs against the

said C. H. Reilly and the said P. B. Ryan to be paid equally by them, and directing the said whisky to be destroyed, and bottles and automobile to be sold at public auction to the highest bidder as provided by law, and the money received therefrom to be turned over to the county treasurer of Weber county."

Judgment was accordingly entered declaring the said liquor, bottles, and automobile forfeited to the state of Utah, said liquor to be destroyed, and that the bottles and automobile be sold by the sheriff of Weber county.

The defendants Reilly and Ryan prosecute this appeal from the judgment aforesaid pursuant to Comp. Laws Utah 1917, § 3357, and their counsel insist that the district court erred in making the findings of fact, conclusions of law, and in entering judgment forfeiting said automobile. They urge that the findings in certain particulars are not supported by the evidence, and that the conclusions of law are contrary to the findings of fact. The principal error assigned and urged, however, is that the district court erred in holding that the act conferred power upon the court to declare the automobile forfeited.

[1] The contention that the evidence fails to support the findings of fact in the particulars stated by counsel is without merit. While, judging from the record, the evidence, in some particulars, seems to be in favor of appellants' contention, yet that, standing alone, is not controlling. The credibility of the witnesses was peculiarly within the province of the district court, and, in view of the circumstances, it was not bound to believe the statements of the defendants, and certainly not where the inferences properly deducible from the undisputed facts were contrary to those statements.

[2] In view that the majority of this court has held in the case of *State v. Davis*, etc., 184 Pac. 161, in which an opinion has just been filed, and which precedes this one, that the courts of this state have power to declare forfeited all automobiles which are used for the illegal transportation of intoxicating liquors, and in view that that is the only question left for consideration in this case, it is unnecessary to discuss that question further. The writer, however, dissents from the majority upon the right of the courts to declare a forfeiture of automobiles, for the reasons stated in the dissenting opinion filed in the case of *State v. Davis*, etc., supra.

The judgment of the district court of Weber county is affirmed, at appellants' costs.

(55 Utah, 100)

BADERTSCHER v. INDEPENDENT ICE CO. et al. (No. 3336.)

(Supreme Court of Utah, Sept. 5, 1919. On Application for Rehearing, Oct. 9, 1919.)

1. APPEAL AND ERROR ⇨414—JOINT TORT-FEASOR DISMISSED FROM CASE NOT ENTITLED TO NOTICE OF APPEAL.

Where plaintiff sued two as joint tort-feasors, and the court dismissed the action as to one defendant, *held* that on appeal by the other defendant, who was cast below, the defendant as to whom the case was dismissed was not an adverse party on whom notice of appeal must be served.¹

2. APPEAL AND ERROR ⇨414—JOINT TORT-FEASOR DISMISSED FROM CASE NOT ENTITLED TO NOTICE OF APPEAL.

Where an action against two joint tort-feasors was dismissed against one, *held* that, on appeal by the remaining defendant from an adverse judgment, the one as to whom action was dismissed was not an adverse party on whom notice of appeal must be served, on the theory that it was interested in the appeal because under Comp. Laws 1917, § 6484, a party who fails in an action otherwise than upon the merits may commence a new action within one year after reversal or failure.

3. APPEAL AND ERROR ⇨880(3)—ON DISMISSAL OF JOINT TORT-FEASOR PLAINTIFF ONLY COULD ALLEGE ERROR.

Where an action against two joint tort-feasors was dismissed as to one, *held* that only the plaintiff in the action could complain of the ruling.

4. APPEAL AND ERROR ⇨871—QUESTION AS TO DISMISSAL OF JOINT TORT-FEASOR REVIEWABLE ONLY ON APPEAL BY PLAINTIFF.

Where an action against two joint tort-feasors was dismissed as to one, *held* that the ruling cannot be reviewed without appealing from the judgment immediately following the ruling.

5. APPEAL AND ERROR ⇨262(2)—RESERVATION OF EXCEPTION NECESSARY ON APPEAL FROM NONSUIT.

The sustaining of a motion by one defendant for nonsuit cannot be reviewed on appeal by the remaining defendant from an adverse judgment, where the appealing defendant saved no exception to the ruling.²

6. MASTER AND SERVANT ⇨801(4)—EMPLOYEE OF SERVANT OF ANOTHER LIABLE FOR NEGLIGENCE.

One may be in the general service of another, and nevertheless with respect to particular service be deemed the servant of a third person, so as to render the latter liable for the servant's negligence.

7. MASTER AND SERVANT ⇨801(4)—HIRE OF TEAMS AND TEAMSTERS OF ANOTHER LIABLE FOR TEAMSTERS' NEGLIGENCE.

Where a coal company hired teams and teamsters from an ice company, the coal company having the right to direct their movements, such teamsters must, for the purpose of determining liability for their negligent acts in delivering coal, be deemed the servants of the coal company.

Gideon, J., dissenting.

Appeal from District Court, Salt Lake County; J. Louis Brown, Judge.

Action by Godfrey J. Badertscher against the Independent Ice Company, a corporation, and Wasatch Coal Company, a corporation. From a judgment against the last-named defendant, the case having been dismissed as to the first, the latter defendant appeals. Affirmed.

G. A. Iverson and P. G. Ellis, both of Salt Lake City, for appellant.

Geo. G. Armstrong, W. E. Rydalph, and Ed. McGurrin, all of Salt Lake City, for respondent.

FRICK, J. Plaintiff commenced this action in the district court of Salt Lake county against the Independent Ice Company, a corporation, hereinafter called ice company, and against the Wasatch Coal Company, also a corporation, hereinafter styled coal company, to recover damages for personal injuries which he claimed to have suffered through the alleged joint negligence of the two companies.

Upon the trial of the case, after the plaintiff had introduced his evidence, the two companies filed separate motions for nonsuits upon the ground that the evidence, for the reasons stated in the motions, was insufficient to take the case to the jury. The district court granted the motion of the ice company and denied that of the coal company. The case was accordingly dismissed as against the ice company, and the trial proceeded as against the coal company alone. The jury, under the instructions of the court, which are not complained of here, found a verdict in favor of the plaintiff against the coal company. Judgment was duly entered on the verdict, from which the coal company appeals, and assigns a number of errors, which we shall hereinafter consider.

[1] In taking the appeal from the judgment against it the coal company did not serve the ice company with notice of the appeal. The plaintiff has filed a motion to dismiss the coal company's appeal upon the ground that the ice company is an adverse party, and hence a necessary party to the appeal, and, not having been served with notice of the appeal, he contends this court cannot hear the appeal for want of juris-

¹ Groot v. R. R. Co., 24 Utah, 152, 96 Pac. 1019; Griffin v. Southern Pac. Co., 31 Utah, 296, 87 Pac. 1091; Allen v. Garner, 45 Utah, 39, 143 Pac. 223; Langton L. & C. Co. v. Peery, 48 Utah, 112, 159 Pac. 49.

² Stewart v. R. R., 39 Utah, 275, 117 Pac. 465.

diction. In view that the plaintiff sued the two companies as joint wrongdoers, their precise relationship for the purposes of this motion is quite immaterial. The question, and the only question, to be determined upon the motion, is, Is the ice company an adverse, and hence a necessary, party to this appeal? In other words, would its interests, from a legal point of view, be affected in case the judgment against the coal company were modified or reversed? The fact that the district court, upon the evidence produced against the ice company, as a matter of law found that it was not connected with the alleged wrong or tort, and upon that ground entered a judgment dismissing the action against it, which judgment is in full force and effect, should conclusively dispose of this motion against the plaintiff's contentions. If, as a matter of law, the plaintiff has no cause of action against the ice company, in what way can that company be interested in this appeal, which is from a judgment against the coal company alone, and which appeal is from that judgment only and from no other? I confess my utter inability to understand how the ice company is any longer connected with this case. Why is not the judgment of dismissal upon the grounds stated, while not appealed from, for the purposes of this appeal just as conclusive as a judgment upon the merits in defendant's favor, if not appealed from, would be? It would seem that upon a proposition so elementary no authority should be required. The following cases are, however, squarely in point: *Bliss v. Grayson*, 24 Nev. 422, 56 Pac. 231; *O'Keefe v. Omlie*, 17 N. D. 404, 117 N. W. 853; *State v. Mining Co.*, 169 Mo. App. 79, 154 S. W. 168. See, also, *Tucker v. Carlson*, 113 Iowa, 449, 85 N. W. 901.

In *Bliss v. Grayson*, supra, the court said: "Notice of appeal by a defendant need not be served on defendants who were dismissed from the action before judgment." *O'Keefe v. Omlie*, supra, is precisely to the same effect. As a matter of course such must be the case. When the judgment of dismissal was entered, which is still in full force and effect, the ice company went out of the case, and thereafter its legal relation to the defendant coal company was precisely the same as though it never had been a party at all. True, the plaintiff might have appealed from the judgment of dismissal, and might thus have continued the ice company in the case; but he did not do so, and therefore the judgment of dismissal stands. The plaintiff was, however, the only one who could have complained of that judgment. The coal company, being sued as a joint wrongdoer, cannot legally complain because the action was dismissed against the ice company before judgment. The coal company, being a joint wrongdoer, is liable for the whole damage, and has no right of contribution against its

joint wrongdoer, and hence cannot complain if the other joint wrongdoer is dismissed from the action. 1 *Cooley on Torts* (3d Ed.) 254; *Groot v. R. R. Co.*, 34 Utah, 152, 98 Pac. 1019; *City of Covington v. Whitney* (Ky.) 96 S. W. 907. Indeed, the coal company had no right of appeal from the judgment of dismissal. That is squarely decided in the case of *City of Covington v. Whitney*, supra, and is clearly the logic of the decision in *Groot v. R. R. Co.* It is, however, contended that the cases of *Griffin v. So. Pac. Co.*, 31 Utah, 296, 87 Pac. 1091, *Allen v. Garner*, 45 Utah, 39, 143 Pac. 228, and other cases there cited, hold to the contrary. There is no merit to the contention. In all of those cases there were joint judgments, and the party upon whom service of notice was omitted would have been affected by the modification or reversal of the judgment. The distinction between those cases and the one at bar is stated in the case of *Langton L. & C. Co. v. Peery*, 48 Utah, 112, 159 Pac. 49, in the following words:

"It will be observed, however, that the test whether a party below is a necessary party to an appeal, as laid down in that case [*Allen v. Garner*, 45 Utah, 39, 143 Pac. 228], as in all other cases emanating from this court, is that the omitted party must be affected by a modification or reversal of the judgment appealed from. If a party would not be affected he is not a necessary party, and hence to omit to serve him with notice of appeal * * * is not fatal to the appeal."

All of the Utah cases are clearly distinguishable from the case at bar, and hence have no controlling influence here.

[2] It is, however, further contended that inasmuch as, under our statute (Comp. Laws 1917, § 6484), a party who fails in an action otherwise than upon the merits "may commence a new action within one year after the reversal or failure" of the original action, that for that reason the ice company is interested in this appeal and should have been served with notice. That contention entirely overlooks or ignores the real purport of the statute. What the statute permits is a "new action" which is entirely independent of the one that failed. The original action, is ended, so far as the defendant against whom it was dismissed is concerned, precisely the same as though no new action could be commenced. If it be true that in this case the ice company must be served with notice because the new action could be commenced against it, if commenced within the time limited by the statute, then it is also true that in this state the joint wrongdoers have a right to be served with notice of appeal, whether parties to the action or not, for the simple reason that a new action can be commenced at any time against them, if commenced within the statutory period of

limitations, so long as the damages remain unsatisfied.

But it is urged that the ice company is interested in maintaining the judgment against the coal company and in having it paid by that company. While that may be true, it would be no less true if the ice company had never been made a party to the action. It is true precisely the same so far as the driver of the wagon is concerned, who, because of his negligence, caused plaintiff's injury of which he here complains. So long as the damages remain unsatisfied the driver of the wagon may be sued, if sued within the statutory period of limitations, and hence he is also interested in having the coal company pay the judgment. No one would, however, seriously contend that he could come into this court and insist upon an affirmance of the judgment against the coal company. The legal status of the ice company, in view of the entry of the judgment of dismissal, is, however, precisely the same as that of the driver of the wagon. True, it was made a party to the action, but the district court found and adjudged as a matter of law that it was not responsible for the wrong, and entered judgment dismissing the action against it. The ice company, therefore, is no more a party to the action than is the driver of the wagon, and for that reason has no right to be heard on the coal company's appeal any more than the driver would have. The case of *Humphreys v. Hunt*, 9 Okl. 196, 59 Pac. 971, is relied on as holding to a contrary doctrine. While it is true that in that case the Supreme Court of Oklahoma has apparently arrived at a different conclusion, yet the writer confesses his utter inability to understand the legal principle upon which the decision in that case rests. Another case is also relied on, namely, *Bullock v. Taylor*, 112 Cal. 147, 44 Pac. 457. That case is a case of joint contractual liability, and, in addition to that, it seems from that case that an appeal by any party to the action brings up the whole cause for review. Such is not the case in this jurisdiction. Here there is no appeal except from a final judgment. A party, in order to be entitled to have rulings occurring during the trial reviewed, must appeal from the final judgment. An appeal may also be taken from any judgment, if there be more than one in the case, and from any independent part of a judgment. In this case the judgment of dismissal in favor of the ice company is clearly a separate and independent judgment, has no connection with the judgment against the coal company, and an appeal by the coal company from the judgment against it in no way affects the judgment of dismissal. Besides, as we have seen, the plaintiff is the only one who could have assailed the judgment against the coal company by an appeal, and he did not do so. Neither the case from

Oklahoma nor the one from California has any bearing upon this motion. Moreover, this court, in a number of unreported cases, refused to dismiss appeals upon the ground that a joint wrongdoer, against whom the action was dismissed in the court below, was not served with notice of appeal to this court. The rulings in those cases are manifestly sound and should be adhered to.

[3-5] Finally, it is contended that, inasmuch as the coal company has assigned the ruling of the district court in sustaining the ice company's motion for a nonsuit as error, for that reason it should have been served with notice. I have already pointed out that the coal company cannot legally complain of that ruling, and that in no event could the ruling be reviewed without appealing from the judgment following the ruling. Both of the foregoing reasons are conclusive against the motion. It would be strange doctrine, however, because a party asks too much, that, for that reason, the court is ousted of jurisdiction. If that doctrine prevailed this court would have to be abolished for want of something to do. But even if the coal company had the right to complain of the ruling of the district court in sustaining the ice company's motion for a nonsuit, yet this court would be powerless to review the ruling, because the coal company saved no exception to the ruling. Without such an exception we cannot review the ruling on the motion for a nonsuit. *Stewart v. R. R.*, 39 Utah, 375, 117 Pac. 465. The motion to dismiss the appeal must, therefore, be denied.

This brings us to the merits of the appeal.

[6, 7] Plaintiff's evidence, which is material here, at the time the coal company interposed its motion for a nonsuit, was, in substance, as follows: The coal company was engaged in the retail coal business at Salt Lake City. The ice company was engaged in the ice business. During the winter season the ice company had a surplus of men and teams, while the coal company did not always have sufficient men and teams to deliver coal to its customers as ordered by them. The coal company applied to the ice company for teams and men, and for the running gears of wagons. Whenever the coal company desired men and teams it would apply to the ice company, and the ice company would then order some of the teamsters in its employ to report to the coal company with teams and the running gears of wagons. The coal company furnished the wagon boxes in which the coal was hauled, on which boxes the name of the coal company was printed in large letters. After the box was placed on the running gear of a wagon, the teamster with the team and wagon would report to the foreman of the coal company at its coal yard, and the foreman would then direct the teamster where to

load the coal and to whom to deliver the same. If the coal was delivered C. O. D. the teamster would also collect the price of the coal, and in addition thereto the additional cost of delivery, which in this case was \$1 per ton. When the coal was to be delivered C. O. D., and the customer did not pay therefor, the coal was taken back to the coal company's yard by the teamster. The extra amount that was collected by the coal company for delivering the coal to its customers, in this instance \$1 per ton, was divided between the ice company and its teamsters. The ice company, however, settled with the teamsters periodically. The relationship of the coal company and the ice company and its teamsters was that the ice company hired the teamsters, furnished the teams and running gears of the wagons; the coal company furnished the coal and the wagon boxes and the customers to whom the coal was to be delivered; and the teamsters did the work incident to the delivery of the coal, and in case the coal was delivered C. O. D. collected the price of the coal plus the cost of delivering, in this instance \$1 per ton, and would account to the coal company for the price of the coal. At the time the motion for a nonsuit was interposed it was uncertain whether the teamster whose alleged negligence caused plaintiff's injury was one of the ice company's teamsters or whether he was hired by the coal company. The team and wagon-gear, however, belonged to the ice company, while the wagon box belonged to the coal company. We shall consider this case, however, as though the teamster was employed by the ice company, was paid by it from time to time, and was sent to the coal company to deliver coal as hereinbefore stated.

On the evening of November 2, 1917, one of the teamsters aforesaid undertook to deliver a wagon load of coal to one of the coal company's customers in the southeastern part of Salt Lake City. In attempting to deliver the coal the team was unable to pull the load of coal over the sidewalk, and the teamster then unhitched his team, leaving the wagon tongue to protrude entirely across the sidewalk about a foot above the walk. The tongue was left in that condition, without any sign or warning of any kind, all night. Early the next morning, before daylight, the plaintiff, being wholly ignorant of the condition of the wagon tongue, in delivering the morning papers, while riding on his bicycle, ran against the wagon tongue, and was thrown from his bicycle and was severely injured. The coal company unloaded the coal from the wagon some time next day. The plaintiff made the necessary proof concerning his injuries, damages, etc., and rested. Both the ice company and the coal company then interposed separate motions for a nonsuit. The motion of the ice company

was granted, while that of the coal company was denied, and the case proceeded to judgment against it. The appeal is from that judgment.

The principal error assigned, in fact the only one we need to specially consider, is that the court erred in denying defendant's motion for a nonsuit, and in submitting the case to the jury on the facts, upon the ground that the driver of the wagon was not the agent or servant of the coal company, but was in fact and in law the agent or servant of the ice company. We need not pause to consider the relationship of the ice company to the transaction in question. It is sufficient for us to know that the ice company was dismissed from the case as hereinbefore stated, and that the coal company cannot legally complain of the court's ruling in dismissing the ice company from the case. The only question, therefore, that concerns us is, what is the relationship of the coal company and the driver of the wagon and how is it related to the transaction in question? Can we say as a matter of law that it should not be held liable for the negligence of the driver in leaving the wagon tongue in the condition stated, and thus endangering the safety of any person who might attempt to pass over the sidewalk in the nighttime? It is not always easy to determine the precise relationship of the parties under circumstances like those in the case at bar. The courts have at times found it difficult to determine which one of two alleged employers is liable for the negligent acts of commission or omission of a particular employé. Mr. Justice Moody states the principle which applies to cases like those we have just referred to so clearly and so admirably that we take the liberty of quoting his statement, which is found in the case of *Standard Oil Co. v. Anderson*, 212 U. S. at page 220, 29 Sup. Ct. at page 253 (53 L. Ed. 480). The Justice says:

"One who employs a servant to do his work is answerable to strangers for the negligent acts or omissions of the servant committed in the course of the service. The plaintiff rests his right to recover upon this rule of law which, though of comparatively modern origin, has come to be elementary. But, however clear the rule may be, its application to the infinitely varied affairs of life is not always easy, because the facts which place a given case within or without the rule cannot always be ascertained with precision. The servant himself is, of course, liable for the consequences of his own carelessness. But when, as is so frequently the case, an attempt is made to impose upon the master the liability for those consequences, it sometimes becomes necessary to inquire who was the master at the very time of the negligent act or omission. One may be in the general service of another, and, nevertheless, with respect to particular work, may be transferred, with his own consent or acquiescence, to the service of a third person, so that he becomes

the servant of that person with all the legal consequences of the new relation."

The facts and conclusion of the court are so accurately reflected in the third headnote to the case of Philadelphia & R. C. & I. Co. v. Barrie, 179 Fed. 50, 102 C. C. A. 618, as to justify the adoption of that headnote as part of this opinion, which we do. The headnote reads as follows:

"Where defendant, a coal dealer, in delivering coal from its yards to customers, hired from another dealer a team and a driver in the latter's general employ, paying a stipulated sum per hour for their services, and having full control and direction of the work and the method of its performance, the driver, while engaged in such work, was a servant of defendant, which was liable for an injury to a third person caused by the driver's negligence in its performance."

The doctrine announced in the Barrie Case is also fully sustained in 1 Labatt, Master and Servant (2d Ed.) §§ 52-57, where the author, in referring to the decisions in which the relationship between a servant who by his employer is permitted to work for another person is discussed, approves and adopts the language of Mr. Chief Justice Cockburn in Rourke v. White Moss Colliery Co., L. R. 2 C. P. Div. 205, namely:

"When one person lends his servant to another for a particular employment, the servant, for anything done in that particular employment, must be dealt with as the servant of the man to whom he is lent, although he remains the general servant of the person who lent him."

The author concludes:

"In other words, the servant of A. may, for a particular purpose or on a particular occasion, be the servant of B., though he continues to be the general servant of A. and is paid by him for his work."

To the same effect is Scribner's Case, 231 Mass. 132, 120 N. E. 350.

Plaintiff's counsel has also called our attention to a recent article in 89 Central Law Journal, pp. 97-103, in which the doctrine is ably discussed, and where a number of cases are cited and distinguished. The writer of the article makes it quite clear that the doctrine quoted from Labatt is the one that is supported by the best-considered cases. We desire to express our appreciation to counsel for having directed our attention to the article while the case remained undisposed of.

The following cases also fully sustain the conclusion reached in the Barrie Case from which we have quoted: Kolnitsky v. Matthews, 64 Misc. Rep. 167, 118 N. Y. Supp. 866, Weber v. Becker (Sup.) 136 N. Y. Supp. 119, and Glover v. Richardson & Elmer Co., 64 Wash. 403, 116 Pac. 861. There are a number of cases cited in the foregoing cases, where the same result was reached under

similar circumstances, to which we need not specially refer.

The law as laid down in the foregoing cases fully justifies us in sustaining the ruling of the trial court in denying the motion of the coal company for a nonsuit. Counsel for the coal company has however, cited and relies upon the following, among other, cases: Driscoll v. Towle, 181 Mass. 416, 63 N. E. 922; Foster v. Wadsworth-Howland Co., 168 Ill. 514, 48 N. E. 163; Chicago, etc., Co. v. Campbell, 116 Ill. App. 322; Cohen v. Western Elec. Co., 50 Misc. Rep. 660, 99 N. Y. Supp. 525; Quinn v. Complete Elec. Const. Co. (C. C.) 46 Fed. 506; Joslin v. Grand Rapids Ice Co., 50 Mich. 516, 15 N. W. 887, 45 Am. Rep. 54; Kellogg v. Church Charity Foundation, 203 N. Y. 191, 96 N. E. 406, 38 L. R. A. (N. S.) 481, Ann. Cas. 1913A, 883; Ash v. Century Lumber Co., 153 Iowa, 523, 183 N. W. 888, 38 L. R. A. (N. S.) 973.

While all of the foregoing cases have features which in some respects are similar to those in the case at bar, yet, upon a close analysis of the cases, it will be found that the case at bar in many respects is distinguishable from those cases, and that the controlling features of this case are like those in the cases we have quoted from above.

Upon the whole record we feel constrained to hold that the district court did not err in denying the motion for a nonsuit, and that the case is not one where we can say as a matter of law that the coal company is not responsible for the negligent acts of the driver of the coal wagon in leaving it in the condition he did while in the act of delivering the coal of the coal company; while, upon the other hand, under the law as laid down in the cases we have quoted from, when applied to the facts, the jury could well find that the driver of the wagon was the agent of the coal company, and that it is responsible for his negligence.

Other errors assigned, in view of the record, are not such as require special consideration.

For the reasons stated the judgment should be, and it accordingly is, affirmed, with costs to plaintiff.

CORFMAN, C. J., and WEBER and THURMAN, JJ., concur.

GIDEON, J. I dissent. Probably a brief review of what I understand the facts to be, as disclosed by the record, will give a better understanding of my views respecting the questions presented on this appeal.

It appears that the Wasatch Coal Company was conducting a retail coal business at Salt Lake City, Utah. At the time of the alleged accident it had no teams of its own with which to deliver coal to its customers. The Independent Ice company was the owner of teams and wagons, and during the summer

months was engaged in selling and delivering ice. In the fall of 1917 a contract or agreement was made between the coal company and the ice company whereby the latter undertook, for an agreed sum per ton, to deliver coal for the defendant coal company to its various customers within Salt Lake City. The arrangement seems to have been that whenever the coal company desired teams it would telephone the ice company, and thereupon the ice company would send its teams, together with drivers and wagons, except the beds or boxes, to the office of the coal company, where the driver would receive directions as to the time of delivery, the amount of coal to be delivered, and the addresses to which it should be delivered. If the coal was delivered C. O. D., the drivers collected the money and returned it to the coal company. When the coal was directed to be so delivered, and the customer failed to pay, the driver would return the coal to the yards of the coal company. After the day's work the drivers would return the teams to the stables of the ice company, and would take the teams from there the following day. It also appears that the ice company employed the drivers, paid them an agreed compensation, discharged them at its pleasure, and that the coal company in no way directed or suggested the employment of any one as a driver other than if any particular driver was objectionable notice was usually given to the ice company of that fact and some other driver would be substituted. On or about November 2, 1917, one of the teams of the ice company was delivering coal for the coal company, and, as directed by the manager of that company, attempted to deliver a load of coal at an address given by said company. In attempting to pass from the street over the sidewalk to the residence where the coal was to be delivered the wagon became so mired in the dirt that the team could not pull it over the walk. Thereupon the driver unhitched the team, left the wagon tongue extending partially across the paved sidewalk, placed no lights or guards around it, and left it in that condition overnight. In the early morning following plaintiff ran over the end of the tongue, and was thrown to the pavement, and received the injuries complained of. No officer or employé of either company, except the driver, had any knowledge of the condition in which the loaded wagon had been left until the following day.

At the conclusion of plaintiff's testimony the court granted a motion for nonsuit made by the defendant ice company. The jury returned a verdict against the coal company. That company appeals. It failed, however, to serve notice of appeal upon its codefendant, the ice company. The respondent, plaintiff below, now moves to dismiss the ap-

peal, and urges such failure to serve notice of appeal upon the ice company as grounds therefor. That motion, in my judgment, should be granted.

The complaint charges the defendants jointly with the negligence that caused the injury. Both defendants denied the negligence as well as liability. The record in this case clearly shows that either the defendant ice company or the defendant coal company is responsible for the negligence that caused the injury. There can, in my judgment, be no question about that. The tongue of the wagon was negligently left by the driver so as to cause the injury. At that particular time the driver sustained such relationship to either the ice company or the coal company as would make one of such defendants liable for his negligent acts. There is nothing in the record tending to show that both defendants sustained such relationship to the driver as to make them both either individually or jointly liable. Admittedly the driver was in the general employ of the ice company. If it should be determined by this court that the coal company, appellant, is not liable, it would indisputably follow that the ice company would be answerable for the consequences of the driver's negligent act. Of course, the driver would be personally liable. The defendant ice company succeeded in convincing the trial court that it was not liable. That the court determined as a legal proposition upon granting the ice company's motion for nonsuit. Such was not a trial or final determination upon the merits of the ice company's liability. *Williams v. Nelson*, 45 Utah, 255, 145 Pac. 39. Under the provisions of Comp. Laws Utah 1917, § 6484, the plaintiff could within the time specified in that section, institute another action against the ice company notwithstanding the granting of the nonsuit in this action. The presumption is always indulged, and rightly so, that a judgment debtor is solvent and will pay any judgment regularly rendered and entered against him. The affirmance of the judgment against the coal company and the payment of the same would be a complete defense to any action the plaintiff might thereafter prosecute against the ice company for the alleged negligent act. Notwithstanding the ruling of the district court that the ice company is not liable, and notwithstanding that if this court should affirm the judgment against the coal company and that judgment should be paid, as the ice company has a right to assume that it will be, and notwithstanding that under the admitted facts in this case that if the coal company is not liable the ice company is and can be subjected to a new action, the majority opinion is that the ice company has no interest in the appeal and is in no sense an adverse party. Such a conclusion, in my judgment, contravenes the

principle or rule announced by this court in *Griffin v. S. P. Co.*, 31 Utah, 299, 87 Pac. 1092, where the court, speaking through Chief Justice McCarty, says:

"We are of the opinion, and so hold, that unless it affirmatively appears from the record that a party to an action would not be injuriously affected by a reversal of the case, such party must be served with notice in case an appeal is taken, otherwise this court can acquire no jurisdiction over the action except to dismiss the appeal, and thereby affirm the judgment appealed from."

In *Langton Lime & Cement Co. v. Peery*, 48 Utah, at page 115, 159 Pac. at page 50, the test for the determination of who are adverse parties is stated by Justice Frick in the following language:

"This court, by an unbroken line of decisions, has held that all the parties to an action who may be adversely affected by a modification or reversal of the judgment are adverse parties under our statute, and must be made parties to the appeal either as appellants or respondents."

Naturally the converse of that proposition would be true, as pointed out in the majority opinion in the quotation taken from 48 Utah, at page 112, 159 Pac. 49.

The facts in the *Griffin Case*, supra, were that the defendant railroad company and one Austin were jointly charged in the complaint with the negligence that caused the death of plaintiff's intestate. Austin was served with summons, but failed to plead or further appear in the action, and default was entered against him. The railroad company answered, and a general verdict was returned by the jury against both defendants. The railroad company appealed, but failed to serve notice upon its codefendant. This court dismissed the appeal, and assigned as one of the reasons for so doing that a reversal might injuriously affect Austin, and this court could not induce the presumption that it would not. In the present case both defendants are jointly charged with the commission of the negligent act. During the trial the ice company had judgment in its favor by the court granting its motion for nonsuit. I confess my inability to follow the reasoning whereby the conclusion is reached that one defendant jointly charged with another, but who has judgment entered against him, is any more an interested or a necessary party than one who is also jointly charged with another with the negligent act in question, but who is successful in having a judgment entered and rendered in his favor, or that the latter thereby ceases to be an adverse party to an appeal from the judgment. Especially does that reasoning to me seem fallacious in view of the fact that under the provisions of our Code, and under the admitted facts in this record, such successful defendant would be

liable to be sued in a new action for the same negligent act. In my judgment the latter is an adverse party, and is interested in having the judgment of the lower court affirmed. Such, in fact, was the holding of the Supreme Court of Oklahoma under a statute similar to ours, in *Humphrey et al. v. Hunt*, 9 Okl. 198, 59 Pac. 871. In that case Maggie Hunt brought action against Lewis Humphrey and eight others, including one Fred Belt, to recover damages for the death of her husband. At the trial a verdict was had and judgment entered against six of the defendants, and a verdict and judgment in favor of Belt and against plaintiff. The defendants against whom judgment had been entered appealed, but did not serve notice of appeal upon Belt. The appeal was dismissed on the ground that appellants had failed to serve notice upon all the adverse parties. The court assigns as a reason for such ruling that Belt was entitled to be made a party so that he could present to the appellate court any reasons he might have why the judgment should be affirmed. No sound reason, in my judgment, is given in the prevailing opinion, nor in the authorities cited therein, why the conclusion of the Oklahoma court should not be controlling here.

A like ruling was made by the Supreme Court of California in *Bullock v. Taylor*, 112 Cal. 147, 44 Pac. 457. True, that action was for breach of contract against three defendants claimed to have executed the contract as partners. Nonsuit was granted as to two of the defendants and judgment was against the other. The defendant against whom judgment was rendered served notice of appeal on the plaintiff only. On the appeal one of the errors assigned was the granting of the motion for nonsuit of appellant's codefendants. The appellate court dismissed the appeal, holding that jurisdiction had not been acquired, and that the defendants who had been taken out of the case by granting the nonsuit would be adversely affected by a reversal of the judgment. I can see no difference in principle between an action of that character and the one now under consideration.

In the present case the appellant's third assignment of error is as follows:

"The court erred in granting the motion of the defendant Independent Ice Company for a nonsuit for the reason that the evidence shows that, as between the defendants Independent Ice Company and the Wasatch Coal Company, the teamster, Ed. Wesler, at the time of the accident complained of, was the servant or agent of the said Independent Ice Company and not of the Wasatch Coal Company; and for the further reason that, if there was any conflict in the evidence as to whether said teamster was at the time of the accident the servant or agent of either of said defendants, that question should have been submitted to the jury."

If there ever was any question as to the Independent Ice Company being an adverse party, the foregoing assignment would seem to be sufficient answer to the contention. At least it is conclusive that the appellant considered that the court erred in granting the ice company's motion for nonsuit, and he assigns it as a proper subject for review by this court.

It is insisted that the ice company is in no worse condition by a reversal of this judgment than it would have been if it had never been made a party to the action. Granting that that may be true, nevertheless the ice company was made a party, and as such I think is entitled to have its rights determined, if possible, in this suit, and not be harrassed by new proceedings. It is the admitted policy and the duty of the courts to determine the rights of parties brought into litigation as to avoid the expense and delay of numerous actions.

I am making no defense or argument in support of the ruling or principal announced in the Griffin Case, nor of the statute upon which that rule is predicated. The Constitution of this state guarantees the right of appeal to this court from judgment of the district courts to all litigants, and the Legislature might well have, in my judgment, in prescribing the method of exercising that constitutional right, made such provision that, when a party appealing has neglected to serve all adverse parties, such adverse parties could thereafter, by order of court, be brought into this court, upon it being made to appear that such parties are necessary to the jurisdiction of this court. But so long as the rule or principle announced in the Griffin Case is to stand as the established law or rule of procedure in that class of cases, I see no reason why a different rule should be laid down in cases like the one under consideration. In my judgment, there is no difference in principle.

I think the motion to dismiss the appeal should be granted.

Passing now to a consideration of the merits of the case. I am unable to concur in the affirmance of the judgment. Accepting the general principle expressed in the quotation from 212 U. S. in the prevailing opinion as the true rule to govern in determining when one who is in the general employment of another may, by arrangement made between such employer and a third person, cease to be the employé of the general employer and for the time being become the servant of the third person, I cannot, in the application of that principle to the facts in the instant case, concur in the conclusions reached. In the application of that general principle announced in the case referred to, after discussing the test for determining whether the relationship of master and servant existed between

the servant and the general employer, or between the servant and the one to whom he had been let or hired at the time of the injury, the Supreme Court of the United States concluded the discussion thus:

"To determine whether a given case falls within the one class or the other, we must inquire whose is the work being performed, a question which is usually answered by ascertaining who has the power to control and direct the servants in the performance of their work. Here we must carefully distinguish between authoritative direction and control, and mere suggestion as to details or the necessary co-operation, where the work furnished is part of a larger undertaking."

The facts in that case were that the plaintiff was employed by a master stevedore, who was under contract to load a ship belonging to the defendant with oil. The plaintiff was working within the hold of the ship, where he was injured without fault on his part by being struck by a draft or load of cases containing oil which was unexpectedly lowered into the hold. The motive power was furnished by a steam winch or drum, and the hoisting and lowering were accomplished by means of a tackle, guy rope, and hoisting rope. The tackle and ropes were furnished and rigged by the stevedore, and the winch and drum were owned by the defendant and placed on its dock, some 50 feet distant from the hatch. All the work of loading was done by the employés of the stevedore, except the operation of the winch, which was done by a winchman in the general employ of the defendant. It appears that the operator of the winch received signals from the employés of the stevedore when to raise and lower the tanks containing oil, and that he neglected to observe or follow such signals, thereby lowering the tanks out of time and causing the injury. Applying the general principle stated in the quotation to the facts of that case, the Supreme Court determined that such facts did not warrant the conclusion that the relationship of master and servant did not exist between the defendant and the operator of the winch. It is pointed out that the winchman was under the general employment of the defendant, who selected him, paid his wages, and had the right to discharge him for incompetency, misconduct, or for any other reason; that, before such legal relationship of master and servant could be terminated, it was necessary that a new like relationship be created between the winchman and the stevedore.

The facts presented by the record in the case at bar, as I view them, show that the driver, at the particular time of leaving the tongue of the wagon so as to cause the injury, was doing the work of the ice company. It will be remembered that the contract between the ice company and the coal company was that the ice company should deliver coal

with its teams and wagons at an agreed price. Of necessity, in the performance of that work, the amount of coal, as well as where and to whom it should be delivered, must be determined and directed by the officers of the coal company, otherwise the ice company would have no information or direction how to carry out and complete its part of the contract. The method or manner of delivery seems to have been under the control of the ice company or its employes.

The Supreme Court of Massachusetts, in *Driscoll v. Towle*, 181 Mass. at page 419, 63 N. E. at page 923, in considering a case where the facts are almost identical with the facts here, and in discussing this particular question said:

"In case like the present there is a general consensus of authority that, although a driver may be ordered by those who have dealt with his master to go to this place or that, to take this or that burden, to hurry or to take his time, nevertheless in respect to the manner of his driving and the control of his horse he remains subject to no orders but those of the man who pays him. Therefore he can make no one else liable if he negligently runs a person down in the street."

There is nothing in the record to show that the officers of the coal company in any way controlled, directed, or suggested to the driver employed by the ice company the method to be employed in delivering the coal, or how or in what manner the premises of the person to whom the coal was to be delivered should be entered.

The general principle quoted from the Supreme Court of the United States is made the basis of practically all decisions rendered by the courts of this country since its announcement. In the application of that general principle I have found no authority, where the facts are similar to the facts here, where it has been held that the driver or the party causing the injury was the employe of the one to whom he was let or hired, unless it be the case of *Philadelphia & R. Coal & Iron Co. v. Barrie*, 179 Fed. 50, 102 C. C. A. 618. Circuit Judge Sanborn, in a concurring opinion in that case, said:

"The question in this case is whether the Coal & Iron Company or Martin was the master of the driver, McQuistran, in the latter's performance of the specific act of protecting pedestrians from stepping into the coal hole in the sidewalk while he was unloading the coal into it. When a master who has and exercises the power to hire and discharge his servant lets him and a team to a hirer, to go where and do such known work as the hirer directs, the legal presumption is that, although the hirer directs the servant where to go and what to carry or haul or do, the driver still remains subject to the control of his general employer in the method of his performance of the work to which the hirer assigns him, and the hirer is not liable, in the absence of an agreement to the contrary, for the negligence of the servant

in the method or manner of his performance of his service." (Citing numerous cases.)

Judge Sanborn, however, concurred in the order holding the defendant liable on the ground that the defendant's local manager testified as follows:

"Q. And the method of delivery is under your orders? A. Yes, sir. Q. Place, the time, the amount, and all, is under your orders? A. I have said so two or three times."

As I have pointed out, there is nothing in the record tending to indicate that the method of delivering the coal in the case now under consideration was under the control of the coal company. To that extent, at least, the facts here differ from the facts in the case reported in 179 Fed. There is practically no dispute as to what the facts are in this case. There was, therefore, no question to be submitted to the jury, as some of the cases hold should be done, as to whose employe the driver was at the time of the negligent act committed by him. It thus became a question of law, under the admitted or proven facts, for the court to determine whose servant the driver was at that particular time. The following cases, in my judgment, support what I here contend for: *Foster v. Wadsworth-Howland Co.*, 168 Ill. 514, 48 N. E. 163; *Quinn v. Complete Elec. Const. Co.* (C. C.) 46 Fed. 506; *Kellogg v. Church Charity Foundation*, 203 N. Y. 191, 96 N. E. 406, 38 L. R. A. (N. S.) 481, Ann. Cas. 1913A, 883; *Burns v. Michigan Paint Co.*, 152 Mich. 613, 116 N. W. 182, 16 L. R. A. (N. S.) 816; *Singer v. McDermott*, 30 Misc. Rep. 738, 62 N. Y. Supp. 1086. See, also, 1 *Labatt, Mast. & Serv.* (2d Ed.) § 54.

A careful consideration of the facts of this case and the application of the law thereto, as I understand the law, convinces me that at the time of the act complained of the driver was the servant of the ice company, and that therefore the coal company should not be held liable in this case.

For the foregoing reasons I dissent from the affirmance of the judgment, unless such affirmance shall be based upon the dismissal of the appeal.

On Application for Rehearing.

FRICK, J. Counsel for appellant has filed a petition for a rehearing. He does not contend that we have overlooked or omitted anything, but he most urgently insists that our conclusion is contrary to law. When court and counsel disagree respecting the law that controls a case, counsel, as a matter of course, always insist that their views should have prevailed. For that reason, if for no other, nothing is ordinarily gained by a reconsideration of the legal propositions already decided. In this instance, however, counsel in his petition for a rehearing vigorously insists that the cases we have cited in

support of our conclusion are not applicable to the facts of this case. We doubt not counsel for appellant has convinced himself that such is the case, and is therefore justified in making the assertion. The majority of the court, however, is unable to arrive at such a conclusion. Without attempting to restate the facts, it must suffice to say that there is and can be no doubt whatever that the driver of the coal wagon in delivering the coal was under the sole direction and control of the coal company. He took the team and running gears of a wagon belonging to the ice company to the coal yard of the coal company for the express purpose of delivering the coal to such places and to such persons as he might be directed by the latter company. If that company directed the driver to deliver coal to A., the ice company had no authority or power to direct him to deliver the coal to B., or to C., or to any one else. In delivering the load of coal in question the driver was therefore under the immediate control and direction of the coal company, precisely the same as though he had been originally employed by it for that purpose. For the purpose of that transaction the driver was the agent and employé of the coal company, although in fact and in law he may have remained the general servant of the ice company. The test respecting responsibility is, by which company was he employed and for which one was he acting in delivering the coal in question? Manifestly, for that purpose, he was employed by, and was acting for, the coal company, and not for the ice company. That being so, the coal company, and not the ice company, must be held responsible for his negligent act which caused the injury. Such is clearly the effect of the decisions we have cited in the opinion. We are still clearly of the opinion that our former conclusion is right, and it is therefore adhered to.

The petition for a rehearing is denied.

CORFMAN, C. J., and WEBER and THURMAN, JJ., concur.

(54 Utah, 572)

BAGLIN v. EARL-EAGLE MINING CO.
et al. (No. 3348.)

(Supreme Court of Utah. June 30, 1919. On Application for Rehearing, Oct. 11, 1919.)

1. CORPORATIONS ¶116 — ASSIGNMENT OF CERTIFICATE TO BROKER FOR SALE CARRIES TITLE.

Where the holder of a certificate of corporation stock which was held under a pool agreement, after expiration of the period of the pool, assigned the certificate, *held* that, though the assignment was to a broker for the purpose of enabling him to sell the shares and was without consideration, it passed to him the legal title.

2. CORPORATIONS ¶133 — ON ASSIGNMENT OF STOCK ASSIGNEE MAY COMPEL ISSUANCE OF CERTIFICATE.

Though an assignment of corporate stock by an instrument which passed the legal title was without consideration and for the purpose of enabling the assignee to sell the stock, he may sue the corporation for refusing to issue certificates, he being for the purpose of the action the real party in interest, within Comp. Laws 1917, § 6495, the assignment protecting the corporation from further action by the true owner.¹

3. CORPORATIONS ¶133—WHETHER REFUSAL TO ISSUE NEW CERTIFICATES TO ASSIGNEE CONSTITUTES CONVERSION.

The refusal of a corporation to issue stock certificates to one entitled thereto may or may not constitute conversion, depending upon the character of the excuse the corporation has for not issuing the stock.²

4. CORPORATIONS ¶140—WHETHER GUILTY OF CONVERSION IN REFUSING TO ISSUE CERTIFICATE FOR JURY.

Whether a corporation was guilty of conversion in refusing to issue stock to one entitled thereto, *held*, under the evidence, for the jury.

5. EVIDENCE ¶323(4) — REPORTS OF CURB TRANSACTIONS IN CORPORATE STOCK HEARSAY.

In an action against a mining corporation for refusing to issue stock certificates to one entitled thereto, reports of curb transactions in such stock *held* hearsay, in the absence of any information as to the manner in which the reports were made up, and hence the admission of such evidence on the issue of damages was error.

On Application for Rehearing.

6. CORPORATIONS ¶133—REFUSAL TO ISSUE STOCK TO ASSIGNEE AUTHORIZES AT LEAST NOMINAL DAMAGES.

The fact that a corporation converted stock by refusing to issue the same to one entitled thereto is sufficient to sustain an award of at least nominal damages in favor of the injured party.

7. APPEAL AND ERROR ¶719(9) — INSUFFICIENCY OF EVIDENCE NOT ASSIGNED AS ERROR NOT REVIEWABLE.

In an action against a corporation for damages for refusal to issue certificates of stock to one entitled thereto, where the corporation, on appeal from an adverse judgment, did not assign the insufficiency of the evidence of damages, that question cannot be considered.

8. APPEAL AND ERROR ¶748(2) — AMENDMENT TO ASSIGNMENTS OF ERROR ON MOTION FOR REHEARING DENIED.

Where respondent's brief stated that the appellant corporation, which had wrongfully re-

¹ *Wines v. R. R. Co.*, 9 Utah, 223, 33 Pac. 1042; *Fritz v. Western Union T. Co.*, 26 Utah, 263, 71 Pac. 209; *Anderson v. Yosemite M. Co.*, 9 Utah, 420, 35 Pac. 502; *Culmer v. Clift*, 14 Utah, 238, 47 Pac. 85; *Mundt v. Comm. Bank*, 35 Utah, 90, 99 Pac. 454, 136 Am. St. Rep. 1023.

² *Coray v. Peery Irr. Co.*, 50 Utah, 70, 166 Pac. 672.

fused to issue certificates of stock to respondent, had not assigned as error the insufficiency of the evidence of damages, *held* that, on motion for rehearing, the appellant corporation was not entitled to have granted its application for leave to then amend its assignment of errors, so as to include an assignment of error as to the insufficiency of evidence.³

Appeal from District Court, Salt Lake County; P. C. Evans, Judge.

Action by George Baglin against the Earl-Eagle Mining Company and others. From a judgment for plaintiff, the named defendant appeals. Reversed.

Marloneaux & Beck and George G. Armstrong, both of Salt Lake City, and A. J. Evans, of Lehi, for appellant.

Dana T. Smith, of Los Angeles, Cal., and Fred C. Loofbourow and George J. Constantine, both of Salt Lake City, for respondent.

THURMAN, J. This is an action to recover the value of 10,000 shares of the capital stock of the defendant mining company which plaintiff alleges defendants wrongfully converted to their own use.

The complaint, in substance, alleges that plaintiff is the owner of said shares of stock by purchase from one R. E. Campbell on the 1st day of May, 1917, and that plaintiff at all times thereafter was entitled to have said shares issued to him by the defendant company; that plaintiff on the said 1st day of May, 1917, and thereafter on the 12th day of the same month, demanded of said defendant company that it issue to him said shares of stock, which said company refused and ever since has refused to do; that on the 15th day of May, 1917, the individual defendants, who constituted the board of directors of the defendant company, by resolution directed the president and secretary of said company not to issue said shares of stock to plaintiff; that the defendants were then in possession of said stock, and by the resolu-

tion aforesaid converted the same to their own use, to plaintiff's damage in the sum of \$3,000, the value of the said stock.

Defendants, for want of information sufficient to form a belief, deny that plaintiff is the owner of the stock, or that he purchased the same from Campbell, or that plaintiff is entitled to its possession, or that defendants converted the same, or that the stock is of the value of \$3,000, or that plaintiff sustained damages in said sum or at all.

Further answering, defendants, in substance, allege that in 1915 all of the stockholders of defendant company entered into an agreement with one George E. Hemphill, whereby they gave him the right to purchase 400,000 shares of the capital stock of said company, to be delivered to him from time to time at a certain specified price, and said contract was to continue in effect until the vendors should terminate the same upon 15 days' previous notice in writing, which contract, it is alleged, is still in full force and effect; that at the time of said agreement one Fred Alkire was a stockholder in said company and was one of the parties to said contract; that at the time of making said contract said Alkire, said Hemphill, and others entered into an agreement that none of said stock should be sold, bargained, or otherwise disposed of before May 1, 1917, or as long as said contract with Hemphill should remain in force, and until 90 days thereafter; that at the time of said agreement said Alkire was the owner of 10,000 shares of the stock of said company, and that said stock is the same stock that is now claimed by the plaintiff. It is then alleged, in substance, that after the making of said agreement Alkire transferred his stock to said R. E. Campbell; but defendants, upon information and belief, allege that the same was transferred by Alkire for the use and benefit of himself. It is then alleged that their reason for refusing to issue said stock to plaintiff was solely upon the ground that said Alkire was the owner thereof and had entered into the aforesaid agreement.

The trial court found for the plaintiff against the defendant company and entered judgment for damages. The action as to the other defendants was dismissed. Defendant company appeals, and assigns as error the order of the court overruling its motion for a nonsuit, the admission of evidence over plaintiff's objection, and insufficiency of the evidence to sustain the findings.

The evidence tends to show the following facts: That Fred Alkire was the original owner of the stock in question; that as evidence of ownership he held a certificate of the company therefor, certifying that he owned 10,000 shares of stock subject to a pool agreement that the said stock was not to be issued until May 1, 1917; that in May, 1916, Alkire transferred the stock to R. E. Campbell by indorsement and delivery of the

³ Bean v. Fairbanks, 46 Utah, 513, 151 Pac. 338; Ogden Valley T. & R. Co. v. Lewis, 41 Utah, 183, 125 Pac. 637; Harrison v. Harker, 44 Utah, 541, 143 Pac. 716; Swanson v. Sims, 51 Utah, —, 170 Pac. 774; Marks v. Taylor, 23 Utah, 152, 63 Pac. 397; Genter v. Conglomerate Mfg. Co., 23 Utah, 165, 64 Pac. 362; Wasatch Irr. Co. v. Fulton, 23 Utah, 466, 65 Pac. 205; Van Pelt v. Park, 18 Utah, 141, 55 Pac. 331; O. S. L. v. Russell, 27 Utah, 457, 76 Pac. 245; Houts v. U. P., 35 Utah, 220, 99 Pac. 397; Herriman Irr. Co. v. Keel, 25 Utah, 96, 69 Pac. 719; Jenkins v. Mammoth Min. Co., 24 Utah, 513, 68 Pac. 345; First Nat. Bank v. Brown, 20 Utah, 85, 57 Pac. 377; France v. S. L. & O. Ry., 31 Utah, 302, 83 Pac. 1; Firman v. Bateman, 2 Utah, 268; State v. Campbell, 25 Utah, 342, 71 Pac. 529; S. P. L. A. & S. L. R. v. Board of Education, 35 Utah, 13, 99 Pac. 263; Blue Creek L. & L. Co. v. Anderson, 25 Utah, 61, 99 Pac. 444; Morris v. Salt Lake City, 25 Utah, 474, 101 Pac. 373; Bowe v. Stilwell, 39 Utah, 375, 117 Pac. 376; Vance v. Heath, 42 Utah, 143, 123 Pac. 365; Connell v. O. S. L. R. Co., 51 Utah, —, 163 Pac. 337; Mountain Lake M. Co. v. Midway Irr. Co., 47 Utah, 371, 154 Pac. 534; Egeund v. Fayer, 51 Utah, —, 173 Pac. 313; Holt v. Great Eastern Casualty Co., 51 Utah, —, 173 Pac. 1168.

above certificate; that on May 27th of the same year Campbell sent the certificate to the secretary of the company for transfer, and in due time received one made to himself, in substantially the same form as the one received from Alkire. The exact form of the certificate is as follows:

"Lehi, Utah, May 27, 1916.

"This is to certify that R. E. Campbell is the owner of ten thousand shares of the capital stock of the Earl-Eagle Mining Company, and that said stock, by pool agreement, is directed not to be issued, sold, transferred, bartered, or otherwise disposed of until May 1st, 1917.

"[Signed] Earl-Eagle Mining Company,
"By W. E. Evans, Secretary."

Campbell kept the certificate in his possession until about May 1, 1917, and then "turned it over" to the plaintiff, with the following indorsement thereon:

"Earl-Eagle Mining Company,

"Lehi, Utah, May 1, 1917.

"Please issue my 10,000 shares of Earl-Eagle to the order of George Baglin.

"[Signed] R. E. Campbell."

It also appears from the evidence that plaintiff is a mining stockbroker of Salt Lake City; that Campbell was absent from the state, and some time in the latter part of April, 1917, wrote the plaintiff informing him that he had a pool certificate for 10,000 shares of Earl-Eagle stock; that the pool expired May 1, 1917; that he desired to sell the stock, and inquired if plaintiff could sell it for him after May 1st. Plaintiff answered saying that he could. It further appears, from the testimony of both plaintiff and Campbell, that Campbell transferred the stock to plaintiff without consideration and without intending it as a gift. The only consideration moving Campbell to indorse the certificate and send it to plaintiff, as shown by the evidence, seems to be that Campbell desired to sell the stock and plaintiff assured him that he could sell it. It also appears from the evidence that plaintiff made formal demand upon the company that the stock be issued to him, and that the company refused to issue it until certain alleged conflicting claims were adjusted. Whether or not the refusal to issue the stock, in view of the excuse offered, amounted in law to a conversion we need not now determine.

Certain evidence admitted in proof of the market value of the stock was vigorously contested by the defendants, and its admission as evidence assigned as error. These questions, as far as may be necessary, will receive consideration before concluding these remarks.

At the close of the evidence for the plaintiff, defendants moved for a nonsuit on the following grounds:

"That there is no proof that the complaining party, the plaintiff, was the actual owner or

owner at all of the stock that he attempts to sue for; or that he was entitled to any rights or privileges of an incorporator; or that there is no proof that the corporation was in any way, or the individuals in any wise, liable for refusal to issue the stock at the time that the alleged conversion is complained of;

"That there is no evidence of a conversion in the record whatever made by the plaintiff, for the reason that there is no evidence whatever showing that the corporation or any of the defendants in any wise attempted to exercise any ownership or control as owners over the stock which the plaintiff alleges he made demand for; and there is no evidence that the corporation or these directors in any wise attempted to pass upon the ownership or the title to the stock; or that they ever denied that any particular person was the owner of the stock. There is no evidence of damages whatever in this case, under the rules of law, on which the court could find any damage accruing to the plaintiff in this action."

The trial court overruled the motion. Appellant took exception, and relies upon the exception as grounds of reversal.

The points raised by the exception are (1) that the evidence fails to establish plaintiff's ownership of the stock; (2) that there is no evidence of conversion, and (3) that there is no evidence of damage. If any one of these propositions is true, the court erred in denying the motion.

Appellant, under the first proposition, contends that plaintiff, in view of the evidence, was not the owner of the stock, and was therefore not the real party in interest.

[1, 2] Comp. Laws Utah 1917, § 6495, with certain exceptions which are immaterial here, provides that "every action must be prosecuted in the name of the real party in interest." Relying upon this provision of the Code, appellant insists that plaintiff was not entitled to prosecute the action. We have heretofore alluded to the fact that the evidence showed the stock was transferred from Campbell to plaintiff without consideration; that he neither sold it to plaintiff nor gave it to him; that he delivered the certificate to plaintiff with the indorsement thereon authorizing defendant to issue the stock to the order of plaintiff; that Campbell's purpose in so doing was to authorize plaintiff to sell the stock for Campbell's benefit. No other conclusion can be drawn from the evidence, which is unimpeached and uncontradicted.

Plaintiff himself testified on cross-examination that his relation to the stock was that of broker. He referred to Campbell as his client, and also stated, in effect, that the damage sustained by the loss of an opportunity to sell the stock would be that of his client, and not his own, except his loss of a broker's commission.

Testimony as to whether or not there was a consideration for the assignment was admitted over respondent's objection. The po-

sition of respondent in respect to the question is that it is immaterial what the consideration was, or whether there was any consideration at all, inasmuch as the assignment conferred upon him the legal title to the stock.

This contention seems to be supported by the highest authority on code remedies. Pomeroy, *Code Remedies*, § 70, also *Remedies and Remedial Rights*, § 132, state the proposition as follows:

"Analogous to the subject discussed in the preceding paragraph is the question whether an assignee, to whom a thing in action has been transferred by an assignment which is absolute in its terms, so as to vest in him the entire legal title, but which, by means of a contemporaneous and collateral agreement, is, in fact, rendered conditional or partial, is the real party in interest. It is now settled by a great preponderance of authority, although there is some conflict, that if the assignment, whether written or verbal, of anything in action is absolute in its terms, so that by virtue thereof the entire apparent legal title vests in the assignee, any contemporaneous, collateral agreement by virtue of which he is to receive a part only of the proceeds, 'and is to account to the assignor or other person for the residue, or even is to thus account for the whole proceeds, or by virtue of which the absolute transfer is made conditional upon the fact of recovery, or by which his title is in any other similar manner partial or conditional,' does not render him any the less the real party in interest; he is entitled to sue in his own name, whatever collateral arrangements have been made between him and the assignor respecting the proceeds. The debtor is completely protected by the assignment, and cannot be exposed to a second action brought by any of the parties, either the assignor or other, to whom the assignee is bound to account."

If this is a sound exposition of the law, the question is, does it apply to the facts in the instant case? Here the certificate relied on as evidence of Campbell's title is absolute in form. The indorsement or assignment to plaintiff authorizes the issuance of the stock to the order of plaintiff. The assignment on its face is positive and unqualified. It is true there was a collateral agreement or understanding by which it was understood that plaintiff was to procure the issuance of the stock by the defendant company to himself or order, and dispose of it for the benefit of Campbell, less plaintiff's commission as broker. We have stated this collateral understanding in the broadest terms possible under the evidence, so as to give appellant the benefit of every fact that might lend support to its contention.

There can be no question as to the assignability of the stock. There can be no question as to the assignment itself, as far as the instrument relied on is concerned. It is true it does not purport to be given for a consideration, but that was a matter with which the defendants could have no possible

concern. The defendants were completely protected as against any action upon the part of Campbell, and that was the only concern they could have so far as relates to the form of the assignment. This brings the case clearly within the principles enunciated by Pomeroy in the language above quoted and the cases cited in the note.

Assuming that the doctrine enunciated by Pomeroy is supported by the weight of judicial opinion, of which we have no doubt, we feel compelled to hold that the assignment in the case at bar conveyed the legal title to plaintiff, the collateral agreement or understanding of the parties to the contrary notwithstanding. Plaintiff, by the assignment became the real party in interest. He had a right to demand the issuance of the stock, and had the right to enforce the demand. He had every right that Campbell would have had if the assignment had not been made. As to his right to maintain the action, assuming that defendants refused to issue the stock without legal excuse, there can be no reasonable doubt. See specially *Castner v. Sumner*, 2 Minn. 44 (Gil. 32), cited in the above excerpt. In addition to the cases cited in the note the following are referred to, lending more or less support to the doctrine: *Minn. Thresher Manufacturing Co. v. Helper*, 49 Minn. 395, 52 N. W. 83; *Young v. Hudson*, 99 Mo. 102, 12 S. W. 632; *Chew v. Brumagen*, 13 Wall. 497, 20 L. Ed. 663; *Cottle v. Cole*, 20 Iowa, 481; *McPherson v. Weston*, 64 Cal. 275, 30 Pac. 842.

Respondent calls our attention to the following Utah cases: *Wines v. R. R. Co.*, 9 Utah, 228, 33 Pac. 1042; *Fritz v. Western Union T. Co.*, 25 Utah, 268, 71 Pac. 209; *Anderson v. Yosemite M. Co.*, 9 Utah, 420, 35 Pac. 502; *Culmer v. Clift*, 14 Utah, 286, 47 Pac. 85; *Mundt v. Comm. Bank*, 35 Utah, 90, 99 Pac. 454, 136 Am. St. Rep. 1023; also two California cases, *Tuller v. Arnold*, 98 Cal. 522, 33 Pac. 445, and *Dollar v. International Banking Corp.*, 13 Cal. App. 331, 109 Pac. 499.

In support of its contention that plaintiff is not the real party in interest, appellant cites and relies on the following: *Bliss on Code Pleading* (3d Ed.) § 45; 23 Am. & En. Enc. Law, 932; 15 Enc. Pl. & Fr. 710; *Williams v. Whitlock*, 14 Mo. 559; *Gruber v. Baker*, 20 Nev. 453, 23 Pac. 858, 9 L. R. A. 302; *Robbins v. Deverill*, 20 Wis. 148; *Chew v. Brumagen*, 13 Wall. 504, 20 L. Ed. 663; *Black's Law Dictionary*, 997; *Skews v. Dunn*, 3 Utah, 186, 2 Pac. 64; *Tripler v. Mt. Pleasant C. & S. B.*, 21 Utah, 313, 61 Pac. 25. Appellant quotes an excerpt from *Bliss on Code Pleading*, supra, as follows:

"The real party in interest is the party who is to be benefited or injured by the judgment in the case. It will be observed that the statute provides the action must be prosecuted in the name of the real party in interest, and, of course, if the defense can show that the plain-

tiff or plaintiffs are not the real parties in interest, the action must fail."

On referring to the volume cited, we find it is not a quotation from the text but from the note. The language is taken from the opinion of the court in *Eaton v. Alger*, 57 Barb. (N. Y.) 179. The language is very pointed, and certainly supports appellant's contention; but inasmuch as the case was afterwards overruled by the New York Court of Appeals (*Eaton v. Alger*, 47 N. Y. 345), and a contrary doctrine announced, reference to the case as authority for appellant was, to say the least, an unhappy selection. We have examined all of the authorities relied on by appellant on this particular question, and read them with more than ordinary care. We are nevertheless, of the opinion that it cannot be successfully urged that plaintiff in this case is not the real party in interest.

[3, 4] As to whether or not the conduct of the defendants in respect to the transaction constituted a conversion of the stock but little need be said. The refusal by a corporation to issue stock to one entitled thereto may or may not constitute conversion. It all depends upon the character of the excuse the corporation has for not issuing the stock. In *Coray v. Peery Irr. Co.*, 50 Utah, 70, 166 Pac. 672, a recent decision by this court in an action for refusing to issue a certificate of stock we held that the complaint of plaintiff, to which a demurrer had been sustained by the trial court, stated a good cause of action, and reversed the judgment on that ground. In *Mundt v. Bank*, supra, a case to compel the transfer of stock on presentation to the corporation of a duly indorsed certificate, this court sustained the action, and affirmed a judgment in favor of plaintiff.

The *Mundt* Case is of interest in another connection. The opinion defines the relative rights of the corporation and the owner of an indorsed certificate demanding transfer of the stock. It shows the duty and responsibility of a corporation in that regard, and also the duty and right of the corporation under certain circumstances to refuse to make the transfer. The law is there stated clearly and succinctly, and need not be repeated here. What is there said respecting the transfer of stock is equally applicable in a case where a demand is made for the issuance of the stock, as in the case at bar. The same principle governs. The law being as there stated, the only question to determine in this case is one of fact. Did the defendants in refusing to issue the stock act in good faith? Were there sufficient facts to justify their refusal? The trial court evidently arrived at the conclusion that there was some evidence of a conversion. We are not prepared to say that the conclusion arrived at was without foundation.

[5] The third and last proposition relied on by appellant in its motion for a nonsuit

presents a more serious question. Assuming there was a conversion of the stock, was there any substantial evidence of damage? Plaintiff himself was the only witness who testified on that subject prior to a motion for nonsuit. He testified that he was a broker; had been for several years on the Salt Lake Mining Exchange; that he had transacted business in other cities through other brokers; that the *Earl-Eagle* stock was listed on the Boston curb; that he followed the market both in Salt Lake and Boston during the month of May, 1917; that he knew what the market quotations were during that month in Salt Lake City; that he also knew what the quotations were on the Boston curb; that there were no sales during May on the Salt Lake exchange; that he attended the meetings of the stock exchange every day and heard brokers offer bids for the stock; that the market quotations as he knew them on the Salt Lake stock exchange were from 12 to 15 cents bid, and the stock offered at 30; that that condition continued for several months.

At this point several papers, marked plaintiff's Exhibits C to H, inclusive, were identified by the witness. They purported to be daily statements of stock transactions on the Boston curb from May 1 to May 7, 1917. The exhibits were offered in evidence of market value. Defendants objected on the grounds that they were incompetent, irrelevant, immaterial, and hearsay and had not been properly identified. Objection overruled. The exhibits were read in evidence, purporting to show sales of *Earl-Eagle* stock at prices ranging from 24 to 30 cents per share. Plaintiff testified that he received these records in the ordinary course of business. He also testified as to market quotations on the Salt Lake Exchange; that he was the present custodian of the records of the exchange, but was not the official custodian. The records of transactions concerning *Earl-Eagle* stock during the month of May, 1917, were admitted over the defendants' objection that they were incompetent and immaterial. The records show that from one-quarter cent to one cent was bid, with an occasional offer to sell up to as high as 30 cents per share up to and including the 18th day of the month; that after that from 5 to 25 cents was occasionally bid, with offers to sell at prices ranging from 30 to 60 cents per share, but no sales were made during the month. On cross-examination plaintiff testified he thought the quotations from the Boston curb were sent out by the Boston Curb Association. He had no positive knowledge as to who they were sent out by. He never received any from the Boston curb, but only from the brokers. Plaintiff was of the opinion that *Earl-Eagle* stock on May 15, 1917, was worth from 20 to 30 cents per share. He arrived at that conclusion from Boston quotations. His answer was based

(184 P.)

on his knowledge obtained from the sheets of the Boston curb. He knew nothing of the Earl-Eagle Company's affairs or the merits of the property. The records from the Boston curb did not disclose who bought the stock. The witness admitted that for all he knew the seller and purchaser may have been the same person. He did not know whether or not such conduct was permitted on the Boston curb. Witness did not know what created the market there or whether or not it was a bona fide market. Sometimes a quarter of a cent was bid to make a quotation. He learned from the quotations, newspapers, and brokers that some sales had been made. Plaintiff testified he sold 5,000 shares of stock on the Boston curb at from 15 to 18 cents per share, but was unable to deliver, because he did not have the stock in his possession. He did not know who purchased the stock. The sale did not go through.

Substantially all the testimony of plaintiff as to the market value of the stock was objected to by defendants as being hearsay and incompetent, especially as to the records of transactions on the Boston curb. The opinion expressed by plaintiff as to the market value was objected to because it appeared to have been based entirely on the Boston quotations, of which plaintiff had no knowledge, except as they appeared in the exhibits. It must be admitted that the evidence was in the highest degree unsatisfactory. On the face of it it appeared to be the baldest kind of hearsay. Without further evidence as to its reliability, it is impossible to conceive upon what principle it should be permitted to determine the rights of litigants in a court of justice. The plaintiff did not know how the records were made up. He did not know whether or not the purported sales were bona fide. He did not even know that the buyer and seller were not the same person. In other words, the purported sales in Boston may have been the merest fiction for aught anything appears in the evidence of plaintiff.

In this connection an excerpt quoted by appellant from the case of *Vogt v. Cope*, 66 Cal. 31, 4 Pac. 915, is strikingly in point:

"There was nothing to show, or tending to show, how or in what manner the 'reports of sales' were made up; where the information they contained was obtained; or whether the quotations of prices made were derived from actual sales, or otherwise. In the absence of some such proof, the 'reports of sales' offered by the plaintiff were incompetent, and the court below was right in its ruling."

See, also, *Whelan v. Lynch*, 60 N. Y. 469, 19 Am. Rep. 202; *Fairley v. Smith*, 87 N. O. 367, 42 Am. Rep. 522; *Norton v. Willis*, 73 Me. 582; *G. & S. A. Ry. Co. v. Hillman* (Tex. Civ. App.) 118 S. W. 158.

The evidence showed there were no sales whatever made on the Salt Lake Exchange.

The fact that bids were made on different dates all the way from a quarter of a cent to 25 cents per share, and offers to sell on other dates from 20 to 60 cents per share, and no bids and offerings to sell on the same day, affords no evidence of market value without further evidence of a bona fide market. *Norton v. Willis*, supra.

If we treat the motion for nonsuit as having been waived, and consider the evidence offered by the defendants, it can afford the plaintiff no consolation. Mr. Geo. E. Hemphill, selling agent of the Earl-Eagle Mining Company, had a contract with the company to sell 400,000 shares. He lived in Boston two years before coming to Salt Lake City. He testified he was engaged in the business of stock broker and mining, was acquainted with the company's mining property, and was president and manager of the company. When in Boston he was in touch with the Boston Exchange. The curb reports are authorized, but not guaranteed. They are made up by some authorized agent of sales during the day. The witness stated that he personally maintained the Boston market as to Earl-Eagle stock. *He directed the buying and selling price.* The stock on the market was treasury stock under his control. The personal stock was all pooled. The witness controlled the market in the way to create interest and publicity. It seems to have been a case of playing both ends against the middle, a species of "film-flaming" and "thimble-rigging," to fleece the innocent public, especially the exceedingly numerous type of whom it is said one is "born every minute."

We search the record in vain for a line of competent substantial evidence that throws any light whatever upon the question of actual market value. Notwithstanding these manipulations to stimulate a market and keep it alive, the bottom dropped entirely out of the market, as far as the Earl-Eagle stock was concerned, as soon as the first assessment was levied. It is not our intention to discredit the stock or the property itself. It may have had more or less merit; but this court would be doing an injustice, both to the people of the commonwealth and to the stranger within our gates, if, when such a case is brought before us, we should refrain from expressing our views in unmistakable language.

We are of the opinion there was no competent evidence of damage to the plaintiff, and that the motion for a nonsuit should have been sustained.

The judgment is reversed, at respondent's cost.

CORFMAN, C. J., and FRICK, WEBER, and GIDEON, JJ., concur.

On Application for Rehearing.

THURMAN, J. The court unhesitatingly concedes that the opinion handed down in

this case is vulnerable to one or more of the objections urged against it by respondent in his application for rehearing.

[8, 7] In deciding the motion for a nonsuit, and determining that there was no evidence of damage, the court inadvertently overlooked the fact that respondent was at least entitled to nominal damages because of the unlawful conversion of the stock. The court was therefore in error in holding there was no evidence of damage. It is also contended by respondent that insufficiency of the evidence as to damage was not assigned as error, and therefore the court had no authority to review and determine that question. After a careful consideration of the record, we find the contention of respondent is correct, and we avail ourselves of this opportunity to make the correction. These matters were not argued before the court, and were therefore overlooked. The fact, however, that there was no assignment of error as to insufficiency of the evidence of damage was sufficiently stated by respondent in his brief to entitle it to be considered by the court.

[8] In its reply to the application for a rehearing appellant makes formal application for leave to amend its assignment of errors as to insufficiency of the evidence, and presents a motion for that purpose. The motion is vigorously opposed by respondent on the grounds that the application was not made in time, and no excuse whatever is offered for the delay. The court is of the opinion, under the circumstances attending this case, that the contention of respondent is unanswerable and should prevail. Even admitting that in certain cases the appellant may be permitted to file an assignment of errors after the time expires, or to amend an assignment already filed, upon seasonable application, where no prejudice inures to the opposing party, still, in our opinion, it would be an unwarranted extension of the privilege to permit an appellant to amend its assignment under circumstances such as exist in the present case. Here the appellant failed to assign as error the matter in controversy at the time he filed his assignment of errors. The respondent's brief called attention to the fact that there was no assignment of error as to that question, the case was argued and submitted, an opinion was rendered reversing the case partly on the ground that the evidence as to damage was insufficient, respondent applied for a rehearing, and again makes the point that there was no assignment of error as to one of the points upon which the case was decided. Then, for the first time, appellant asks for leave to amend. To allow the amendment applied for in this case without any excuse whatever for the delay in making the application would be in effect to hold that an assignment may be filed or amended at any time before the opinion is officially published. Such a holding would be a substantial abrogation of the rule

requiring an assignment of errors to be filed, and incidentally would nullify the statute upon which the rule is founded. The consequences are altogether too serious. The application for leave to amend must be denied.

Both the parties have been exceedingly diligent in collating authorities in support of their respective contentions in respect to this question, and while we have not deemed it necessary to consider the case in the light of authority, because of the utter lack of any showing of diligence or excusable neglect, still, as the question is one of practice and of great importance, especially to the legal profession, we cite the principal authorities relied on by each of the parties.

Appellant cites the following cases: *United States v. Pena et al.*, 175 U. S. 500, 20 Sup. Ct. 165, 44 L. Ed. 251; *Independent School Dist. v. Hall*, 106 U. S. 428, 1 Sup. Ct. 417, 27 L. Ed. 237; *City of Memphis et al. v. St. Louis & S. F. R. Co.*, 183 Fed. 529, 106 C. C. A. 75; *Bean v. Fairbanks et al.*, 46 Utah, 513, 151 Pac. 338; *Ogden Valley T. & R. Co. v. Lewis*, 41 Utah, 183, 125 Pac. 687; *Powell v. Nolan*, 27 Wash. 318, 67 Pac. 712, 68 Pac. 389; 2 Cyc. 1005, H. Amendments; 8 C. J. 1399; *Whaley v. Vidal*, 26 S. D. 300, 128 N. W. 331; *Hubbard v. Garner*, 115 Mich. 406, 73 N. W. 390, 69 Am. St. Rep. 580; *Hall v. C., R. I. & P. R. Co.*, 84 Iowa, 311, 51 N. W. 150; *Stanley v. Barringer et al.*, 74 Iowa, 34, 36 N. W. 877; *Hudson v. Smith*, 111 Iowa, 411, 82 N. W. 943; *Roberts v. Parker*, 117 Iowa, 889, 90 N. W. 744, 57 L. R. A. 764, 94 Am. St. Rep. 316; *Chenoweth v. Chenoweth* (Ind. App.) 115 N. E. 758; *Magee v. Paul* (Tex. Civ. App.) 159 S. W. 325.

In reply to these cases respondent cites the following: *Harrison v. Harker*, 44 Utah, 541, 142 Pac. 716; *Swanson v. Sims*, 51 Utah, —, 170 Pac. 774; *Bristol, Plaintiff in Error, v. City of Chicago, Defendant in Error*, 21 Ill. 605; *Louisville R. R. Co. v. Smoot*, 135 Ind. 220, 38 N. E. 905, 34 N. E. 1002; *Baldwin v. Sutton et al.*, 148 Ind. 591, 47 N. E. 629, 1067; *Gladding v. Union R. R. Co.*, 25 R. I. 122, 54 Atl. 1060; *Hanover F. I. Co. v. Johnson*, 26 Ind. App. 122, 57 N. E. 277; *Marks v. Taylor*, 23 Utah, 152, 63 Pac. 897; *Genter v. Conglomerate Mng. Co.*, 23 Utah, 165, 64 Pac. 362; *Wasatch Irr. Co. v. Fulton*, 23 Utah, 466, 65 Pac. 206; *Van Pelt v. Park*, 18 Utah, 141, 55 Pac. 381; *O. S. L. v. Russell*, 27 Utah, 457, 76 Pac. 345; *Houtz v. U. P.*, 35 Utah, 220, 99 Pac. 997; *Herriman Irr. Co. v. Keel*, 25 Utah, 96, 69 Pac. 719; *Jenkins v. Mammoth Mining Co.*, 24 Utah, 513, 68 Pac. 845; *First National Bank v. Brown*, 20 Utah, 85, 57 Pac. 877; *France v. S. L. & O. Ry.*, 81 Utah, 302, 88 Pac. 1; *Firman v. Bateman*, 2 Utah, 268; *State v. Campbell*, 25 Utah, 342, 71 Pac. 529; *S. P. L. A. & S. L. R. R. v. Board of Education*, 35 Utah, 13, 99 Pac. 263; *Blue Creek L. & L. Co. v. Anderson*, 35 Utah, 61, 99 Pac. 444; *Morris v. Salt Lake City*, 35 Utah, 474,

101 Pac. 373; *Bowe v. Stillwell*, 39 Utah, 377, 117 Pac. 876; *Vance v. Heath*, 42 Utah, 148, 129 Pac. 365; *Connell v. O. S. L. R. R.*, 51 Utah, —, 168 Pac. 337; *Mountain Lake M. Co. v. Midway Irr. Co.*, 47 Utah, 371, 154 Pac. 584; *Egelund v. Fayer*, 51 Utah, —, 172 Pac. 313; *Holt v. Great Eastern Casualty Co.*, 51 Utah, —, 173 Pac. 1168.

Notwithstanding the inadvertence of the court and the errors in the opinion above referred to, it does not necessarily follow that respondent is entitled to a rehearing of the cause. If the order reversing the judgment and remanding the cause was, nevertheless, right, the application for rehearing should be denied.

The opinion recites the fact that certain exhibits were admitted in evidence over appellant's objection as to their competency. The particular grounds of the objection and the alleged infirmities of the evidence are stated in the opinion, and need not be repeated here. The opinion cites many cases tending to show that such matter is incompetent as evidence. The court was of the opinion that the exhibits should not have been admitted. We held, in effect, that the admission of the documents was prejudicial error. Respondent referred us to no cases whatever in support of his contention prior to the opinion. In his application for rehearing he refers to many cases which bear more or less upon the question, some of which go far towards lending support to the contention that in certain cases price lists, trade journals, and even newspaper reports, may be admitted in evidence as tending to prove market value. We believe, however, that in every case cited the documents admitted or relied on were either assumed to be authoritative and properly identified or proven to be so to the satisfaction of the court. The contention here is that the authority of the exhibits admitted and their genuineness as reports of actual sales were not satisfactorily established by extrinsic evidence, and that in any event the matter was hearsay. We think this contention of appellant has not been overcome by anything offered by respondent. The fact that it appears in this very case that the purported sales and purchases, or offers to sell and purchase, were manipulated and controlled by the same person, and that such things could and do happen, tend to show the extreme danger of admitting such matter haphazard without proper authentication as to its genuineness. The cases and authorities cited by respondent are as follows: *Wigmore*, Ev. § 716; 17 Cyc. 425; *St. Louis*, etc., R. Co. v. *Pearce*, 82 Ark. 353, 101 S. W. 760, 118 Am. St. Rep. 75, 12 Ann. Cas. 127; *Wigmore*, Ev. § 463, and § 719; *Central R. R. v. Skellie*, 86 Ga. 693, 12 S. E. 1017; *Hudson v. N. P.*, 92 Iowa, 231, 60 N. W. 603, 54 Am. St. Rep. 550; *Morris v. Columbian I. W. Co.*,

76 Md. 354, 25 Atl. 417, 17 L. R. A. 851; *Whitney v. Thacher*, 117 Mass. 523; *Cleveland*, etc., v. *Perkins*, 17 Mich. 296; *Hoxsle v. Empire Lumber Co.*, 41 Minn. 548, 43 N. W. 476; *Fountain v. Wabash R. R. Co.*, 114 Mo. App. 676, 90 S. W. 393; *Texas*, etc., v. *Donovan*, 86 Tex. 373, 25 S. W. 10.

We doubt if any of the cases cited support the contention of respondent when applied to the facts of this particular case. If they do, we are not inclined to follow them as against the better reasoned cases cited in the opinion.

It follows, therefore, that the opinion heretofore rendered should be and is modified in accordance with the views herein expressed, and that the application for a rehearing should be denied.

CORFMAN, C. J., and FRICK, WEBER, and GIDEON, JJ., concur.

(55 Utah, 23)

In re HANSEN'S ESTATE. (No. 8319.)

(Supreme Court of Utah. July 31, 1919.)

1. EXECUTORS AND ADMINISTRATORS §59 — EVIDENCE INSUFFICIENT TO SHOW DECEASED WIFE OWNED STOCK AND SECURITIES.

Evidence held insufficient to show that a deceased wife was the owner of canal stock, or a note and mortgage, transferred by her husband, her administrator, by indorsement in his handwriting.

2. HOMESTEAD §145—RIGHT OF SURVIVING SPOUSE TO OCCUPY NOT LOST BY REMARRIAGE.

On death of the husband or wife, the surviving spouse, under Comp. Laws 1917, § 7643, is vested with the right of occupancy and use of the homestead, which continues until otherwise directed by the court, and is not lost merely by remarriage.

3. ATTORNEY AND CLIENT §86—COUNSEL'S ADMISSION OF CONCLUSION OF LAW NOT BINDING ON CLIENT OR COURT.

Counsel's admission of a legal conclusion is binding neither on his client nor on the court; it being the court's duty to declare the law as it exists, regardless of concessions.

4. EXECUTORS AND ADMINISTRATORS §278 —PAYMENT OF CLAIMS WITHOUT PRESENTATION NECESSITATES PROOF THAT THEY WERE JUST.

An administrator is entitled to credit for debts paid by him in good faith, on making satisfactory proof that they were justly due and that the amount paid was the true amount of the debt over all payments or set-offs, and that the estate is solvent, though no claim for such indebtedness was presented and allowed as provided by the Probate Code.

5. EXECUTORS AND ADMINISTRATORS §278 —PAYMENT OF CLAIMS WITHOUT ALLOWANCE PLACES BURDEN OF PROOF ON ADMINISTRATOR.

In paying claims without requiring their presentation and allowance, the administrator

tor acts at his peril, and assumes the burden to prove all the facts required by Comp. Laws 1917, § 7750, to be proven to the satisfaction of the court.

**6. EXECUTORS AND ADMINISTRATORS —110 —
PAYMENT OF TAXES GIVES RIGHT TO CREDIT.**

A widower, administrator of his deceased wife's estate, interested in preserving it for himself and their children, acted within his rights in paying taxes out of his own funds, and is entitled to credit therefor, with interest, on his final accounting, whether paid before or after his appointment.

**7. EXECUTORS AND ADMINISTRATORS —132
—IMPROVEMENTS ON REALTY SHOULD BE AUTHORIZED BY COURT.**

An executor or administrator should apply to the court for authority to make improvements on realty of decedent, and if he chooses to make them without first obtaining authority he assumes the burden clearly to prove the improvements were necessary and made in good faith.

**8. EXECUTORS AND ADMINISTRATORS —132
—WHAT REPAIRS AND IMPROVEMENTS GIVE RIGHT TO CREDIT.**

Under Comp. Laws 1917, §§ 7718, 7739, a widower, administrator of his deceased wife's estate, held entitled to allowance on final accounting of any expenditures necessarily made in repairing houses, buildings, or fences existing at the death of his wife, though whether he should be allowed credit for new additions to the house, the erection of a barn, etc., was for the district court to determine, in view of the condition of the premises, etc.

**9. EXECUTORS AND ADMINISTRATORS —132
—WINDMILL NOT IMPROVEMENT ENTITLING ADMINISTRATOR TO CREDIT.**

A widower, administrator of his deceased wife's estate, on his final accounting as such, held not entitled to credit for the cost of erection of a windmill, an improvement of a temporary character, necessitated mainly for his own convenience while occupying the premises.

**10. HUSBAND AND WIFE —159 — LOAN TO
HUSBAND SECURED BY NOTE SIGNED BY WIFE
AS SURETY, NOT A CHARGE ON HER ESTATE.**

Where a husband borrowed money for his own use, and his wife signed the notes merely as surety, the husband, after his wife's death, when he was her administrator, in paying the notes merely paid his own debt, and cannot charge any portion thereof to the estate.

Appeal from District Court, Salt Lake County; H. M. Stephens, Judge.

In the matter of the estate of Maren C. Hansen, deceased. Petition by Martha H. Reese, decedent's daughter, against Henry Hansen, her father, the administrator, to compel an accounting, and for his removal and the appointment of a successor. From a judgment for petitioner, the administrator appeals. Reversed, and cause remanded, with directions.

H. Ray Van Cott, of Salt Lake City, for appellant.

A. V. Watkins, of Salt Lake City, for respondent.

AGEE, District Judge. The deceased died intestate November 4, 1895, in Salt Lake county, possessed of 43 acres of land in that county. No proceedings were had for the administration of her estate until March 14, 1902, when the appellant, Henry Hansen, was appointed administrator of said estate and qualified as such. On March 24, 1902, an inventory and appraisal of the estate was filed, which showed that the estate consisted of two tracts of land, one of 20 acres, appraised at \$680, and the other of 23 acres, appraised at \$940. These tracts were separated merely by a public road, and constituted the home of the appellant and his family. Nothing further was done until the 26th day of October, 1915, when an order was entered directing that notice to creditors should be published, which was accordingly done, and on December 28, 1915, a decree finding that due notice had been given to creditors was entered, but no claims against the estate were presented.

The deceased left, surviving her, her husband, the appellant herein, and five minor children, of which Martha H. Reese was the eldest. The appellant and his family had lived on this land for several years prior to the death of his wife, and after her death he and their five minor children continued to reside there until the children reached their majority, respectively, or married and left the parental domicile. About a year after the death of Maren C. Hansen, appellant remarried, and he and his present wife and their children have continued to occupy the said premises as their home. On January 11, 1917, the respondent, Martha H. Reese, filed in the district court of Salt Lake county a petition, alleging that she was a daughter and heir of said deceased, the appointment of the appellant as administrator of the estate of her deceased mother, Maren C. Hansen, and that her mother left an estate consisting of the two tracts of land hereinbefore mentioned, of the value of \$680 and \$940, respectively, and also of certain shares of capital stock in an irrigation company, which shares of stock she alleges were held in trust by the appellant as trustee for his former wife, for the purpose of irrigating the lands described.

After setting out the names of the heirs of the deceased, respondent further alleges that appellant, as administrator of the estate of her deceased mother, had failed and neglected, for a period of more than 14 years after his appointment and qualification as such, to publish notice to creditors; that he had occupied said real estate for more than 14 years after his appointment as administrator and had enjoyed the property as his own, and had also used the irrigation stock as his own, and had neglected to account to said estate for the rents and profits thereof for that period of time; that he had failed

(184 P.)

to take the necessary steps to have the estate closed and distributed, and had allowed the real estate to be sold for taxes for the year 1900, and had procured a quitclaim deed therefor in 1914 from Salt Lake county, conveying said real estate to him personally, and not as administrator. She further alleges that appellant pretended to have large claims against the estate, which were not legal and just, and that he claims to be the owner of the stock in the irrigation company, and denies that he held the same in trust, and that it would be necessary to bring suit to recover said stock and the said water rights and the rents and profits of said real estate for the time that he had occupied the same. She prayed that appellant, as such administrator, be required to render an accounting and for the revocation of his letters of administration, and the appointment of another as administrator, and for general relief.

To this petition the appellant filed an answer in which he admits the allegations of the petition as to the death of the deceased, his appointment as administrator; that the deceased left an estate, consisting of the real estate described in the petition; that it was of the value therein stated; and that he did not publish notice to creditors until more than 14 years after his appointment, and had not rendered any account or taken any steps to close the estate. He denies, however, that the deceased was the owner of any water stock or water right, or any personal property, at the time of her death, and alleges in substance that the reason that he did not render an account as such administrator, or publish notice to creditors, was that in March, 1894, he was sick and was not expected to live any great length of time, and that at that time he was the owner of all of the said real estate, and that the improvements thereon were of little value, and that in order to protect his wife, and to provide for her and their children, all of them minors, in case of his death, he conveyed the real estate to his wife without other consideration; that thereafter he regained his health, and that his wife died November 4, 1895; that his wife intended, and repeatedly promised to reconvey the real estate to him, but that for about two months before her death she was physically unable to make the necessary conveyance. He further alleges that after the death of his wife he purchased the interest of all of his children in said property, and that all of them except the respondent, Martha H. Reese, conveyed their interest to him, and that the said Martha H. Reese had received the consideration agreed upon, and had agreed to convey her interest in said real estate to him, but afterwards refused to do so. He admits that he occupied the premises for more than 14 years after his appointment as administrator, but alleges that the rental value of said real estate in

the condition it was in at the time of the death of Maren C. Hansen, and at all times since that date, exclusive of the improvements placed thereon by him, and without water right, did not exceed \$50 per year, and further alleges that ever since the death of his wife he had paid the taxes on said real estate, and that he had at all times resided on said lands with his minor children. He admits that he made claims against the estate, but denies that said claims are illegal or unjust.

With his answer appellant filed an account as follows.

"Account and Report.

Debtor.

To amount of inventory and appraisal of property of said estate, on file herein.....	\$1,600 00
Rental value of real estate, without water right, in the condition that the property was in at the time of the death of Maren C. Hansen, deceased, commencing in the year 1902 and ending with the year 1916, at \$50 per annum.....	700 00
Total	\$2,300 00

Contra.

To clerk's fees:	
Filing petition.....	\$ 2 00
Filing inventory.....	\$10 00
To advertising notice to creditors.....	4 00
To advertising notice of hearing on petition	5 00
To medical services, hired help, and nurse charges for deceased.....	520 00
To payment of two promissory notes: One to Charles Nielson, of Big Cottonwood, Salt Lake county, Utah, for \$500, and the other to Joseph P. Newman of Big Cottonwood, Salt Lake county, Utah, for \$500, owned jointly by Maren C. Hansen and Henry Hansen at the time of the death of Maren C. Hansen, one-half of which is chargeable against the estate of Maren C. Hansen	500 00
Attorney's fees, paid to Smith & McBroom..	50 00
Attorney's fees paid to Wilson & Smith.....	25 00
To taxes on real estate for the years 1902 to 1916, both inclusive.....	678 45
To C. A. Carlquist, funeral expenses, November 4, 1895.....	75 00
To Utah Nursery Company, for trees planted on said property.....	9 00
To Victor Anderson, for driving well on said real estate, October, 1897.....	250 00
Paid Consolidated Wagon & Machine Company for windmill.....	62 50
To A. N. Anderson for furnishing material and driving flowing well.....	358 00
To improvements made on said real estate by Henry Hansen, since the date of the death of said deceased, which were and are of the value of.....	1,425 00
(The last-mentioned improvements consist of the construction of four rooms, rebuilding of a summer kitchen, and the construction of a barn and a granary.)	
To building a fence on said real estate by Henry Hansen	306 00
(Henry Hansen has constructed a flowing well to which is attached a windmill, but such flowing well and windmill are before accounted for in this report.)	
Total	\$4,077 95

The respondent, in a reply filed, alleges, inter alia, that the real estate in question was purchased with money belonging to her

deceased mother, and that the appellant took title thereto in his own name, and that because of difficulties in which appellant became involved he conveyed the property to his wife. With her reply the respondent filed exceptions to the account rendered by appellant, in which she objected generally to all of the items therein, on the ground that none of them were presented within the time limited by the notice to creditors, and were not properly chargeable against the estate. She particularly objected to the items of \$500 paid to Newman and Nielsen; the items for medical services, hired help, and nurse, and all of the items of expenditures for improvements on the land, on the ground that they were not properly chargeable against the estate and are exorbitant. She also excepts to the items for attorney's fees, on the ground that the attorneys had been negligent in looking after the legal business of the estate, to the damage and detriment of the estate, and that the services were of no value to the estate. She also excepts to the item for medical services, hired help, and nurse on the ground that the charges were exorbitant, unsupported by vouchers, and indefinite as to time, amount, and class of service, and by whom rendered. She also excepts to the amount with which appellant charged himself as rent for the real estate and alleges that the rental value was at least \$500 per annum.

We have stated the issues joined thus fully in order that a full understanding of the questions involved may be had. By agreement the issues joined by the petition, the answer, and reply, and the account rendered by the administrator, appellant herein, and the exceptions thereto by the respondent were tried together. The hearing was commenced on December 3, 1917, and on the next day a postponement was ordered by agreement, and the trial was resumed March 28, 1918. In the meantime Messrs. Smith & McBroom, who had previously represented him, had withdrawn as counsel for appellant, and Ray VanCott, Esq., and Hon. A. J. Weber, now a member of this court, appeared for the appellant during the remainder of the trial. At the conclusion of the trial the court refused to allow any of the items of appellant's account, except \$2 for filing of petition for letters of administration, \$10 for filing inventory, \$4 for publication of notice to creditors, and \$5 for publishing notice of hearing on petition, a total of \$21, and found that at the time of her death the deceased, Maren C. Hansen, was the owner of the real estate hereinbefore mentioned, and also 24 shares of the capital stock of the Utah & Salt Lake Canal Company, and a note for \$900, made by one Bostolo Brosgheln, payable originally to the appellant, Henry C. Hansen, and secured by a mortgage on certain real estate, and assigned to the de-

ceased, and that such shares of stock and said note and mortgage should have been included in the inventory filed by appellant as administrator. The trial court also found that appellant was chargeable with rental value of the real estate from January, 1896, a little less than two months after the death of Maren C. Hansen, to the date of the judgment, together with legal interest thereon, amounting in the aggregate to \$17,396.84. The court further found that there was due from the administrator, because of said note and mortgage, \$2,892.25, and that the appellant had received for a right of way for a railroad line over the real estate the sum of \$174, which, with interest, amounted to \$234.35, making a total debit against appellant of \$20,523.44.

Judgment was entered in accordance with these findings, and removing appellant as administrator, appointing another administrator, and directing such administrator to bring necessary legal actions to recover from appellant and other necessary parties the rents and profits owing by him to the estate, and also to recover the 24 shares of capital stock in said canal company. From this judgment the administrator has appealed to this court, and assigns many errors, but the only errors which we deem it necessary to consider are those challenging the correctness of the judgment of the trial court in charging the appellant as administrator with rents for the real estate from the date of the death of Maren C. Hansen to the date of the accounting, and with the \$900 note and interest thereon, and with the 24 shares of canal stock, and refusing to allow him any credits for the payment of any debts of the deceased, expenses of her last illness, funeral expenses, and attorney's fees, or for taxes paid, or for improvements and repairs made on the real estate, and removing him as administrator.

Much of the evidence in the record relates to the conveyances made by children of appellant after they arrived at their majority, and the consideration therefor; but, since the appellant concedes that at the time of the death of Maren C. Hansen the title to the land in question was in her, we think this has no bearing on the questions involved in this proceeding, the object of which is to require an accounting by the appellant as administrator, and to remove him and secure the appointment of another in his place.

As the respondent contends, and the trial court held, that the 24 shares of stock in the canal company and the \$900 note and mortgage belonged to the deceased at the time of her death, and should have been included in the inventory, which contention is stoutly contested by appellant, and he assigns as error this holding of the trial court, we deem it advisable to first dispose of this question. While it is contended by respondent

ent that the land was paid for, at least in part, by money belonging to deceased, it is not contended that appellant was not the original owner of the canal stock and the note and mortgage in question.

[1] The record shows without controversy that on March 3, 1894, the land was conveyed by appellant to his wife, and there is no evidence in the record, and no attempt to prove, that any consideration whatever was paid by the deceased for his conveyance. The only evidence as to the purchase of the real estate was given by the appellant, who testified that the land was bought with the \$1,000 borrowed from Newman and Nielson on notes signed by him and his deceased wife. He testified, however, that the deceased inherited certain moneys from her father, part of which she received before leaving Denmark, and part after arriving in this country, and that part of this money was spent on this land. At the time the conveyance of the land was executed, appellant assigned to his wife the mortgage in question and presumably transferred the note to her, although all the evidence in the record on this subject consists of the record of the assignment of the mortgage. On the same date four certificates of capital stock of the canal company, aggregating 24 shares, held by appellant, were surrendered, and a new certificate for 24 shares was issued to Maren C. Hansen. There was no attempt to prove that she paid any consideration whatever for the note and mortgage, or the canal stock. So far as the record discloses, this conveyance of the land and the assignment and transfer of the note and mortgage and canal stock covered practically all the property owned by appellant. The only explanation given for this conveyance of the real estate, the assignment of the mortgage, and the transfer of the capital stock is found in the testimony of appellant and this is very meager. He testified that at the time the deed to the land was executed he was very sick; in fact, so sick that on his recovery he did not remember having made the deed until reminded of the fact by the physician who treated him. He further testified that he had no recollection of having transferred the canal stock, or concerning the \$900 note and mortgage, but that, if he did transfer the canal stock, it was retransferred to him before his wife died. He also testified that after his recovery his wife fully intended to reconvey the land to him, and repeatedly promised to do so, but that for two months before her death she was unable to make the necessary conveyance. On October 12, 1897, the certificate of stock issued to Maren C. Hansen was surrendered and a new certificate issued to appellant. The surrendered certificate bore the following indorsement: "Maren Kristine Hansen, September 25, 1895." The contention of the re-

spondent is that this indorsement was forged by appellant, and, while the appellant denies that he wrote the indorsement, there is evidence tending to show that the handwriting is his.

Conceding this to be true, does it justify a finding that the indorsement is a forgery? We think not. Keeping in mind that it is undisputed that appellant, prior to March 3, 1894, was the owner of the real estate, and of this canal stock, and of the note and mortgage in question, all of which were conveyed and transferred to his wife, Maren C. Hansen, at the same time when appellant was very sick, that it constituted practically all of the property of the appellant, and that all of their children, five in number, were small, we think the most reasonable inference to be drawn is that this conveyance, and this transfer from appellant to his wife were made in contemplation of impending dissolution, in order that in case of his death the widow would not only have the home, but all of the property, to enable her to keep her children together and to rear them, and that upon the recovery of the husband, and when the wife in turn fell sick, it was her desire that in case of her death the husband should have all the property for a like purpose, and that, although she never reconveyed the real estate, she delivered the certificate of canal stock that had been issued to her, and also the note and mortgage, to her husband, if, indeed, the same had ever been in her actual possession, and that she indorsed the certificate and note, or authorized her husband to indorse her name thereon. In other words, we think the only reasonable inference to be drawn from all the facts and circumstances appearing in the record is that it was the desire of appellant and his wife, Maren C. Hansen, that upon the death of either the survivor should at once, without any probate proceedings, have all the property which they had accumulated through years of toil, to enable such survivor to support and maintain their minor children, and, for the purpose of accomplishing this end, the certificate of stock and the note and mortgage were returned to appellant, but owing to the illness of deceased a deed to the real estate was not executed by her to her husband, the appellant.

We think the evidence is insufficient to fasten upon appellant the crimes of forgery and embezzlement. He only kept what was rightfully and equitably his own. So far as the note and mortgage are concerned, there is no allegation concerning them in the petition, and no issue is tendered by the pleadings, and the findings and judgment of the trial court as to the note and mortgage are without the issue. As before stated, the appellant testified that he had no recollection of having transferred the canal stock to his

wife, and had no recollection of the note and mortgage. It is not strange, however, that appellant, who testified that he had been sick a great deal, having had pneumonia eight times and typhoid pneumonia once, could not remember the details of these transactions between himself and wife, which occurred more than 20 years ago.

Holding, as we do, that the evidence is insufficient to show that the deceased, Maren C. Hansen, was the owner of the canal stock, or the note and mortgage in question, it is unnecessary for us to discuss the evidence as to the genuineness of the indorsement of the certificate or the release of the mortgage. We conclude that the trial court erred in charging the appellant in his account as administrator with the shares of capital stock and the note and mortgage in question.

[2] Appellant contends that he was not chargeable with the rental value of the real estate, for the reason that it was the homestead of the family, and under Comp. Laws Utah 1917, § 7643, he and his family of minor children were entitled to occupy the same "until otherwise directed by the court," and that the court has never made any order in the matter. That section provides, in so far as applicable to this question, as follows:

"When a person dies leaving a surviving wife, husband, or minor children, they shall be entitled to remain in possession of the homestead and to the use of the property exempt from execution until otherwise directed by the court. * * *

Counsel for respondent contends that upon the remarriage of the appellant his right as the surviving husband of Maren C. Hansen to occupy the homestead ceased, and cites in support of that contention two cases from California, namely, *In re Estate of Boland*, 43 Cal. 640, and *In re Still's Estate*, 117 Cal. 509, 49 Pac. 463. We think these cases are readily distinguishable from the case at bar. Each of the California cases arose upon an application to set aside a homestead under a statute of that state concerning homesteads. There appears to have been two provisions in the California statutes concerning the right of a surviving widow to a homestead in the lands of her deceased husband, namely: (1) Where during the existence of the community a homestead had been created by a compliance with the homestead act; and (2) where after the death of the husband she applied to the proper court for an order setting apart a homestead to her out of the lands of the deceased. Under the first provision, where, during the life of the husband, a family homestead has been set apart, the title vests in the wife or widow by right of survivorship; and in the second the right to a homestead is acquired by making application to the proper court and obtaining an order setting apart a homestead. In the *Boland Case* the court said:

"Conceding, for the purpose of this case, that the property in question could be set apart to the widow, under the provisions of the Probate Act, notwithstanding the will of John Boland, it is evident that the widow could acquire no homestead interest in the property until an order of the probate court, or judge, was made, setting it apart to her. It differs from the case of a homestead created during the existence of the community, by a compliance with the provisions of the homestead act, the title to which vests in the wife upon the death of the husband, by right of survivorship. In the latter case the property becomes the property of the widow by operation of law. In the case presented it could only become hers by the decree of the court or judge."

It will be observed that it is there held that the right to have a homestead set apart after the death of the husband is determined by her status at the time the order is made, and that, since the order can be made only upon application of the widow, if she has remarried and is no longer a widow and head of the family, no homestead can be set apart to her.

Under Comp. Laws Utah 1917, § 7643, the right to remain in the possession of the homestead vests in the surviving spouse by operation of law upon the death of the husband or wife, without any order of any court, and this right continues "until otherwise directed by the court." It will thus be seen that under the provisions of the laws of California, under which the decisions referred to were made, it requires an affirmative act upon the part of the court or judge to entitle the widow to any homestead right in the property of her deceased husband, while under section 7643, supra, the homestead right attaches upon the death of the husband or wife, and it requires an affirmative act to terminate such right. In other words, in this state, upon the death of the husband or wife, the surviving spouse, by operation of law, is vested with the right of occupancy and use of the homestead, and this right continues, according to the express terms of the statute, "until otherwise directed by the court." No doubt the court would, upon application of any person interested in the estate, and upon a showing that justice required that this right to the occupancy and use of the homestead should be terminated, enter an order to that effect; but the remedy of a person interested in the estate is to apply to the court for an order directing the termination of such occupancy and use, and not in a proceeding to compel the surviving spouse to pay rental for the land.

It follows that, since no order has ever been made terminating the right of the appellant to occupy the lands in question, which constituted the homestead of the family at and prior to the death of Maren C. Hansen, he had a right under the law to occupy the same, and is not chargeable with

the payment of rent therefor, and that the trial court erred in charging him with such rental value in the settlement of his account.

[3] It is contended, however, by respondent, that the appellant never claimed the right to occupy the lands as surviving husband of Maren C. Hansen, and that during the trial his former counsel waived any such right by his admission that appellant was liable for the reasonable rental value of the lands; but we think this was but an admission of a legal conclusion and is binding neither upon appellant nor upon the court. It is the duty of the court to declare the law as it exists, regardless of what a party or his counsel may concede to be the law. 1 Sutherland, Code Pleading, 427; Russell v. Wheeler, 129 Mich. 41, 88 N. W. 73.

It is due to the learned trial judge who heard the case below to say that the many admissions of this character made by the former counsel of appellant were calculated to mislead the court in the hurry of the trial; but a careful reading of the record discloses the fact that after the change of counsel was made the present counsel for appellant objected to any evidence of the rental value of the premises on the express ground that the appellant and his minor children were entitled to occupy the premises "until otherwise directed by the court."

[4, 5] The trial court also refused to allow the appellant any credit in his account as administrator for funeral expenses, or the expenses of the last illness of the deceased, or for taxes paid on the real estate, or for permanent improvements placed thereon. The record does not disclose just why all of these claims were disallowed, but it was presumably on the theory that they must have been presented to the judge within the time fixed for the presentation of claims and must have been allowed by him. Comp. Laws Utah 1917, § 7666, reads as follows:

"The executor or administrator, as soon as he has sufficient funds in his hands, must pay the funeral expenses and expenses of the last sickness and the allowance made to the family of the decedent. He may retain in his hands the necessary expenses of administration, but he is not obliged to pay any other debt or any legacy until the payment has been ordered by the court."

Under this section claims for funeral expenses and expenses of the last sickness of the deceased person are not required to be presented as other claims, but may be paid by the administrator without having been presented and allowed. Indeed, the statute requires him to pay such expenses as soon as he has sufficient funds in his hands. Of course, in his final settlement, the administrator should be required to prove to the satisfaction of the court the payment of such claims and that they are reasonable and just. Section 7750 provides that if up-

on the settlement of the account of an administrator—

"it appears that the debts against the deceased have been paid without the affidavit and allowance prescribed by statute, and it shall be proven by competent evidence to the satisfaction of the court that such debts were justly due, were paid in good faith, that the amount paid was the true amount of such indebtedness over and above all payments or set-off, and that the estate is solvent, it shall be the duty of the said court to allow the said sum so paid in the settlement of said accounts."

This section clearly confers upon the court ample authority to allow the administrator credit for any claims actually paid by him upon producing the proof required therein; and, indeed, it is the duty of the court to allow credit for claims so paid upon satisfactory proof of the required facts. The appellant is therefore entitled to credit for any debts against the deceased which were actually paid by him in good faith, upon making satisfactory proof to the court "that such debts were justly due and that the amount paid was the true amount of such indebtedness over and above all payments or set-off, and that the estate is solvent," notwithstanding no claim or claims for such indebtedness had been presented and allowed as provided by the Probate Code. In paying any claims, without requiring their presentation and allowance, the administrator acts at his peril; that is, he assumes the burden of proving all the facts required by the last-mentioned section to be proven to the satisfaction of the court. Such payments are not to be encouraged, and when made the proof should be clear and convincing to entitle him to credit in the settlement of his account; but when such proof is satisfactory to the court the law makes it the duty of the court to allow the sum so paid in settlement of the final account of the administrator.

[6] Comp. Laws Utah 1917, § 7767, reads as follows:

"Before any decree of distribution of an estate is made, the court must be satisfied, by the oath of the executor or administrator, or otherwise, that all state, county, and municipal taxes legally levied upon personal property of the estate have been fully paid."

It is, we think, likewise the duty of the administrator to pay all taxes legally levied against the real estate. In this case it is undisputed that the appellant paid all the taxes levied against the lands belonging to the estate, and it is difficult to understand why he should not be credited with such payment in the settlement of his accounts. Indeed, counsel for the respondent has not contended otherwise in his brief, and upon the oral argument only contended that no credit could be given for any payment made prior to his appointment as administrator, since such payment must have been made

by him personally, and not as administrator. If the appellant had been a stranger to the estate, and not interested therein, there would be much force to this contention, as he would, under such circumstances, have been an intermeddler, voluntarily paying taxes of another. But the appellant was one of the heirs of Maren C. Hansen, and as such, and as the father of her minor children, was interested in preserving the estate by preventing it from being sold for taxes. He was, therefore, acting within his rights in paying the taxes out of his own funds, and is entitled to credit for all the taxes paid, together with interest thereon from the date of payment, whether paid before or after his appointment. The cause appears to have been tried upon the theory that the appellant occupied a position in no way different from a person who was a stranger to the estate, except in his capacity as administrator, and this probably led to the application of erroneous principles of law in determining this question and that of the payment of rentals.

[7, 8] As we have before stated, the court disallowed all of the claims of the appellant for improvements and repairs made on the premises. This presents a more difficult question than does the claim for taxes which we have been discussing. Comp. Laws Utah 1917, § 7718, provides, *inter alia*, that an administrator "must keep in good tenantable repair all houses, buildings, and fixtures," on real estate under his control. Section 7739 provides that "he shall be allowed all necessary expenses in the care, management, and settlement of the estate." Under these provisions we have no doubt that the appellant is entitled to credit for expenses incurred in making repairs on the existing buildings, such as putting in new floors, putting on new roof, and other necessary repairs, or for the repair of existing fences; but the question is: Is he entitled to credit for any new buildings? Our statute on this subject is identical with the California statute on the same subject, and in the case of *In re Clos' Estate*, 110 Cal. 494, 42 Pac. 971, it was held that where an old building becomes untenable, and it was impractical to repair it, a new building might be erected and its erection might be treated as repairs. We quote the first and third paragraphs of the syllabus in that case:

"1. An executrix of an estate, part of the buildings on which had been used for years as stables, on complaint as to their unsafe condition, consulted architects in regard to repairing the same, but was informed that, since the buildings were within the fire limits of the city, an ordinance required fireproof roofs and walls. It appeared that the premises were practically untenable, because of the condition of the stables. Held, that the erection of new buildings at a reasonable cost on the site of the old for the same purposes, and in compliance with

the ordinance, were 'repairs,' within Code Civ. Proc. § 1452, requiring executors to 'keep in good, tenantable repair all houses, buildings, and fixtures' on the estate, so that the executrix was entitled to credit for the expense thereof on her accounting."

"3. An executrix need not show, as a condition precedent to the allowance of a claim for the expense of repairs on the estate, that the repairs were ordered by the probate court, where the expense was reasonable, and for the benefit of the estate."

It is impossible to lay down any hard and fast rule to govern in matters of this kind. Much must necessarily be left to the judgment and sound discretion of the trial judge, but we approve of the statement of the Court of Appeals of New York in *In re Niles*, 113 N. Y. 547, 21 N. E. 687, in the following language:

"This matter of the administration of estates is one which is peculiarly within the cognizance of equity, and a Surrogate's Court, in adjusting the accounts of executors and administrators, is governed by principles of equity as well as of law. *Upson v. Badeau*, 3 Bradf. Sur. [N. Y.] 15. Within the exercise of the statutory powers conferred upon him to direct and control the conduct and to settle the accounts of administrators and executors, the surrogate is not fettered; nor is he prevented by any rule of law from doing exact justice to the parties."

While section 7718, *supra*, does not in express terms require an executor or administrator to do more than to keep in good tenantable repair all houses, buildings, and fixtures of the estate, section 7739 provides that he shall be allowed all necessary expenses in the care, management, and settlement of the estate, and we think this provision is broad enough to include such permanent improvements on the land as are reasonably necessary for its occupancy and to preserve the estate and enhance its value. *The better practice, however, and the one which the district courts should insist upon under ordinary circumstances, is for the executor or administrator to apply to the court in which the estate is being administered for authority to make such improvements. If an executor or administrator chooses to make such improvements without first obtaining authority to do so from the court, he acts at his peril, and assumes the burden of proving that the improvements were necessary, and were made in good faith and for the benefit of the estate, and the proof of these facts should be clear and convincing.* The question of the allowance for improvements must be determined from the facts in each particular case, bearing in mind that such improvements must be proven to have been reasonably necessary and made in good faith for the benefit of the estate. Take the matter of sinking a well. If there is no water on or in connection with the premises suitable for domestic purposes, in view of the

indispensable necessity for pure wholesome water for such purposes, and the further fact that its acquisition will add permanently to the value of the estate, we think it rests in the sound discretion and good judgment of the court to allow the administrator the expenses necessarily incurred in that behalf; but all the facts and circumstances should be taken into consideration and the matter determined upon the principles of justice and equity.

In this case we think appellant is clearly entitled to the allowance of any expenditures necessarily made in repairing houses, buildings, or fences existing on the premises at the time of the death of Maren C. Hansen, but that in view of the fact that the appellant, with his family, had the use and occupancy of the premises, it is a matter for the district court to determine, from all the facts and circumstances, whether or not appellant should be allowed credit for new additions to the house, and for the erection of a barn, the construction of new fences, and the sinking of wells, in the settlement of his account. In determining this question the court should take into consideration the evidence as to the condition of the premises, and their state of improvement and value at the time of the death of the decedent, and their condition, state of improvement, and value at the date of the settlement of the account of the administrator, and from all these facts determine what, if any, credits the administrator is entitled to in the settlement of his accounts for expenses incurred in the making of new improvements of the premises; it appearing without dispute that at the date of the death of Maren C. Hansen the land had but little improvements thereon, and that the buildings and fences were of small value, while a witness for the respondent testified that the farm, at the time of the trial, was in a high state of cultivation, and one of the best in the locality. These are matters to be considered in determining the rights and equities of the parties.

If the judgment of the trial court is allowed to stand, respondent, without any expense whatever to her or to the estate, in the care and improvement of the property, or the payment of taxes, would receive from the estate approximately four times the value of the real estate at the time of the death of her mother, and also her distributive share of the real estate in its greatly improved condition and enhanced value, as well as her distributive share of the 24 shares of canal stock, while the appellant, in his declining years, would be turned from the home he has established and improved

by a quarter of a century of toil, penniless. We cannot give our approval to a rule of law which would result in a judgment so harsh.

[9, 10] As to the claim made by the appellant for the cost of the erection of the windmill placed on the premises, this being an improvement of a temporary character and necessitated mainly for the convenience of the appellant while occupying the premises, we think he would not be entitled to credit therefor. Nor do we think he is entitled to credit for the \$500 paid in satisfaction of the two notes, one given to Newman and the other to Neilson, as we think the only reasonable inference to be drawn from the evidence is that those notes were given for money borrowed by appellant for his own use, and that his wife signed them merely as surety, and that appellant, in paying those notes, was paying his own debt, and, of course, in such an event, would not be entitled to charge any portion thereof to the estate. The evidence upon this subject is somewhat meager, and we do not attempt to make any final determination of the matter, but leave the question open, to be determined by the district court in the final settlement of the accounts of the administrator.

The appellant contends that the court erred in refusing to allow him to amend his answer by alleging that he had contracted with the respondent for the purchase of her interest in the real estate in question and had paid the consideration therefor, and also in holding that the respondent was the owner of an undivided two-fifteenths interest in the real estate. This proceeding, however, being one to compel an accounting by the administrator, and for his removal, and the appointment of a successor, these questions cannot properly be determined in this proceeding, but may arise upon the distribution of the estate, or in an action by the appellant to compel the respondent to convey her interest in the estate, should he elect to bring such an action.

The judgment is reversed, and the cause remanded to the district court of Salt Lake county, with directions to set aside the findings of fact, conclusions of law, and judgment, to deny the petition for the removal of the appellant as administrator, to grant a rehearing upon the account of the administrator, and to settle such account in accordance with the views expressed herein. Appellant to recover costs on this appeal.

CORFMAN, C. J., and FRICK, GIDEON,
and THURMAN, JJ., concur.

(43 Nev. 227)

In re FORNEY'S ESTATE. (No. 2394.)

(Supreme Court of Nevada. Oct. 2, 1919.)

1. BASTARDS §10 — LEGITIMATION MUST BE VALID IN STATE WHERE BASTARD AND FATHER LIVED.

Legitimation of a bastard must be according to the law of the state in which she and her father had lived during their joint lives, to entitle her to take as his heir personal property which he left in another state.

2. BASTARDS §10 — FOR LEGITIMATION FATHER MUST HAVE FAMILY INTO WHICH CHILD IS RECEIVED.

Under Civ. Code Cal. § 230, for legitimation of a bastard, the father must have a family into which the child can be received.

Sanders, J., dissenting.

Appeal from District Court, Washoe County; George A. Bartlett, Judge.

In the matter of the estate of Charles F. Forney, deceased. From the decree of distribution, and an order denying a motion for new trial, the administrator and the State appeal. Reversed.

L. B. Fowler, Atty. Gen., and Robert Richards, Deputy Atty. Gen., for the State.

Summerfield & Richards, of Reno, for appellant administrator.

James T. Boyd and Harlan L. Heward, both of Reno, for respondent.

COLEMAN, C. J. Charles F. Forney, long a resident of Truckee, Cal., died leaving on deposit in certain banks in Reno, Nev., the sum of \$4,500. The public administrator of Washoe county, Nev., qualified as administrator of the estate, and in due time filed his final report and petition for distribution, which alleges:

"That the whole of said estate is the separate property of said decedent, and that your petitioner is informed and believes, and therefore alleges the fact to be, said decedent at the time of his death left him surviving no wife, nor father, nor mother, nor sister, nor brother, nor any children, nor ancestors, nor descendants, whomsoever, and left him surviving no heir or heirs at law or next of kin whatsoever, and, according to the best information and belief of your petitioner, all the rest, residue, and remainder of said estate should escheat herein and be distributed to the state of Nevada pursuant to the provisions of law."

On the 10th day of April, 1915, one Gladys Pohl, by and through her guardian ad litem, filed in the matter of said estate her petition, reciting that she was the daughter of the deceased and one Minnie Pohl; that she was born at the town of Truckee, Cal., on the 6th day of April, 1908, and that ever since her birth she had continued to reside with her mother in said town; that the said

Forney, on various and divers occasions, publicly acknowledged the said Gladys Pohl to be his daughter; that he provided her with the common necessities of life, and informed various and divers persons that the said Gladys Pohl was his daughter, and that he intended to care and provide for her as a father should; that said Gladys Pohl is the only child of deceased, and that there are no other heirs. Said petition concludes with a prayer that the estate of the deceased be distributed to her after the payment of all charges of administration.

Upon the hearing, the court found the facts to be as alleged in the petition of said guardian, and entered a decree accordingly. From the decree, and from an order denying a motion for a new trial, the administrator and the state have appealed.

[1] Counsel for appellants contend that the statute of California controls in determining whether or not Gladys Pohl was legitimated by Forney during his lifetime, while counsel for respondent argue that the statute of Nevada controls. The petition filed in behalf of the minor does not allege facts sufficient to make out a claim under the California law, in that it fails to allege that Forney received the child into his family.

A child's right to inherit depends upon its status. There must be some fixed place where the status of the child can be established. What better place than the residence of both parties? Common sense and reason both so dictate. The status of a child is not an ambulatory thing, which can be shifted from place to place to suit any condition that may arise. If any other rule prevailed, and Forney had left money on deposit in several states, the minor might be permitted to lay claim to the deposits in all of them except the state in which she and Forney had lived during their joint lives, which would be, it seems to us, a reflection upon the law. It was to avoid such absurd results that led to the establishing of the rule recognized in *Ross v. Ross*, 129 Mass. 243, 37 Am. Rep. 322, and therein expressed in the following language:

"It is a general principle that the status or condition of a person, the relation in which he stands to another person, and by which he is qualified or made capable to take certain rights in the other's property, is fixed by the law of the domicile, and that this status and capacity are to be recognized and upheld in every other state, so far as they are not inconsistent with its own laws and policy. Subject to this limitation, upon the death of any man, the status of those who claim succession or inheritance in his estate is to be ascertained by the law under which that status was acquired; his personal property is indeed to be distributed according to the law of his domicile at the time of his death, and his real estate descends according to the law of the place in which it is situated;

but, in either case, it is according to those provisions of that law which regulate the succession or inheritance of persons having such a status."

This rule is recognized by and stated in Woerner's American Law of Administration (2d Ed.) at section 565, as follows:

"It has been repeatedly stated that the law of the domicile governs the distribution of personal property, so that it is unnecessary to cite authorities here in support of this principle."

It is said in 1 Cyc. p. 931:

"The law of the domicile of the parties is generally the rule which governs the creation of the status of an adopted child."

There may be some exceptions to the general rule laid down, but these exceptions are made in favor of persons domiciled in the state in which the property is situated. 22 R. C. L. p. 42, § 8.

In opposition to the rule laid down, counsel for respondent rely upon the cases of *Hood v. McGehee* (C. C.) 189 Fed. 205, *Brown v. Finley*, 157 Ala. 424, 47 South. 577, 21 L. R. A. (N. S.) 679, 131 Am. St. Rep. 68, 16 Ann. Cas. 778, *Blythe v. Ayres*, 96 Cal. 532, 31 Pac. 915, 19 L. R. A. 40, and *In re Loyd's Estate*, 170 Cal. 85, 148 Pac. 522. We do not think any of the cases cited sustains the contention. In the first case mentioned, real estate was involved, and question as to the adoption of the plaintiffs was not in controversy. It was purely a question as to whether or not adoptive children by proceedings under the laws of Louisiana, or the defendants, the next of kin, should inherit under the laws of Alabama. The court said:

"Each state has exclusive jurisdiction of the regulation of the transfer and descent of real estate within its limits. It would be competent for the Legislature of Alabama to deny the right to inherit real property to children adopted in its own courts by its own procedure. It would be competent for it to confer such rights on children of its own adoption and deny it to those of the adoption of foreign states. This is what Alabama legislation, as construed by its court of last resort, has accomplished."

In the *Loyd Case* the question here presented was not considered nor disposed of. In the case of *Blythe v. Ayres* the child sought to recover under the laws of California, the state in which the father had lived, and where all the declarations and acts relied upon to establish legitimation had taken place. In the opinion we find nothing repugnant to the rule stated. *Brown v. Finley* seems to sustain the contention made for it, but it is not in accord with the general rule, and does not appeal to our sense of what the law ought to be.

[2] Having reached the conclusion that the law of California controls, let us inquire what the law of that state is as to the legitimating of a child born out of wedlock. Sec-

tion 230 of the Civil Code of California reads as follows:

"The father of an illegitimate child, by publicly acknowledging it as his own, receiving it as such, with the consent of his wife, if he is married, into his family, and otherwise treating it as if it were a legitimate child, thereby adopts it as such; and such child is thereupon deemed for all purposes legitimate from the time of its birth. The foregoing provisions of this chapter do not apply to such an adoption."

This statute has been construed by the Supreme Court of California in several cases, and in the matter of the *Estate of De Laveaga's*, 142 Cal. 158, 75 Pac. 790, it was held that the existence of a family into which a child could be received was essential to an adoption, and in *Estate of Gird*, 157 Cal. 534, 108 Pac. 499, 137 Am. St. Rep. 131, the court, in speaking of this question, said:

"Different views have been entertained by justices of this court whether the existence of a family into which the child can be received is essential to an adoption under this section, but that question has been finally determined in the affirmative by this court in *Estate of De Laveaga*."

In addition to the California cases cited in the briefs of counsel, we call attention to *In re Walker's Estate* (Cal.) 181 Pac. 792; *In re McNamara's Estate* (Cal.) 183 Pac. 552, decided August 25, 1919. There is now pending and undecided before the Supreme Court of California the case of *In re Estate of Baird* (No. S. F. 8995), in which the same question is involved. What constitutes a "family" has been a question of much concern before the Supreme Court of California.

But it not being contended that Forney had a family into which he could have taken the child, or that he did take her into his family, we are compelled to direct a reversal of the order and judgment appealed from, and that a new trial be granted; respondent to have leave to amend his petition, as he may be advised.

The judgment and order appealed from are reversed.

DUCKER, J., concurs.

SANDERS, J. (dissenting). The state of Nevada and the public administrator of Washoe county, Nev., through their joint and several notices of appeal, have appealed to this court from a decree and order adjudging and decreeing Gladys Pohl, a resident of the state of California, to be the lawful heir and distributee of the estate of Charles F. Forney, deceased, who died intestate (living and domiciled in the state of California, at Truckee, Cal.), on or about the 25th of October, 1913, and by their appeal have succeeded in having it authoritatively determined that, in this jurisdiction, the rule of comity or private international law must be ap-

plied to the succession and distribution of said estate, the case not being within the exceptions to either rule. From this, in my opinion, it follows that both justice and comity demand that the appellants before proceeding further should voluntarily move the lower court to remit the fund involved in this controversy to the place of the decedent's domicile to be distributed according to the foreign law. There are no creditors, either local or domiciliary, or any citizen or citizens of this state to be affected by such an order. That it is competent for the lower court to make an order transferring the residue of an estate in this situation, to be handed over to some person authorized by proper authority to receive it at the domicile of the deceased, I consider undoubted. *Gravillon v. Richard's Ex'r*, 13 La. 293, 33 Am. Dec. 563. Should the appellants oppose an application for such an order, on the ground that Gladys Pohl is an illegitimate child of the deceased and not capable of inheriting under the foreign law, it would bring to the attention of the lower court a matter overlooked by the experienced and able counsel for the appellants and respondent, which I deem to be pertinent and controlling in so far as the state of Nevada is concerned in the succession or escheat of said estate. The state of Nevada does not come in by way of succession, but by an action or information of escheat to vest title to the residue of the estate in the hands of the public administrator in the state of Nevada. Escheat is not succession. It is the very opposite of succession. It is what happens when there is no succession. *Estate of Miners*, 143 Cal. 194, 76 Pac. 968.

Before the state of Nevada can successfully assert its claim of escheat it must affirmatively appear that the person seised of the estate, real or personal, died within this state. Section 6130, Rev. Laws. The information filed by the state in the district court, alleging the estate to be escheatable, does not contain such an allegation; but it is conceded, or must be conceded, that Forney died without, and not within, the state of Nevada. It is true, the statute provides that if the intestate shall leave no husband, nor wife, nor kindred, the estate shall escheat to the state for the support of the common schools. As amended, Stats. 1917, p. 37. It is also true that, every citizen dying is presumed to leave some one entitled to claim as his heir, however remote, unless one or the other of the two exceptions known to the

law—alienage or illegitimacy—should intervene. *People v. Fulton Fire Ins. Co.*, 25 Wend. (N. Y.) 205.

Escheat in this jurisdiction depends upon positive statute. Like forfeiture, it is not favored. 10 R. C. L. 613. Our statute provides:

"If any person shall die, or any person who may have died, within this state, seised of any real or personal estate, and leaving no heirs, representatives, devisees or legatees capable of inheriting or holding the same, and in all cases where there is no owner of such estate capable of holding the same, such estate shall escheat to and be vested in the state of Nevada." Section 6130, Rev. Laws.

This statute dates back to territorial days. It was the territorial law (Stats. 1861, p. 240), which was carried into the state law, and has remained on our statute books unchanged by amendment or supplement down to the present time.

The case as made by the state clearly falls within the purview of the first clause of the section, that deals expressly with heirs capable of inheriting or holding the estate of a person who dies or died within the state. It is useless for me to enter upon an exhaustive discussion of this legislation. Its reason and purpose is obvious.

The motives and conduct of these high officers—the Attorney General and the public administrator of Washoe county—is not questioned. They have sought with great zeal and ability, in the performance of their duty, to reach beyond the limits of the local law to enrich the state of Nevada at the expense of an unfortunate child, recognized by the local law to be an heir and entitled to the distribution to her of the fund here litigated. The question is one of strict legal right, and unless the right of the state can be maintained under its own law, which, in my view, cannot be successfully done, it follows that the information filed in the district court by the Attorney General, alleging that the residue of the fund in the hands of the public administrator of the estate of Charles F. Forney, deceased, is escheatable, should be dismissed.

Entertaining these views, it is not necessary for me to discuss the motion to dismiss the appeal of the public administrator. I have, however, a strong impression that he is in a much better position to appeal from the judgment and decree than the state of Nevada.

(43 Nev. 248)

Ex parte PIEROTTI. (No. 2404.)

(Supreme Court of Nevada. Oct. 6, 1919.)

1. GAMING ⇐68(3)—NICKEL-IN-THE-SLOT MACHINE GAMBLING DEVICE.

Nickel-in-the-slot machines, by which a player has a chance of losing the amount he plays or receiving a larger amount, are well-known gambling devices.

2. GAMING ⇐62—NUISANCE ⇐61—GAMING HOUSES NUISANCES AT COMMON LAW.

While at common law gaming or gambling was not itself unlawful, and is not now a crime unless so made by statute, yet at common law public gaming houses were nuisances, not only because they were deemed great temptations to idleness, but because they were apt to draw together numbers of disorderly persons.

3. LOTTERIES ⇐3—NICKEL-IN-THE-SLOT MACHINES, THOUGH GAMBLING DEVICES NOT LOTTERIES.

A nickel-in-the-slot machine, although a gambling device and expressly brought within the purview of the earlier gambling statutes, is not a lottery, within Const. art. 4, § 24, declaring that no lotteries shall be authorized in the state; and hence the Legislature may, as it did in St. 1915, except slot machines for the sale of cigars and drinks and no backplay allowed.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Lottery.]

4. CONSTITUTIONAL LAW ⇐70(3)—WHETHER ALLOWING NICKEL-IN-THE-SLOT MACHINES INJUDICIOUS QUESTION FOR LEGISLATURE.

Whether a law allowing nickel-in-the-slot machines to a limited extent is unwholesome is a question for the Legislature or the people and not the courts.

In the matter of the original application of Louis Pierotti for a writ of habeas corpus. Writ issued.

Norcross, Thatcher & Woodburn, of Reno, for petitioner.

L. D. Summerfield, Dist. Atty., of Reno, and L. B. Fowler, Atty. Gen., for respondent.

SANDERS, J. The thing or device denominated in the complaint "a lottery" is a "nickel-in-the-slot machine." The act complained of is that the petitioner willfully and unlawfully set up a nickel-in-the-slot machine in his place of business at 128 Commercial Row, in the city of Reno, Nev.

The offense charged with the word "lottery," entirely removed therefrom, would be a public nuisance.

Every place wherein any gambling game or device is kept, or any article, apparatus, or device useful therefor is kept, "shall be a public nuisance." Section 6561, Rev. Laws.

[1] Nickel-in-the-slot machines have a well-defined meaning in criminal law.

"Slot machine by which the player has a chance of losing the amount he plays is a

* * * gambling device." Territory v. Jones, 14 N. M. 579, 99 Pac. 338, 20 L. R. A. (N. S.) 239, and note, 20 Ann. Cas. 128, and note; 12 R. C. L. pp. 721-26-28-29.

It would be idle for us to deny that chance is the material element in the operation of such machines. The player hopes to get cigars or drinks for nothing. The dealer hopes chance will save him from giving something for nothing. If it were not for the chance to win cigars or drinks, the customers of the dealer would not use the machine. Lang v. Merwin, 99 Me. 486, 59 Atl. 1021, 105 Am. St. Rep. 293.

Since the year 1901, in this jurisdiction, nickel-in-the-slot machines played for cigars and drinks (now, perforce of the statute, nonintoxicating drinks, Stats. 1919, p. 1) are expressly brought within the purview of gambling statutes. Stats. 1901, c. 13, 1905, c. 52, 1907, c. 212, 1908-09, c. 210, 1913, c. 149, and 1915, cc. 80, 284.

[2] At common law "gaming," or the synonymous term "gambling," was not in itself unlawful, and is not now eo nomine a crime, unless so made by statute. 12 R. C. L. 708. "But at common law all public gaming houses were nuisances, not only because they were deemed great temptations to idleness, but also because they were apt to draw together great numbers of disorderly persons." Scott v. Courtney, 7 Nev. 419.

[3] Our Legislature, in the exercise of its power over the policy and morals of the people, found it desirable to declare every place wherein any gambling game or device is kept, or any article, apparatus, or device useful therefor is kept, to be a public nuisance. But in 1915 the Legislature (St. 1915, c. 284), in legislating upon the subject of gambling, found it desirable and expedient to modify the stringent provisions of the anti-gambling law by inserting therein a proviso:

"Provided, however, that nothing in this paragraph shall be construed as prohibiting social games played, only for drinks and cigars served individually, or for prizes of a value not to exceed two dollars, nor nickel-in-the-slot machines for the sale of cigars and drinks and no playback allowed."

The paragraph referred to in the proviso reads:

"Every person who shall play at any game whatsoever, other than those hereinabove excepted, for money, property or gain, with cards, dice or any other device which may be adapted to or used in playing any game of chance, or in which chance is a material element, or who shall bet or wager on the hands or cards or sides of such as do play as aforesaid, shall be deemed guilty of a felony."

It is obvious that the purpose of the proviso was to exempt players at such machines from prosecutions for a felony, and also to

declare places wherein such gambling devices are kept to be lawful places. If it was competent for the legislative body to pass the act declaring every place wherein a gambling device which is adapted and used for the purpose of gambling to be a public nuisance, it must be conceded that it was competent for that body by the adoption of the proviso to make the place, which but for the statute would be a public nuisance, a lawful place. It is true as a general proposition that courts will not hold conduct to constitute a nuisance where authority therefor exists by virtue of legislative enactment. This rule is supported by abundant authority. 20 R. C. L. 500, and note. But it must be observed that this rule is subject to the limitation above indicated, that it must be competent for the legislative body in the first instance to declare the thing or place a nuisance. This is a matter for judicial determination, and brings us to the real and only point to be determined in this proceeding, Has the Legislature, by the adoption of the proviso above quoted, sanctioned a lottery?

Unless gambling devices, such as nickel-in-the-slot machines, may be said to be brought within the constitutional inhibition (article 4, § 24), "no lottery shall be authorized by this state," the Legislature has not exceeded its power in adopting the proviso in question. A lottery is defined by statute to be any scheme for the disposal or distribution of property by chance, among persons who have paid or promised to pay any valuable consideration for the chance of obtaining such property, or any portion of it, * * * whether called a lottery, raffle, or gift enterprise, or by whatever name the same may be known. Section 6494, Rev. Laws. It would seem from this comprehensive language to have been the intention of the Legislature to prevent every pecuniary transaction in which chance is a material element. In this connection it may be said that we are entirely in accord with what is said in the case of the State v. Overton, 16 Nev. 136, an able and exhaustive discussion of the subject of lotteries.

There is no doubt that nickel-in-the-slot machines amount to the disposal of property by chance, but whether or not they amount to setting up, proposing, or drawing a lottery, as the word "lottery" is used in the Constitution—"No lottery shall be authorized by this state" (article 4, § 24, Const.)—is an entirely different question. There can be no doubt of what was meant by this language of the Constitution, and it clearly referred to the class of enterprises which had formerly been lawful if authorized by law, and criminal if unauthorized. *People v. Reilly*, 50 Mich. 384, 15 N. W. 520, 45 Am. Rep. 47.

It is contended by the state that the word "lottery," as defined by the statute, expresses

both the intention of the framers of the Constitution and the Legislature to prohibit the enactment of any law that sanctions the disposal of property by chance, "by whatever name the same may be known."

"It is a safe and necessary rule to construe criminal statutes so as to include what is fairly and reasonably within the legitimate scope of the language, but not to include what is not within the language, merely because it partakes of similar mischievous qualities." *People v. Reilly*, supra.

It is true that in common parlance, in a dictionary sense and the statutory definition, the word "lottery" may be a game. But the Legislature of this state, since the date of its organization as a state, has plainly drawn a distinction between lotteries and unlawful gaming. This distinction is universally recognized as being within the power of such bodies to make in the absence of any constitutional inhibition. Both are offenses against the law, and both are offenses against public policy. *Temple v. Commonwealth*, 75 Va. 901. The reason for the distinction is not difficult to find. A lottery is prohibited by the Constitution as a public nuisance—a crime against the good order and the economy of the state. Section 6561, Rev. Laws. It is a crime that goes to the destruction of the morals of the people and paralyzes the industrial energy of society. From the language employed in the Constitution it is evident that this was the understanding of its framers. *Ex parte Blanchard*, 9 Nev. 104. "It is this extensive reach, and not merely its speculative purposes, which makes lottery gambling so dangerous" as to be a proper subject for constitutional prohibition. The reason for the distinction is forcibly expressed by the highest court of the land in this language:

"The suppression of nuisances injurious to public health or morality is among the most important duties of government. Experience has shown that the common forms of gambling are comparatively innocuous when placed in contrast with the wide-spread pestilence of lotteries. The former are confined to a few persons and places, but the latter infests the whole community; it enters every dwelling; it reaches every class; it preys upon the hard earnings of the poor; it plunders the ignorant and simple." *Phalen v. Commonwealth*, 8 How. 163, 12 L. Ed. 1030.

It is true that lotteries and unlawful gaming partake of the same mischief. They belong to the same family. Chance is the material element in both. The Legislature is prohibited from legislating upon one and permitted by virtue of its inherent powers to legislate upon the other as the occasion arises. This for the reason of the wide distinction or contrast between the vice of lotteries, which infests the whole community, and the mischief or nuisance of gaming, which is generally confined to a few persons

and places. To say that the Legislature is without power to legislate upon the subject of gaming is to set at naught the basic power of the legislative branch of the government.

But it is urged that a nickel-in-the-slot machine for the sale of cigars and drinks is a gambling scheme or device for the disposal or distribution of particular classes of property, and is therefore brought within the statutory definition of lotteries, regardless of gambling statutes. Conceding this to be true, the question here is, had the Legislature the power to make such devices the subject of separate and distinct legislation because of their gambling qualities? The Legislature derives its power to legislate upon such gambling devices from its inherent authority over the morals and policy of the people, and not from the statutory definition of lotteries.

The fact that the Legislature had, by the proviso in question, sanctioned the adaptation and use of nickel-in-the-slot machines to stimulate the disposal of cigars and drinks by appealing to and arousing the gambling propensities of visitors to places where such devices are set up, does not change the character of the device from a gambling to a commercial transaction. But for its being a "gamble" customers would not use it. Gambling is the same yesterday, to-day, and forever. It is for the Legislature, and not courts, to draw the line of demarcation between the varied kinds. It is not the province of courts to confound by construction what the Legislature has made clear.

It is further argued that it is "automatic gambling," and easily distinguished from other forms of gambling, such as those games excepted from the operation of the anti-gambling law—poker, studhorse poker, five hundred, whist, and solo, where the deal alternates. This we regard as being a distinction without a difference, and an admission that such machines are gambling devices and not lotteries, unless it be said that the excepted games are different from automatic gambling devices, in that skill is the material element in such games and not chance. This is absurd. Any game played with cards in which the hand at cards depends on a dealing with the face down is a game of chance. 12 R. O. L. 717.

It is argued that the language of the proviso, "for the sale of cigars and drinks," means "sales" as defined by law. There is no such thing as a "sale" by chance. To say that the restriction placed on the player in the proviso, "no playback allowed," applies to "sales" or to "lotteries," is impracticable, if not unreasonable.

It is insisted by counsel for the state that calling the scheme by name a slot machine instead of a lottery machine does not change its character. Neither does the fact that the proviso limits its operation and restricts

the player exert any influence in determining its character. In support of this contention counsel quote extensively from the opinion of this court in the case of *State v. Overton*, supra. In that case the court had under review a special statute that clearly sanctioned a lottery; but the court in addressing itself to the point that all schemes or devices in which chance is a material element are lotteries did not see fit to include in its illustrations automatic gambling games, which we assume to have been then in operation in this state, such as faro, roulette, keno, and such gambling devices. It is fair to presume that had the court been of the opinion that the word "lottery" included these devices it may have properly brought them within the purview of the constitutional inhibition against lotteries. If these devices are lotteries, so are slot machines.

We are also referred to the case of *Loiseau v. State*, 114 Ala. 34, 22 South. 138, 62 Am. St. Rep. 84. In that case the indictment contained three counts: First, that defendant did unlawfully set up, carry on, or operate a device of chance, to wit, a slot machine; second, that he did unlawfully sell chances in a device of chance, to wit, a slot machine; and third, that defendant did set up, or was concerned in setting up or carrying on, a lottery, to wit, a slot machine. The defendant was convicted upon the first two counts. It will be observed that the indictment itself makes a distinction between gambling and lotteries, and the court in its opinion plainly recognizes the distinction by the use of this language:

"The evidence in the case authorized a conviction under either the first or second count of the indictment, and we are not prepared to say that he might not have been properly convicted under the third count."

The other cases cited by the state are taken from those jurisdictions where the word "lottery," as used in the organic law or statute, is extended by construction to all the various forms of gambling. The effect of these decisions is to say that gambling is per se a public nuisance, and therefore is brought within the constitutional and statutory prohibitions against lotteries.

[4] It is useless to continue this discussion. The law in question may be considered unreasonable and unwholesome, but the motive that prompted the Legislature in exempting from the operation of the anti-gambling law slot machines of the character here discussed is no concern of ours. It is a matter for the people or their representatives.

The criminal complaint in this case charges the petitioner with the crime of contriving, operating, setting up, proposing, and drawing a lottery, to wit, a nickel-in-the-slot machine for the sale of cigars and drinks, and no playback allowed.

Entertaining the views hereinabove expressed, we are clearly of the opinion that the complaint does not state a public offense, and the petitioner is entitled to be discharged from arrest on habeas corpus. Let the writ issue.

COLEMAN, C. J., and DUCKER, J., concur.

(43 Nev. 253)

NEHLS et al. v. WILLIAM STOCK FARMING CO. (No. 2381.)

(Supreme Court of Nevada. Oct. 8, 1919.)

1. FRAUDS, STATUTE OF §129(2)—PART PERFORMANCE HAS NO APPLICATION TO CONTRACT NOT TO BE PERFORMED WITHIN A YEAR.

A contract not to be performed within one year is void under Rev. Laws, § 1075, notwithstanding part performance; the doctrine of part performance having no application to such contract, and the statute being aimed exclusively at the time of performance and not the subject-matter.

2. FRAUDS, STATUTE OF §129(3)—PART PERFORMANCE TAKES LAND CONTRACTS OUT OF THE STATUTE.

Part performance takes land contract out of statute of frauds when not to enforce the contract would result in a fraud being perpetrated upon a party who has partially performed.

3. FRAUDS, STATUTE OF §144—LESSOR OF HORSES AND TEAMS NOT ESTOPPED TO SHOW INVALIDITY OF CONTRACT.

Where lessees hired horses to plow and seed land, after lessor had refused to furnish horses, and without being misled by any act or acts on part of lessor, lessor is not estopped from setting up invalidity of its parol contract to furnish horses under statute of frauds in lessees' action for damages for breach thereof.

Appeal from District Court, Humboldt County; Edw. A. Ducker, Judge.

Action by Oscar Nehls and another against the William Stock Farming Company. Judgment for plaintiffs and defendant appeals. Reversed.

Cheney, Downer, Price & Hawkins, of Reno, for appellant.

Salter & Robins, of Winnemucca, for respondents.

COLEMAN, C. J. This is an action to recover damages for an alleged breach of contract. The complaint as amended pleads a written lease of certain lands for a period of five years, of date August 23, 1915, and also an oral contract whereby it is alleged the defendant agreed, as an inducement to the making of the lease, to furnish to plaintiffs, for a period of five years (during the term of the lease), without charge, sufficient horses to cultivate the land so leased and to

harvest the crops. It is alleged in the complaint that plaintiffs entered into possession of the lands leased on November 14, 1915, and during the year 1916 cultivated and harvested a crop and surrendered one-third thereof to defendant as rental; that plaintiffs requested defendant to furnish them horses to plow and prepare lands for the crop of 1917, but that defendant refused to furnish the necessary horses, to wit, 40 head; that because of such refusal plaintiffs rented 14 head of horses at an outlay of \$893; that they were damaged in the sum of \$7,339 because of the failure to get the balance of the horses; and it contains certain other matters not necessary to state. An answer was filed denying the execution of the verbal contract; denying all other material allegations of the complaint, except execution of the written lease; pleading the statute of frauds; and setting up two causes of action as counterclaims. The reply admits the indebtedness pleaded in the counterclaims.

Upon the trial of the case, before a jury, plaintiffs offered evidence tending to prove that the defendant company orally stipulated and agreed with the plaintiffs to furnish sufficient horses to plow the ground leased; that in June, 1916, they demanded of defendant horses to prepare the land for the crop of 1917; that 40 head of horses were necessary for the seeding and harvesting of the crop of 1917; that defendant refused to furnish the same, or any part thereof; that plaintiffs hired 14 head at an expense of \$893; and that, because of defendant's refusal to furnish said 40 head of horses, plaintiffs had been damaged in a large sum of money.

The defendant objected to the testimony so offered, for the reason that such agreement relative to the furnishing of horses, not being in writing and not to be performed within one year, was within the statute of frauds (Rev. Laws, § 1075), and null and void. The trial judge overruled the objections, to which ruling exceptions were taken. From a judgment in favor of plaintiffs, defendant has taken this appeal.

It is the contention of appellant that the judgment must be reversed, because the oral contract relied upon being for five years was within the statute of frauds, and null and void. It is not contended by respondents that the contract was one which was to be completed within a year, but it is asserted that it is taken out of the operation of the statute of frauds by partial performance.

[1, 2] Learned counsel have made in this court, as they no doubt did in the trial court, a very ingenious argument in support of their contention, and one which would appeal to and sway a trial judge who, in the bustle and rush incident to a jury trial, has

not the time to give mature consideration to such arguments. After much reflection and investigation, we are convinced that the contention of the learned counsel cannot be sustained. The doctrine of part performance does not apply to contracts of the character here in question, but to contracts relating to land, when not to enforce the same would result in a fraud being perpetrated upon a party who has partially performed. The statute in question is aimed exclusively to the time of performance, and not to the character or subject-matter of the contract. The rule applicable to the situation here presented is enunciated in *Pomeroy on Contracts* (2d Ed.) p. 141, as follows:

"The clause relating to contracts not to be performed within a year from the making thereof seems, by its very terms, to prevent any validating effect of part performance upon all agreements embraced within it. As the prohibition relates not to the subject-matter, nor to the nature of the undertaking, but to the time of the performance itself, it seems impossible for any part performance to alter the relations of the parties, by rendering the contract one which, by its terms, may be performed within the year. It has, indeed, been held in some cases that, if all the stipulations on the part of the plaintiff are to be performed within a year, an action will lie for a breach of the defendant's promise, although it was not to be performed within the year and was not in writing. In all these cases, however, the promise of the defendant was simply for the payment of the money consideration, which might, in every instance, have been sued for and recovered upon his implied promise; and the doctrine itself has been expressly and emphatically repudiated by numerous other decisions."

This rule is recognized by ample authority. In *Osborne v. Kimball*, 41 Kan. 187, 21 Pac. 163, in considering just such a contention as is here made, the court says:

"The doctrine of partial performance is not applicable to this class of contracts. It is confined only to those relating to lands, the non-execution of which would operate as a fraud upon the party who had made partial performance to such an extent that he cannot be reasonably compensated in damages. It is an equitable principle, frequently invoked in actions for the specific performance of parol contracts for the purchase of land, under which possession had been taken, improvements made, and where there has been payment or partial payment of the purchase price. The courts are slow to introduce additional exceptions, or to depart further from the strict letter of the statute of frauds, and even in the contracts of the class mentioned full payment of the purchase money is not a sufficient performance to take them out of the statute. *Nay v. Mograin*, 24 Kan. 80. We have heretofore had occasion to deny the enforcement of contracts other than those relating to land, and which were not to be performed within one year, where they had been partially performed, and we see no reason to extend the doctrine of enforcing such or-

al contracts upon the ground of part performance."

In another case in which the question arose the court used the following language:

"The respondent insists that there was such part performance both of the logging contract and of the hauling contract as to take them out of the statute of frauds. The doctrine of part performance, however, has no application to this clause of the statute of frauds. In the nature of the case, where the statute is directed solely to the time of performance and not to the character or subject-matter of the contract, part performance could not remove the ban of the statute, without in effect repealing the statute." *Union S. & T. Co. v. Krumm*, 88 Wash. 20, 152 Pac. 681.

The case of *Conoly v. Harrell*, 182 Ala. 243, 62 South. 511, is also in point. Plaintiff and defendant entered into an oral agreement for the employment of plaintiff for a period exceeding one year, wherein it was agreed that in addition to a monthly salary the plaintiff should receive one-fourth of the net profits of the business. The court said:

"It appears from the bill that the monthly salary of complainant was paid to him up to November 1, 1907, for twelve months after the service began November 1, 1906. The contract alleged was an entirety. It was indivisible. *Martin v. Massie*, 127 Ala. 504, 29 So. 31. The partial (not complete) performance of the contract did not take it out of the statute of frauds. *Scoggin v. Blackwell*, supra [36 Ala. 351]; *Treadway v. Smith*, supra [56 Ala. 345]. The ground of the demurrer asserting that the agreement relied on was obnoxious to the statute of frauds should have been sustained."

In a note to *Diamond v. Jacquith*, L. R. A. 1916D, 880, the editor says:

"The rule that part performance will prevent the operation of the statute so far as performance has gone, can, by the nature of things, have no application to actions for the breach of contract. In such actions recovery is based not upon what has been done under the contract but upon the loss accruing from what has not been done. Therefore, even in jurisdictions which have adopted that rule, there can be found no ground upon which to base a right of recovery for the breach of a contract not to be performed within a year. It may consequently be stated as a rule without exception that the part performance of services under a parol contract not to be performed within a year does not remove the contract from the operation of the statute of frauds, so that an action may be maintained for its breach, either by the master or servant."

But counsel for respondent strenuously contend that the defendant should be estopped from pleading and urging the statute of frauds, and rely upon the case of *Seymour v. Oelrichs*, 156 Cal. 782, 106 Pac. 88, 134 Am. St. Rep. 154. That was a case in which Seymour, who had a life position as captain of detectives in San Francisco, at a

monthly salary of \$250, entered into an oral agreement with the defendants whereby he was to resign as captain of detectives and accept a position with them for ten years at a monthly salary of \$300. The defendants repudiating the contract, Seymour brought suit. The defendants pleaded the statute of frauds. The court held that because of the fact that Seymour had been induced to give up his life position, to which he could not be reinstated, defendants' refusal to comply with the verbal agreement operated as a fraud upon the plaintiff, and sustained the plea of estoppel. The court said:

"The claim of plaintiff is not that mere part performance of a contract for personal services which by its terms is not to be performed within a year, 'invalid' under our statute because not evidenced by writing, renders the same valid and enforceable. Such a claim would, of course, find no support in the authorities. Browne on Statute of Frauds, § 448. He necessarily is compelled to rely solely on the claim that the defendants by their conduct and promises, on which he was entitled to and did rely, having induced him to give up his life position in the police department in order to enter their employ for a term of years at \$300 a month, on the assurance from them that they would give him a written contract for such time and amount, and it being impossible for him to be placed in statu quo, are estopped from now setting up the statute of frauds as a defense to his action on the contract. Under this claim, the fact of part performance by plaintiff plays no part whatever. It was the change of position caused by his resignation from the police department upon which his claim wholly rests, and this resignation was, of course, no part of the performance of the contract of service, but was something that must be done by plaintiff before he could begin to perform, as was known to the defendants. Plaintiff's case, in this regard, would be just as strong if after his resignation he had been prevented by defendants from beginning to perform.

"The right of courts of equity to hold a person estopped to assert the statute of frauds, where such assertion would amount to practicing a fraud, cannot be disputed. It is based upon the principle 'thoroughly established in equity, and applying in every transaction where the statute is invoked, that the statute of frauds, having been enacted for the purpose of preventing fraud, shall not be made the instrument of shielding, protecting or aiding the party who relies upon it in the perpetration of a fraud or in the consummation of a fraudulent scheme.' 2 Pom. Eq. Jur. § 921. It was said in *Glass v. Hulburt*, 102 Mass. 24, 35, 3 Am. Rep. 418: "The fraud most commonly treated as taking an agreement out of the statute of frauds is that which consists in setting up the statute against its enforcement, after the other party has been induced to make expenditures, or a change of situation in regard to the subject-matter of the agreement, or upon the supposition that it was to be carried into execution, and the assumption of rights thereby to be acquired; so that the refusal to complete the ex-

ecution of the agreement is not merely a denial of rights which it was intended to confer, but the infliction of an unjust and unconscientious injury and loss. In such case, the party is held, by force of his acts or silent acquiescence, which have misled the other to his harm, to be estopped from setting up the statute of frauds."

[3] Accepting the rule laid down in the Seymour Case for our guidance in this case (and we know of no case more favorable to the plaintiffs), without expressing any view as to its correctness, still the plea of estoppel is not available. The Seymour Case turned upon the proposition that it was the change of position caused by Seymour's resignation. No change of position on the part of the plaintiffs is alleged in the complaint, or proven, nor is there any allegation or proof of any act or acts or silent acquiescence of defendant which misled the plaintiffs. They had notice as early as June, 1916, that the defendant refused to furnish horses to seed the crop of 1917. They hired the 14 horses mentioned with knowledge of defendant's refusal to furnish horses. It certainly cannot be said that they were misled in hiring the horses by the conduct or silent acquiescence of the defendant, nor were they led to believe by such silent acquiescence that they would get any horses whatever for the seeding and harvesting of the 1917 crop, which is the big item of damage sought to be recovered.

We think the court erred in admitting the evidence, for which reason the judgment must be reversed.

It is so ordered.

SANDERS, J., concurs.

DUCKER, J., not participating.

(25 N. M. 417)

MORRISON v. ROBINSON. (No. 2290.)

(Supreme Court of New Mexico. Sept. 12, 1919.)

(Syllabus by the Court.)

APPEAL AND ERROR \S 78(3) — ORDER SUSTAINING DEMURRER TO COMPLAINT NOT AN APPEALABLE "FINAL JUDGMENT."

An order sustaining a demurrer to a complaint, without further action by the court finally disposing of the cause, is not a "final judgment," and is not reviewable by the Supreme Court.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Final Decree or Judgment.]

Appeal from District Court, Quay County; Leib, Judge.

Suit by Robert Morrison against Onie E. Robinson. Demurrer to complaint and

amended complaint sustained, and plaintiff allowed an appeal. Appeal dismissed.

R. A. Prentice, of Tucumcari, for appellant.
C. H. Aldredge and Ed F. Saxon, both of Tucumcari, for appellee.

ROBERTS, J. On September 11, 1916, appellant filed a complaint in the district court of Quay county in equity against one Onie E. Robinson, for the purpose of securing an adjudication as to the rights of the parties to certain described real estate, and to have a decree entered declaring the appellee trustee for appellant, and to secure the vesting of the legal title to the real estate in appellant. To the complaint a demurrer was interposed and sustained, and appellant was given 20 days' time within which to file an amended complaint. Within the time limited an amended complaint was filed, to which a demurrer was interposed and sustained, and appellant was given 20 days' time within which to further plead. No final judgment was ever entered. Appellant prayed and was allowed an appeal by the district court from a supposed final judgment, but it was apparently taken for granted that the order sustaining the demurrer was a final judgment, for no other further order or judgment appears in the transcript.

An order sustaining a demurrer to a complaint, without further action by the court finally disposing of the cause, is not a final judgment, and is not reviewable by the Supreme Court. This is well settled by the authorities (3 C. J. 481), and has been decided by the territorial Supreme Court (*Cutler v. Hinman*, 14 N. M. 62, 89 Pac. 267). In that case it was held that the territorial Supreme Court was without jurisdiction to review an order sustaining a demurrer, absent a final judgment in the case. While it is true the appellee in this case has not raised the point, this court being without jurisdiction to review the order, absent a final judgment, it necessarily follows that the court must dismiss the appeal.

For the reasons stated, the appeal will be dismissed; and it is so ordered.

PARKER, C. J., and RAYNOLDS, J., concur.

(25 N. M. 411)

BISHOP v. MACE et al. (No. 2287.)

(Supreme Court of New Mexico. Sept. 8, 1919.)

(Syllabus by the Court.)

1. APPEAL AND ERROR §901 — BURDEN OF PROOF ON APPELLANT TO SHOW FINDING OF FACT NOT SUPPORTED BY EVIDENCE.

In the appellate court the burden rests upon the appellant to show that a finding of fact

made by the trial court is not supported by the evidence.

2. TAXATION §529 — EVIDENCE SHOWING PAYMENT OF TAX ON WHICH TAX DEED WAS BASED.

Evidence reviewed, and held to warrant the finding of the trial court to the effect that the tax upon which a tax deed was issued had been paid.

3. APPEAL AND ERROR §204(1)—OBJECTIONS TO EVIDENCE, NOT MADE BELOW, NOT REVIEWABLE.

Objections not made in the court below to the admissibility of evidence will not be considered on appeal.

Appeal from District Court, Union County; T. D. Leib, Judge.

Action by George F. L. Bishop against E. D. Mace and others. Judgment for plaintiff, and defendants appeal. Affirmed.

O. P. Easterwood, of Clayton, for appellants.

D. A. Paddock, of Clayton, for appellee.

ROBERTS, J. This action was instituted in the court below by appellee to quiet his title to lots 1 and 2 and the E. $\frac{1}{2}$ of the N. W. $\frac{1}{4}$ of section 31, township 28 N., range 36 E., in Union county, N. M., against the adverse claims of the appellant E. D. Mace. Appellant answered the complaint, setting up that he was the owner of the land by virtue of a certain tax deed issued by the county treasurer of Union county to Bernard A. Gow on a certain tax sale for taxes for the year 1901 upon such land, and by virtue of a deed of conveyance from Gow to the appellant. The appellee replied, admitting the execution of the tax deed, but denied that it was a valid deed.

The cause was tried to the court, and findings of fact made and conclusions of law stated. The court found that appellee's predecessor in title had paid the taxes upon the land for the year 1901; and as appellant based his title upon a tax deed issued upon a certificate of sale for alleged delinquent taxes for that year, it necessarily followed that appellant had no title. Conclusions of law were stated to this effect, and appellee's title to the premises in question was quieted. This appeal is prosecuted to review such judgment.

[1] The facts, briefly stated, are as follows: The land in question was originally entered by one B. M. Rupp, who received a patent for the same some years prior to 1901. He conveyed to J. C. Slack. Just when the conveyance was made does not appear, but presumably prior to the year 1899. Slack later conveyed to a third party, afterwards repurchased the same land, and some two or three years after 1901 Slack conveyed the real estate in question to the appellee. After the

conveyance of Rupp to Slack, the taxing officials of Union county continued to assess the real estate in the name of Rupp. It was also assessed on the tax rolls against J. C. Slack. The tax assessed against the land in the name of Rupp was not paid, and in 1902 the property was sold to Union county on the Rupp assessment for the year 1901. This certificate was purchased by appellant's predecessor in title, Gow, in 1915. As stated, the property during the years 1899, 1900, and 1901 was also assessed in the name of J. C. Slack, and the doubt as to whether this tax assessed against the real estate in the name of Slack was paid or not led to the present controversy. The court found that it was paid, and in this court the burden rests upon the appellant to show that the finding that the tax had been paid is not supported by the evidence. 4 C. J. 777.

[2] Appellant strenuously urges that there is no evidence in the record supporting the finding. The following facts, however, appear: The county treasurer of Union county kept a stub book of tax sales. This book was kept apparently in conformity with section 23, chapter 22, Laws 1899. This section provides:

"The collector shall keep a book of sale containing the date of sale, description of the property sold, name of purchaser and amount for which sold."

The stub book referred to contained all the data required to be kept by the county treasurer under this section, and was evidently kept in compliance with the statute referred to. This stub book shows that certificate of sale No. 10 was issued to W. W. Duke for the property in question, together with other real estate, upon a sale held November 8, 1902, for taxes for the years 1899 and 1901. This contained the notation, "See other side." Certificate No. 11 appeared on the next page, and was denominated "Duplicate of No. 10," and agreed with the stub of certificate No. 10, except that it showed a sale for taxes only for the year 1900 and a slight discrepancy in the interest charge. A redemption certificate was put in evidence, showing redemption on November 8, 1902, by J. C. Slack, from the sale of November 8, 1902, of property sold to W. W. Duke for taxes for the year 1900. The record before us clearly shows that the county treasurer of Union county, during the years in question, kept the records in his office in a very imperfect manner. It is impossible for us to say definitely that they show either that the tax against the property assessed in the name of Slack was paid or was not paid. The trial court was confronted with the necessity of determining this question one way or the other. After carefully reviewing it, the trial judge decided that it showed that the tax had been paid. We cannot say that he was wrong

in this finding. We are satisfied from the record that Slack attempted to pay all the taxes due on the property and to redeem from all sales made.

[3] Appellant in this court argues that the court erred in admitting in evidence the stubs of tax sale certificates Nos. 10 and 11, for the reason that no proper foundation was laid for the introduction of this evidence. In the court below counsel for appellant was asked as to whether he would stipulate that the book of stubs was the official record of the treasurer's office of tax sale certificates, and he answered that he would. In the court below he objected on other grounds. Objections not made in the court below to the admissibility of evidence will not be considered on appeal. *James v. Hood*, 19 N. M. 234, 142 Pac. 162.

Finding no available error in the record, the judgment will now be affirmed; and it is so ordered.

PARKER, C. J., and RAYNOLDS, J., concur.

(25 N. M. 415)

GEREN & HAMOND v. LAWSON.
McKINLEY v. SAME.
(Nos. 2267, 2268.)

(Supreme Court of New Mexico. Sept. 9, 1919.)

(Syllabus by the Court.)

1. JUSTICES OF THE PEACE §164(2)—WHERE NO PROCESS ISSUED AGAINST DEFENDANT, GARNISHMENT PROPERLY DISMISSED.

On appeal from the justice court to the district court, the garnishee against whom judgment has been rendered, where it appears from the transcript of the justice that no summons was issued nor service obtained, either personally, by publication, or otherwise, against the defendant and principal debtor, and that he did not appear and waive service, a district court, on motion, properly adjudged the proceedings to be null and void, and dismissed the case, as "garnishment" is an ancillary proceeding, and not a new or separate suit.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Garnishment.]

2. JUSTICES OF THE PEACE §141(2)—WHERE JUSTICE HAD NO JURISDICTION DISTRICT COURT ACQUIRES NONE IN APPEAL.

The statutory and constitutional provisions, that on appeals from justices of the peace to the district courts the case appealed shall be tried *de novo*, mean that such cases shall be so tried when the justice court had jurisdiction. If the justice court had no jurisdiction of the case, the district court, on appeal from the justice court, acquires none by such appeal, and it cannot be tried *de novo*.

Error to District Court, Otero County; Medler, Judge.

Separate actions by Geren & Hamond and by E. D. McKinley against one Demier, with garnishment against J. L. Lawson. Judgments against garnishee in justice court, and he appealed to district court, wherein his motion for a dismissal of cases was granted, and plaintiff in each case brings error. Judgment dismissing appeals affirmed.

L. R. York and Leo L. Heisel, both of Alamogordo, for plaintiffs in error.

F. C. Wilson and D. K. Sadler, both of Santa Fé, for defendant in error.

RAYNOLDS, J. The facts in these two cases are identical, except as to the amounts involved. Plaintiffs in error brought garnishment proceedings against defendant in error, Lawson, and obtained a judgment against him in the justice court. He appealed to the district court, and, upon his motion for a dismissal of the cases in the district court being granted, plaintiffs in error appealed to this court. No process was issued or served upon Demier, the defendant below. He did not enter his appearance, waive service, nor was he made a party by publication or otherwise.

[1] We hold that the district court rightly dismissed the cases. Garnishment is an ancillary remedy to the main action under which it is brought, and not a separate suit. 20 Cyc. p. 979. Where the court has failed to acquire jurisdiction of the defendant in the principal action by any of the methods authorized by the statute, garnishment proceedings based on the principal action are void. 20 Cyc. p. 1033. From the fact that the garnishee, as in this case, had money or credits in his possession or under his control which belonged to the principal debtor, it does not follow that this money or these credits were rightfully the property of the plaintiff, in the absence of an adjudication to that effect in the main suit between the debtor and creditor, and until these rights are determined a judgment against the garnishee in favor of the creditor is a nullity.

[2] It is urged that on appeal to the district court the case should have been tried de novo under the statute (section 3224, Code 1915) and the Constitution (article 6, § 27). Justice courts and district courts have concurrent jurisdiction in many cases; but where a case is begun in the justice court, and an appeal taken to the district court, if the justice has no jurisdiction, there is nothing to try de novo, and the case, on proper motion, should be dismissed. See Pointer v. Lewis, 181 Pac. 428, where the former decisions by this court are discussed and reviewed.

Finding no error in the record, the judgment in the district court, dismissing the ap-

peal from the justice court, is affirmed; and it is so ordered.

PARKER, C. J., and ROBERTS, J., concur.

(56 Mont. 247)

BARRICK v. PORTER. (No. 4019.)

(Supreme Court of Montana. Sept. 22, 1919.)

1. APPEARANCE ~~§~~13 — DEFENDANT ON APPEARANCE ENTITLED TO NOTICE OF SUBSEQUENT PROCEEDINGS.

After appearance in an action, the defendant, or his attorney, if he has appeared by attorney, is, under Rev. Codes, §§ 7149, 7150, entitled to notice of all subsequent proceedings of which notice is required.

2. COSTS ~~§~~205—ON FAILURE TO SERVE MEMORANDUM OF COSTS, PLAINTIFF CANNOT RECOVER.

Where plaintiff did not deliver to the clerk, and serve upon defendant within five days after verdict, or notice of decision, as required by Rev. Codes, § 7170, a verified memorandum of the items of his costs and disbursements, plaintiff was not entitled to recover costs, even though defendant had not appeared, so as to be entitled to notice of proceedings.

Appeal from District Court, Fergus County; Roy E. Ayers, Judge.

Suit by Louis E. Barrick against John R. Porter. From a decree for plaintiff, defendant appeals. Modified and affirmed.

See, also, 54 Mont. 628, 174 Pac. 1178.

E. K. Cheadle, of Lewistown, for appellant.

Blackford & Huntoon, of Lewistown, for respondent.

BRANTLY, C. J. This cause is before this court upon an appeal from a decree in favor of plaintiff. The controversy tried and determined in the district court arose over the right to the use of 530 inches of the water flowing in Judith river, in Fergus county, acquired by an appropriation thereof by a predecessor of the plaintiff on August 1, 1881, for the purpose of irrigating certain farming lands described in the complaint.

Upon application of the plaintiff, when the complaint was filed, the court issued an order requiring the defendant to show cause why he should not be restrained, pending the action, from interfering with plaintiff's use of the water. The defendant was also restrained from interfering with plaintiff's use pending a hearing under the order. The hearing was had on August 15, 1916. From an entry in the minutes of the court, made at the conclusion of the hearing, it appears that the question submitted for determination was whether the restraining order should not be

made permanent; in other words, whether upon the evidence submitted the plaintiff was entitled to the relief demanded in his complaint. The determination of the controversy was taken under advisement by the court, and so held until September 8, 1916, when the court made its formal findings and conclusions of law, and rendered a final decree in favor of the plaintiff. The defendant never made appearance in the action by answer, demurrer, or otherwise than by taking part in the hearing on the order to show cause. On September 5, 1916, while the matter was under advisement, the clerk, at the request of counsel for plaintiff, entered the defendant's default. The findings were made and the decree entered thereon as upon default. The decree adjudged the defendant to pay the costs of the action, amounting to \$82.90.

The record discloses that the plaintiff never filed with the clerk, nor served upon the defendant, a cost bill. The only contention made in this court is that the court erred in adjudging defendant to pay costs, and that the defendant is entitled to have the decree modified in this regard. This contention must be sustained.

[1, 2] After appearance in an action the defendant, or his attorney, if he has appeared by an attorney, is entitled to notice of all subsequent proceedings of which notice is required. Rev. Codes, §§ 7149, 7150. In the absence of a general appearance, he is not entitled to such notice. Whether the defendant made such an appearance in the case, by taking part in the hearing of the order to show cause and at the close thereof submitting the case for final determination on the merits, so as to prevent the entry of default and to entitle him to notice of subsequent proceedings, need not now be determined. In the absence of a compliance by the plaintiff with the requirements of section 7170 of the Revised Codes, he was not entitled to recover his costs. *Orr v. Haskell*, 2 Mont. 350; *Butte Northern Copper Co. v. Radmilovich*, 39 Mont. 157, 101 Pac. 1078. Section 7169 points out particularly what costs the successful party is entitled to recover. Section 7170 declares:

"The party in whose favor judgment is rendered, and who claims his costs, must deliver to the clerk, and serve upon the adverse party, within five days after the verdict or notice of the decision of the court or referee, * * * a memorandum of the items of his costs and necessary disbursements in the action or proceeding, which memorandum must be verified by the oath of the party, or his attorney or agent, or by the clerk of his attorney, stating that to the best of his knowledge and belief the items are correct, and that the disbursements have been necessarily incurred in the action or proceeding."

The plaintiff, therefore, was not entitled to recover his costs, under the express provision of this section, without presenting his claim

for them in a verified bill, whether the defendant was entitled to service or not.

The cause is remanded to the district court, with directions to modify the decree by striking out the item of costs. As thus modified, the decree will stand affirmed.

Modified and affirmed.

HOLLOWAY, HURLY, PATTEN, and COOPER, JJ., concur.

(56 Mont. 244)

STATE ex rel. ANDERSON v. DISTRICT COURT OF SEVENTH JUDICIAL DIST. IN AND FOR DAWSON COUNTY et al. (No. 4439.)

(Supreme Court of Montana. Sept. 22, 1919.)

MANDAMUS \Leftrightarrow 3(11)—ON FAILURE OF CLERK TO ENTER JUDGMENT, REMEDY BY MOTION IN ORIGINAL ACTION.

Nothing remaining to be done after rendition of judgment by court and entry thereof in its minutes, but to enter it in the appropriate book, duty to do which is imposed, by Rev. Codes, § 3048, subd. 3, on the clerk, mandamus will not issue to judge or court to sign and enter it; the remedy, on failure of clerk to enter it, being by application to trial court, in the cause in which it was rendered, for order to the clerk.

Original proceeding in mandamus by the State, on the relation of Albert Anderson, against the District Court of the Seventh Judicial District in and for the county of Dawson and O. C. Hurley, Judge thereof. Dismissed.

S. C. Ford, of Helena, Albert Anderson, of Glendive, and W. D. Gills, of Seattle, Wash., for relator.

H. J. Haskell and D. J. O'Neil, both of Glendive, and Walsh, Nolan & Scallon, of Helena, for respondents.

COOPER, J. This action is the outgrowth of proceedings had in the district court of the Seventh judicial district, in and for Dawson county, entitled "The State of Montana ex rel. Albert Anderson v. Frank Oliver, and Certain Intoxicating Liquors" (No. 3526). The cause came on regularly for trial on May 3d before the court sitting without a jury. At the close of the trial the case was dismissed, and the following entry recorded in the minutes of the court:

"At this time, through his attorney, D. J. O'Neil, defendant moved the court to dismiss the action. Court now grants motion to dismiss the action, and ordered sheriff to return all of the liquors and property seized and taken by undersheriff of Dawson county."

In his petition relator avers—and it is not denied by respondents in their answer

—that on June 16th he presented for signature and entry by the trial judge a proposed judgment together with the following motion:

"Comes now the above-named plaintiff and moves the court that the defendant herein be required to enter, and the court to sign and enter, the judgment ordered herein on the 8d day of May, 1919 (a copy of the proposed judgment to be entered being attached hereto): that the purpose and object of the entry of said judgment is to permit the completion of the judgment roll herein, and to permit plaintiffs to perfect their appeal herein; that defendants refuse and neglect to have said judgment entered."

The motion was denied. Thereafter, on the 28th day of June, application, on the petition filed herein, was made to this court, praying that an alternative writ of mandate be issued out of this court directed to Hon. C. C. Hurley, "commanding him, as such judge, to forthwith make, sign, and enter a judgment" in cause No. 3526, or "show cause why he had not done so." The alternative writ was granted, and the cause is before us on the merits.

But one question is now presented for our consideration, namely: Is the writ properly directed? The motion of defendant, made at the close of the trial, for a dismissal of the action, was granted by the court, and the order thus made recorded in its minutes. What judicial duty, then, had the court not performed? Its order of dismissal put an end to the case and constituted the rendition of the judgment. *Holter Lumber Co. v. Fireman's F. Ins. Co.*, 18 Mont. 282, 286. 45 Pac. 207; 1 Black on Judgments, § 21. Nothing further remained to be done, but the ministerial act of entering the judgment in the appropriate book provided by law; and, by subdivision 3 of section 3048 of the Revised Codes, that duty is imposed upon the clerk. "Rendering judgment is the judicial act of the court. Entering it is the ministerial act of the clerk." *Parrott v. Kane*, 14 Mont. 23, 27, 35 Pac. 243, 244; *State ex rel. Dolenty v. District Court*, 42 Mont. 170, 173, 111 Pac. 731; 15 B. C. L. § 11, p. 578; 23 Cyc. 835. The judgment of the court is its pronouncement on the issue submitted, the record being merely historical and evidentiary. *Montgomery v. Viers*, 180 Ky. 694, 114 S. W. 251. After the rendition of a judgment by the court and its entry in the minutes thereof, in the absence of a statutory command to that effect, a judge is not required to affix his signature to a judgment. It is, however, the clear duty of the clerk to enter judgment in the manner prescribed by law. Upon the failure of the clerk to do so, application should have been made, in cause No. 3526, to the district court for an order requiring him to perform this ministerial duty. *State ex rel. Dempsey v. District Court*, 24 Mont. 566,

63 Pac. 389; *State ex rel. Moshner v. Wright*, 26 Mont. 540, 69 Pac. 101, 91 Am. St. Rep. 421.

In the case of *State ex rel. Dolenty v. District Court*, supra, substantially the same point here involved was decided. The trial court having refused to have a judgment entered, proceedings in mandamus were instituted in this court to compel it to do so. Mr. Justice Holloway, speaking for the court, said:

"The duty of making such entry is imposed by the statute upon the clerk of the district court, and not upon the court or judge. There is not anything in this record to show that the clerk has ever refused to act in compliance with relator's views. But, however that may be, we cannot by mandamus compel the district court, or its judge to perform an act, the performance of which is imposed by law upon another officer, and not upon the court or judge."

The alternative writ heretofore issued is therefore quashed and the proceeding dismissed.

Dismissed.

BRANTLY, C. J., and HOLLOWAY and PATTEN, JJ., concur.

Mr. Justice HURLY did not hear the argument and takes no part in the foregoing decision.

(56 Mont. 241)

STATE v. GRIFFITH. (No. 4340.)

(Supreme Court of Montana. Sept. 22, 1919.)

WAR — EXPRESSION OF OPINION AS TO OUTCOME OF CRIMINAL TRIAL IN OTHER STATE NOT SEDITION.

Defendant, who in vile and vulgar language expressed his opinion that the I. W. W., of whom he was a member and officer, were going to win the federal prosecution of certain of their ringleaders in Illinois, did not thereby commit sedition, as defined by Laws Ex. Sess. 1918, c. 11, which was an emergency war measure.

Appeal from District Court, Yellowstone County; A. O. Spencer, Judge.

J. A. Griffith was convicted of sedition, and from the judgment, and an order denying new trial, he appeals. Reversed, with directions to dismiss the information and discharge defendant.

C. E. Collier, of Spokane, Wash., Geo. F. Vanderveer, of Seattle, Wash., and Nolan & Donovan, of Butte, for appellant.

S. C. Ford and Frank Woody, both of Helena, for the State.

HOLLOWAY, J. The defendant was convicted of the crime of sedition, and appealed from the judgment, and from an order denying him a new trial.

The evidence introduced on behalf of the state is to this effect: On July 8, 1918, the accused entered a saloon in Billings and engaged the proprietor, L. W. Lamb, in conversation, during the course of which accused stated that he was a member and officer of the Industrial Workers of the World, and, referring to the case of *United States v. Haywood et al.*, then on trial in Chicago, asked Lamb what he thought of it and its probable outcome. Lamb replied, "I don't know," and the accused then made the statement which forms the basis of the charge against him, and repeated it immediately thereafter to J. W. Sullivan. The language imputed to him is too vile and vulgar to be repeated here. Under no possible construction could it be given literal application. It was a figurative expression, understood by Lamb and Sullivan to be such, and to convey the meaning: "We [the Industrial Workers of the World] are going to win the case." This interpretation is the only one which could be placed upon the language, when it is considered with the context.

It is conceded by the Attorney General that, if the accused had expressed his opinion in chaste English, or, in other words, had said merely, "We are going to win the case," no possible exception could have been taken to his statement, and no criminal action could have been predicated upon it. Does the fact that he said in effect, "We are going to win the case," but clothed his declaration in coarse, vulgar language, subject the accused to the penalty provided by chapter 11, Laws Extraordinary Session 1918, the statute defining sedition?

The Sedition Act is an emergency war measure, designed to secure to the general government the utmost assistance possible in its prosecution of the world war, by restraining acts or speech reasonably calculated to incite or inflame resistance to the duly constituted authorities exercised to mobilize the resources of the country and exert them in the most effective manner. Every act denounced by the statute has such a direct and immediate relationship to the prosecution of the war that in the very nature of things it is reasonably calculated to hamper the efforts of the government, impede its progress, or defeat its purpose. It was never the intention of the lawmakers to establish rigorous censorship over the common conversation of individuals, or to require the citizen to refine his speech to conform to the standard of belles-lettres.

Neither courts nor court officers are above criticism, but the language imputed to the accused does not rise even to the dignity of criticism. It is nothing more than the expression of an opinion as to the probable outcome of a trial conducted 1,500 miles away. It does not attack our form of government, nor any governmental agency. It

could not under any possible construction tend to bring the form of government, the Constitution, the soldiers, sailors, flag, or uniform, into contempt, or to incite or inflame resistance to duly constituted authority. The law looks beyond the mere form of expression to the substance, and will hold the accused guilty or innocent, according to the meaning which his language was obviously intended to convey.

The use of the language imputed to the accused does not constitute the crime of sedition, and for this reason the judgment and order are reversed, with directions to the lower court to dismiss the information and discharge the defendant.

Reversed, with directions.

BRANTLY, C. J., and HURLY, PATTEN, and COOPER, JJ., concur.

(108 Wash. 437)

GOODRICH et al. v. STARRETT et al.
(No. 15319.)

(Supreme Court of Washington. Oct. 10, 1919.)

NUISANCE §3(1)—UNDERTAKING ESTABLISHMENT IN PURELY RESIDENTIAL DISTRICT A "NUISANCE."

Under Rem. Code 1915, § 8309, defining nuisances, and section 943, providing that anything such "as to essentially interfere with the comfortable enjoyment of life and property, is a nuisance," an undertaking establishment and morgue, conducted in a dwelling house in a purely residential district, where bodies of persons dying from contagious or infectious diseases, as well as others, are prepared for burial, is a "nuisance," which may be enjoined.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Nuisance.]

Department 2.

Appeal from Superior Court, Jefferson County; John M. Ralston, Judge.

Action by Charles F. Goodrich and others against George E. Starrett and another. From a judgment granting a permanent injunction, the defendants appeal. Affirmed.

A. R. Coleman, of Port Townsend, for appellants.

Allan Trumbull, of Port Townsend, for respondents.

FULLERTON, J. This is an action to enjoin the maintenance of an undertaking establishment and morgue, alleged in the complaint to constitute a nuisance. The trial court entered a permanent injunction, and defendants appeal.

The facts appearing in the record are in substance these: The appellant Starrett is the owner of a building originally construct-

ed as a dwelling house, situated in a residence portion of the city, and surrounded by the dwelling houses of others in use as residences by their owners. For some 20 years prior to the commencement of the action, Starrett, either by himself or in partnership with others, had conducted an undertaking establishment and morgue in the city of Port Townsend, at a place remote from residences, and to which there was seemingly no objection because of its location. Some three years prior to the commencement of the action Starrett entered into partnership with his coappellant, Weeks, for the conduct of the business, and shortly prior to the commencement of the action moved the business to the dwelling house of Starrett before mentioned. At the time of the removal the house was somewhat out of repair, one of the windows was entirely gone, and others had in them broken panes of glass, all were without fly screens, or screens of any sort, save for some sash curtains of a flimsy nature, and there were no proper sewer connections, necessary, as one of the appellants admitted, to the conduct of a first-class morgue. With the house in this condition, the appellants began to receive dead bodies for the purpose of preparing them for burial; those dying from contagious and infectious diseases as well as others. Their testimony was, however, to the effect that the building was being put in repair as rapidly as possible.

The respondents severally own dwelling houses, which are adjacent to and surround the house in which the appellants are conducting their business. The testimony of the respondents was to the effect that the conduct of the business greatly interfered with the enjoyment of their homes; that they lived in dread of acquiring some contagious disease; that the constant conveying of dead bodies in and out of the building, the conducting of funeral services therein, accompanied, as they are, by the hysterical sobbing of the relatives of the dead, has a depressing effect upon them, especially the women folk of the families, who, because of the nature of their duties, must remain in the homes and be constant witnesses of the business conducted by the appellants. As typical of the testimony concerning the effect the conduct of the business had upon the surrounding families, we quote from the testimony of the respondent Mrs. Goodrich:

"I am unable to relish my meals or sleep properly; it is on my mind continually. It has a depressing effect upon me. I don't think I am over-sensitive. I have been with the dead at the time of dying, and have no fear of spirits or anything like that; but it is very disagreeable. I have a constant fear of contagion from living in close proximity to a morgue, on account of my children and family. I have noticed a great many flies around my premises lately. I am continually fighting them in the house; we are in fear of them all the time. It suggests this morgue the moment I see a

fly. I can see in the morgue. I can see from my back door the entrance there, I presume, to the basement or the cellar of the house, and upstairs I can see what goes on in the street. I can hear hysterical sobbing and the music that is played there. From my yard I can see them carrying in and out dead bodies. It spoils the enjoyment of our home. I don't care to invite guests to dine at my table. I know that a great many of my friends have the same feeling that I have in regard to it. My chief pleasure has been in caring for my garden, and I am denied that pleasure. If the morgue continues to run in close proximity to my residence, I feel that I cannot live there, and will want to move as soon as we are able."

There was testimony, also, that the permanent operation of the business will greatly decrease the money value of the surrounding property, and testimony of a physician, called as an expert, to the effect that contagious diseases could be carried from the dead bodies in the morgue to the inhabitants of the surrounding dwellings, although it can be gathered from his evidence that he thought the probability somewhat remote.

The testimony of the respondents as to the danger to them arising from the presence of the undertaking establishment was denied by the appellants, and their testimony tended also to minimize the injury testified by the respondents to arise from the general conduct of the business. It is the appellants' contention that the facts do not justify the judgment of the court. Attention is called to the general rule that the business of an undertaker is not a nuisance per se, and to the corollary of the rule that, before it can be held to be such, some special circumstance must be shown taking the particular business from without the rule, and argue that the evidence here fails to disclose any such special circumstance.

The Code, under the chapter entitled "Nuisances," defines a nuisance as follows:

"Nuisance consists in unlawfully doing an act, or omitting to perform a duty, which act or omission either annoys, injures or endangers the comfort, repose, health or safety of others, offends decency, or unlawfully interferes with, obstructs or tends to obstruct, or render dangerous for passage, any lake or navigable river, bay, stream, canal, or basin, or any public park, square, street or highway, or in any way renders other persons insecure in life, or in the use of property." Rem. Code, § 8309.

In the chapter of the Code prescribing a remedy for the abatement of nuisances, a nuisance is further defined as:

"* * * Whatever is injurious to health, or indecent, or offensive to the senses, or an obstruction to the free use of property, so as to essentially interfere with the comfortable enjoyment of life and property. * * *" Rem. Code 1915, § 943.

In *Everett v. Paschall*, 61 Wash. 47, 111 Pac. 879, 31 L. R. A. (N. S.) 827, Ann. Cas.

1912B, 1128, we said that these statutes somewhat widened the common-law definition of nuisance, in that a new element was added—"that is, the comfortable enjoyment of one's property"—and it was there held that dread of disease and fear produced thereby, contrary to the holding of a case founded upon the common law, warranted injunctive relief against a sanitarium for the care of patients afflicted with tuberculosis, which it was sought to establish in a residence district of the city; and this, notwithstanding the expert testimony which tended to show that the danger of contagion to the surrounding residents was remote, and the fear more imaginary than real. In *Densmore v. Evergreen Camp No. 147, W. O. W.*, 61 Wash. 230, 112 Pac. 255, 31 L. R. A. (N. S.) 608, Ann. Cas. 1912B, 1206, the principle was applied to an undertaking establishment. It was there held that such an establishment could be enjoined as a nuisance, when it was sought to conduct it in a residence district, notwithstanding it was maintained with every sanitary precaution.

The principle of these cases clearly justifies the judgment of the trial court. The witness from which we have quoted but voiced the feeling and sentiment of the ordinary individual who is compelled to live near an institution of this sort. The injury to her is physical and actual; it does not depend upon imagination. There are persons, of course, whose occupations have brought them to endure conditions of this sort without suffering or discomfort. But this is the result of their environment. The ordinary individual cannot endure them without actual discomfort and physical suffering, until, at least, his senses have become hardened by a long period of exposure to them. In addition to this, there is the positive showing of destruction of property values. While counsel question the sufficiency of the evidence in this respect, we think the only thing indefinite about it is the amount of the decrease. That there is a substantial decrease we think was abundantly proven. Indeed, it would seem that it is within the ordinary knowledge of mankind that the erection of an undertaking establishment and morgue in a district of a city suitable only for, and used only for, residence purposes, would decrease the value of the surrounding property. Certainly no one, possessing the sensibilities of the ordinary being, would take up a residence in its vicinity as long as other places were obtainable.

But perhaps the appellants' principal reliance for reversal is the case of *Rea v. Tacoma Mausoleum Association*, 103 Wash. 429, 174 Pac. 961. In that case we held that an addition to a mausoleum would not be restrained as a nuisance, injuriously affecting adjoining residence property, when unattended by injurious or offensive drainage or

fumes sensible to the complaining party. In the case, however, the cases of *Everett v. Paschall* and *Densmore v. Evergreen Camp No. 147, W. O. W.*, were noticed, and held not to be in conflict with the principle there announced. We are still of the same opinion, and hold that the case in no way reflects upon the earlier cases as authority.

We think it needless to pursue the inquiry further. Our conclusion is that the judgment appealed from should stand affirmed. It is so ordered.

HOLCOMB, C. J., and MOUNT and BRIDGES, JJ., concur.

(32 Idaho, 397)

LEMP v. LEMP.

(Supreme Court of Idaho. Sept. 20, 1919.)

1. EXECUTORS AND ADMINISTRATORS §=194(1) —COURT MUST SET APART EXEMPT PROPERTY TO SURVIVING SPOUSE.

Where a proper application is made under Comp. Laws, § 5441, the probate court is bound to set aside the exempt property to the surviving spouse; the words therein, "may set apart," being construed to mean "must set apart."

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, May.]

2. EXEMPTION OF PROCEEDS OF DEBTOR'S LIFE INSURANCE—STATUTE.

Comp. Laws, § 4480, subd. 9, exempts all moneys, benefits, privileges, or immunities accruing or in any manner growing out of any life insurance on the life of a debtor, where the annual premiums do not exceed \$250.

3. EXECUTORS AND ADMINISTRATORS §=186— EXEMPT PROPERTY ALLOWANCE TO SURVIVING WIFE SUPERIOR TO DEVISE.

The right of the surviving wife to have exempt property set apart to her is superior to any devise or bequest of such property.

4. EXECUTORS AND ADMINISTRATORS §=173— TESTAMENTARY DISPOSITION SUBORDINATE TO WIDOW'S SUPPORT.

The power of testamentary disposition of property as conferred and defined by statute is not paramount, but is subordinate to the authority conferred upon the probate court to appropriate the property for the support of the widow of the testator.

Appeal from District Court, Ada County; Charles P. McCarthy, Judge.

Proceeding by Mary W. Lemp against Herbert Lemp, executor, for partial distribution of the estate of Edward Lemp, deceased. From a judgment of the district court, reversing a judgment of the probate court, setting aside the proceeds of insurance policies on life of Edward Lemp, deceased, to his widow, Mary W. Lemp, the executor, ap-

peals. Reversed and remanded, with direction to enter judgment affirming the order of the probate court.

See, also, 184 Pac. 224.

Richard H. Johnson, of Boise, for appellant.

O. Homer Lingenfelter and A. A. Fraser, both of Boise, for respondent.

BUDGE, J. This is an appeal from a judgment of the district court, reversing a judgment of the probate court of Ada county, setting aside the proceeds of two insurance policies on the life of Edward Lemp, deceased, to Mary W. Lemp his widow. Lemp died September 6, 1912, testate, holding two policies for \$2,500 each in the New York Life Insurance Company, the annual premiums of which aggregated less than \$250.

The probate court set apart the proceeds of these policies to the widow, on the theory that they were community property and did not pass by the will. The district court reversed the judgment, on the theory that the proceeds of the policies were separate property, and passed by the will to the legatees, Herbert and Bernard Lemp, brothers of the deceased. In order that final disposition might be made of the subject-matter in litigation, a stipulation was entered into by counsel for the respective parties, and filed in the probate court, to the effect that the petition should be considered amended, so as to permit the court to make such order with reference to such proceeds as the law may require. The question, therefore, is presented whether under any provision of the law the widow, upon her application therefor, would be entitled to have set aside to her the proceeds of the insurance policies.

[1, 2] As we view the case, it is, immaterial, and hence unnecessary for us to determine, whether the proceeds of these policies were community or separate property. Comp. Laws, § 5441, provides in part as follows:

"Upon the return of the inventory, or at any subsequent time during the administration, the court or the probate judge may, on his own motion or on petition therefor, set apart for the use of the surviving husband or wife, or the minor children of the decedent, all property exempt from execution. * * *

Comp. Laws, § 4480, subd. 9, exempts:

"All moneys, benefits, privileges or immunities accruing or in any manner growing out of any life insurance on the life of the debtor to an amount represented by an annual premium not exceeding \$250."

Under section 5441, supra, it was the duty of the probate court or judge, either on his own motion or on petition, as in this case, to set apart for the use of the surviving wife all property exempt from execution. Estate of Samuel Miller, 121 Cal. 353, 53 Pac. 906;

Holmes v. Marshall, 145 Cal. 777, 79 Pac. 534, 69 L. R. A. 67, 104 Am. St. Rep. 86, 2 Ann. Cas. 88. In the latter case the Supreme Court of California said:

"In construing this statute, as in the construction of all statutes, it is the duty of the court to arrive at the intent of the Legislature, if it can be done, from the language used in the statute. Statutes exempting property from execution are enacted on the ground of public policy, for the benevolent purpose of saving debtors and their families from want by reason of misfortune or improvidence. The general rule now is to construe such statutes, liberally, so as to carry out the intention of the Legislature, and the humane purpose designed by the lawmakers. 12 Am. & Eng. Ency. of Law (2d Ed.) pp. 75, 76, and cases cited; In re McManus, 87 Cal. 294, 22 Am. St. Rep. 250, and note, 25 Pac. 413, 10 L. R. A. 587; Spence v. Smith, 121 Cal. 536, 66 Am. St. Rep. 62, 53 Pac. 653 [1933]. * * *

"As to the policy payable to and collected by the estate, the estate was the beneficiary, and the money was for the reasons before stated exempt from execution. It was therefore assets of the deceased, exempt from execution, and was properly set apart to the widow as being so exempt. Code Civ. Proc. § 1465; Estate of Samuel Miller, 121 Cal. 353, 53 Pac. 906. The administrator or executor is not the owner of any part of the estate. He, in his official character, only holds it in trust for the parties entitled to it, subject to the purposes of administration. The title to the insurance money came to respondent Annie J. Jenkins through the estate and under the order setting it apart, and vested the title in her as effectively as if she had been named as the beneficiary of the policy. We can see no reason why the insurance money coming to her directly as beneficiary should be exempt from execution, and not that coming to her indirectly through the estate and the order setting it apart. In either case it is exempt from execution. In one case the instrument of life insurance gives the title; in the other, the law gives it to her. The statute provides that all property exempt from execution shall be set apart for the use of the surviving husband or wife. Code Civ. Proc. § 1465."

In view of the stipulation and the provisions of Comp. Laws, § 5441, the probate court was bound to set aside the exempt property for the surviving spouse; the words therein, "may set apart," being construed to mean "must set apart." Estate of Ballentine, 45 Cal. 698; In re Still, 117 Cal. 513, 49 Pac. 463; In re Davis, 69 Cal. 458, 10 Pac. 671.

[3] Nor do we think it is material or necessary to determine whether the proceeds of these policies purported to pass by the will. The right of the surviving wife is superior to any devise or bequest of such property. In re Davis, supra; Estate of Ballentine, supra; Sulzberger v. Sulzberger, 50 Cal. 385.

[4] In the latter case, the court said:

"The power of testamentary disposition of property, as conferred and defined by statute,

is not paramount, but is subordinate to the authority conferred upon the probate court to appropriate the property for the support of the family of the testator, and for a homestead for the widow and minor child or children as well as for the payment of the debts of the estate."

To the same effect are *In re Lahiff*, 86 Cal. 153, 24 Pac. 850; *In re Walkerley*, 77 Cal. 642, 20 Pac. 150; *Eproson v. Wheat*, 53 Cal. 715; *Estate of Huelsman*, 127 Cal. 275, 59 Pac. 776; *In re Kennedy Estate*, 157 Cal. 522, 108 Pac. 282, 29 L. R. A. (N. S.) 428; *In re Levy's Estate*, 141 Cal. 652, 75 Pac. 301, 99 Am. St. Rep. 92; *In re Gray's Estate*, 159 Cal. 160, 112 Pac. 890.

The judgment of the district court is reversed, and the cause is remanded, with instructions to enter up a judgment affirming the order of the probate court setting aside the proceeds of the policies to appellant. Costs are awarded to appellant.

MORGAN, O. J., and RICE, J., concur.

(32 Idaho, 393)

LEMP v. LEMP et al.

(Supreme Court of Idaho. Sept. 20, 1919.)

1. COURTS ⇨202(5)—ON APPEAL FROM PROBATE TO DISTRICT COURT, IMMATERIAL WHETHER EVIDENCE WAS OFFERED BELOW.

Upon appeal from the probate court to the district court, it is immaterial whether evidence was offered in the probate court.

2. COURTS ⇨202(5)—ON APPEAL FROM PROBATE TO DISTRICT COURT, QUESTIONS OF LAW MUST HAVE BEEN FIRST RAISED BELOW.

If such an appeal be taken upon questions of law alone, the district court can review only such questions of law as were raised in the probate court upon the record.

3. EXECUTORS AND ADMINISTRATORS ⇨194(5)—WIDOW PRESUMED MEMBER OF FAMILY.

The presumption is that a decedent's widow was a member of his family, and proof of the former fact makes a prima facie showing of the latter.

4. EXECUTORS AND ADMINISTRATORS ⇨194(5)—OBJECTOR TO WIDOW'S ALLOWANCE HAS BURDEN OF PROOF.

The burden is upon one who objects to the granting of a widow's allowance on the ground that she was not a member of decedent's family, if the proof shows that she was in fact the widow of decedent.

Appeal from District Court, Ada County; Charles P. McCarthy, Judge.

Petition in probate court by Mary W. Lemp, as widow of Edward Lemp, deceased, for a monthly allowance out of his estate, with objections and application for hearing by Herbert Lemp, executor, and Herbert

Lemp and another, legatees. From a judgment of the district court, affirming an order of the probate court granting the allowance, the objectors appeal. Affirmed.

See, also, 184 Pac. 222.

Alfred A. Fraser and Clinton H. Hartson, both of Boise, for appellants.

R. H. Johnson, of Boise, for respondent.

BUDGE, J. This is an appeal from a judgment of the district court, affirming an order of the probate court of Ada county, allowing respondent, Mary W. Lemp, the petitioner therein, \$50 per month out of the estate of decedent, Edward Lemp.

A petition had been filed in the probate court for an allowance of \$100 per month, alleging, among other things, that the petitioner was the widow of the decedent. Appellants filed an application for a hearing on the petition, together with their objections to the granting thereof, and a written offer of proof to sustain such objections. This offer contained no denials of any of the allegations of the petition for family allowance, but consisted of certain affidavits attached to the application for a hearing upon the petition. No witnesses were called or examined, and no application was made to the court for a continuance or for additional time within which to procure witnesses. It is admitted that the petitioner was the widow of decedent, and had never, at any time, received any money or property of any kind from his estate since his death.

The appeal to the district court was on questions of law alone. The principal, if not the only ground relied upon by appellants upon this appeal, relates to the fourth objection filed in the probate court, which is as follows:

"For the reason that petitioner is not a member of decedent's family, she having voluntarily separated from him more than two years before his death."

[1, 2] There is only one way in which the evidence can be reviewed upon appeal from the probate court, and that is by an appeal on questions of law and fact. Rev. Codes, § 4836. Even such an appeal does not properly involve what is commonly understood as a review of the evidence, for in such cases the trial must be de novo. Upon this question this court has held that:

"When the appeal to the district court was completed, and the case transferred to that court by appeal, the case stood there for retrial, and whether or not evidence was offered in the probate court is of no consequence whatever." *Estate of Christensen*, 15 Idaho, 692, 99 Pac. 829; *Kent v. Dalrymple*, 23 Idaho, 694, 132 Pac. 301.

When, as in this case, the appeal to the district court is upon questions of law alone,

that court can review only such questions of law as were raised in the probate court upon the record. *Estate of McVay*, 14 Idaho, 56, at page 69, 93 Pac. 28.

[3] Appellants lay great stress upon the contention that the showing that respondent was the widow of decedent is not sufficient to establish prima facie that she was a member of decedent's family, and insist that the burden was upon respondent to introduce affirmative evidence upon this point. We cannot agree with this contention. In the absence of any showing to the contrary, the presumption is that decedent's widow was a member of his family. The Supreme Court of Indiana, discussing this point, has said:

"It was not necessary for the claimant to show in her petition that she had not deserted her husband, and that she was not living in adultery at the time of his death. In the absence of averment and proof to the contrary, the presumption is in favor of chastity, and that a wife has not abandoned her husband to live in adultery with another." *Sherwood v. Thomasson*, 124 Ind. 541, 24 N. E. 834.

To the same effect are *In re Edwards*, 58 Iowa, 431, 10 N. W. 793; *Jones v. Cooner*, 142 Ga. 127, 82 S. E. 445; *Linares v. De Linares*, 93 Tex. 84, 53 S. W. 579; *O'Neill's Estate*, 11 Pa. Co. Ct. R. 491; *Gray v. Ray*, 19 Ga. App. 510, 91 S. E. 901.

[4] All of the foregoing authorities sustain the proposition that the burden is upon the objector to rebut the prima facie right of the widow to her allowance, and to sustain the objection thereto based upon the ground that the widow was not a member of decedent's family.

Upon the record before us, it is difficult to see how the district court could have done otherwise than to affirm the order of the probate court.

The judgment is affirmed. Costs are awarded to respondent.

MORGAN, C. J., and RICE, J., concur.

(32 Idaho, 408)

KIRK v. MADAREITA et al.

(Supreme Court of Idaho. Sept. 24, 1919.)

1. ANIMALS ⇐100(8)—EVIDENCE ⇐501(10)
—UNDER TWO MILE LIMIT LAW, DAMAGE TO
RANGE BY TRESPASSING SHEEP RECOVERABLE.

Under the two-mile limit law the plaintiff is entitled to recover the actual damage sustained by reason of the loss or injury to the range caused by trespassing sheep. The witnesses should be required to give to the jury such facts, information, and incidents of the damage as will enable the jury to make its own calculation and form its own conclusions as to the aggregate damage sustained.

2. DAMAGES ⇐142—PLEADING OF SPECIAL DAMAGES.

Special damages must be pleaded before evidence thereof can be received or a recovery had.

Appeal from District Court, Ada County; Carl A. Davis, Judge.

Action by Edgar Kirk against Ysidro Madareita and another to recover damages for the violation of Comp. Laws, § 1217. Judgment for plaintiff. From the judgment, and an order denying a motion for a new trial, defendants appeal. Reversed.

Frawley & Koelsch, of Boise, for appellants.

Oppenheim & Lampert, of Boise, and Shad L. Hodgkin, of Twin Falls, for respondent.

REDDOCH, District Judge. This action was commenced by respondent to recover damages under the two-mile limit law (C. L. §§ 1217 to 1219). The case was tried to a jury, resulting in a verdict for respondent, upon which judgment was entered for \$100. Appellants moved for a new trial, which was denied, and this appeal is from the order denying the motion for a new trial, and also from the judgment.

The specifications of error are as follows: First, insufficiency of the evidence to justify the verdict; second, said verdict is against law; and, third, errors in law occurring at the trial. The first and second specifications may be considered together. The complaint alleges that respondent was the owner of certain lands, and was residing in a dwelling house owned by him situated thereon; that he was the owner of 30 head of cattle and several head of horses; that it was necessary for him to have the grass near and within two miles of his dwelling; that appellants were the owners, in possession of, and chargeable with certain sheep; that between March 20, 1915, and April 25, 1915, said sheep were allowed to graze within two miles of said dwelling house; that the grass and pasture in the vicinity of plaintiff's premises and within two miles thereof was totally destroyed, and that during said time said sheep were a constant bother, damage, and annoyance to respondent, to his damage in the sum of \$275.

[1] The testimony shows that respondent was, at the times alleged, residing on the lands owned by him; adjoining it there was unappropriated public domain; that he also at the same time was the owner of about 30 head of cattle and about 8 head of horses; that appellants' sheep, about 5,000 in number, were herded or permitted to graze on the public unappropriated lands within two miles of his dwelling. With this as a foundation, respondent and certain of his witnesses, over appellants' objections, were permitted to state the amount of damage which re-

spondent sustained, as follows: Respondent stated his damage was \$375, but that he only claimed damage in the sum of \$275. Mrs. Kirk estimated the damage at \$275, and Ben Rice estimated the damage at \$250. Upon cross-examination respondent gave the basis of his estimate as follows:

"The only way I could place my damage was at the time I put running after my stock, the damage to my stock, and the damage to the range."

The witness Ben Rice gave the basis of his estimate as follows:

"Upon the grass that was damaged that was inside two miles of his place."

Mrs. Kirk furnished no basis for her estimate.

This, in substance, was the evidence upon which the jury returned its verdict. We fail to see how it could intelligently arrive at any stated amount. The evidence did not disclose the extent or area over which the grass was eaten or destroyed, or that respondent required the grass so eaten or destroyed for his stock, or that his stock would probably have secured the grass, or that there was not sufficient grass or pasturage left for his stock after the sheep had been there, or that the grass was not, in fact, eaten by other stock which had an equal right with respondent's to be there; no evidence as to the nature or character of the damage to respondent's stock, or the value of the range per month or otherwise for each head of such stock. It is contended that respondent could only recover general damages under his complaint, and that there was no competent evidence of such damage. The plaintiff is entitled to recover the actual damage sustained by reason of the loss or injury to the range caused by trespassing sheep. *Roseborough v. Whittington*, 15 Idaho, 100, 96 Pac. 437; *Chandler v. Little*, 30 Idaho, 119, 163 Pac. 299; *Smith v. Benson*, 178 Pac. 480; *Fleming v. Benson*, 178 Pac. 482.

Under the facts disclosed by the record, it was error for the court to permit the witnesses to give lump sum estimates of the damage. *McGuire v. Post Falls Lbr. & Mfg. Co.*, 23 Idaho, 608, 131 Pac. 654; *Pacific Live Stock Co. v. Murray*, 45 Or. 103, 76 Pac. 1079; *Hatch Bros. Co. v. Black*, 25 Wyo. 109, 165 Pac. 518; 4 Ency. Ev. 12.

[2] Evidence was admitted over appellants' objection to the effect that respondent and his wife spent considerable time in driving or herding their stock on the range by reason of the trespass. It is contended that this is special damage, and as the same was not alleged in the complaint the evidence should not have been received. Special damages are defined in 17 C. J. 715, as follows:

"Special, as contradistinguished from general, damages are those which are the natural but

not the necessary consequence of the act complained of."

It does not necessarily follow that the respondent would have to herd or look after his stock, as the natural consequence of the trespass. It was error to permit this evidence as there was no allegation in the complaint upon which to base it. Special damages should be pleaded. *Lee v. Boise Development Co.*, 21 Idaho, 461, 122 Pac. 851; *Sommerville v. Idaho Irr. Co., Ltd.*, 21 Idaho, 546, 123 Pac. 802; *Henderson v. Coleman*, 19 Wyo. 183, 115 Pac. 439, 1136; 17 C. J. 1002.

Under the statutes in question, the party committing the trespass is liable for all damages sustained; but the complaint should be sufficiently specific to apprise the defendant of the nature and elements of the damage claimed.

The judgment and order denying appellants' motion for a new trial are reversed. Costs awarded to appellants.

MORGAN, C. J., and RICE, J., concur.

(36 Wyo. 327)

NORTH LARAMIE LAND CO. v. HOFFMAN et al. (No. 967.)

(Supreme Court of Wyoming. Oct. 6, 1919.)

1. ATTORNEY AND CLIENT ⇨10—ADMISSION TO PRACTICE OF NONRESIDENT ATTORNEYS FOR PURPOSES OF SINGLE CASE.

Comp. St. 1910, § 966, relating to admission of nonresident attorneys for the purposes of a pending case in which they have been employed, provides for admission of nonresident attorneys, not as members of the bar of the state, but *ex gratia* for the occasion.

2. ATTORNEY AND CLIENT ⇨10—NONRESIDENT ATTORNEY NOT AUTHORIZED TO SIGN PROCEEDINGS IN ERROR.

Comp. St. 1910, § 966, providing that nonresident attorneys employed as counsel "in any case pending before any of the courts of this state may be admitted for all the purposes of the case," does not authorize nonresident attorney to sign petition in error, since the proceedings in error are not "pending" until petition is filed.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Pending.]

3. APPEAL AND ERROR ⇨791—RIGHT TO MOVE TO DISMISS NOT WAIVED BY MOTION TO EXTEND TIME FOR BRIEFS.

Defendants in error did not waive right to move for dismissal of proceedings in error by filing a motion for extension of time within which to file and serve brief, where motion for extension and motion to dismiss were made on same day, and the motion for extension was made expressly subject to ruling on motion to dismiss.

4. COURTS §=24—JURISDICTION OF SUBJECT-MATTER NOT ACQUIRED BY AGREEMENT.

Jurisdiction of the subject-matter of an action cannot be conferred by agreement.

5. ATTORNEY AND CLIENT §=11—PETITION IN ERROR SIGNED BY NONRESIDENT ATTORNEY A NULLITY.

Under Comp. St. 1910, §§ 959, 4377, 4422, 5111, petition in error signed by nonresident attorneys, who had not requested or been granted permission to appear or been admitted for purpose of the cause, under section 966, is a nullity; the attorneys having no authority to appear.

6. APPEAL AND ERROR §=361(2)—VOID PETITION IN ERROR DISMISSED.

Where petition in error was a nullity, because signed by nonresident attorneys, proceedings in error will be dismissed.

Error to District Court, Platte County; William C. Mentzer, Judge.

Proceeding between the North Laramie Land Company and Albert B. Hoffman and others, individually and as constituting the Board of County Commissioners of Platte County, Wyo., and another. The North Laramie Land Company brings error. On motion to dismiss proceedings in error. Dismissed.

Pam & Hurd, of Chicago, Ill., and William A. Riner, of Cheyenne, for plaintiff in error.

Kinkad & Henderson, of Cheyenne, for defendants in error.

BEARD, C. J. In this case a motion by the defendants in error to dismiss the proceedings in error has been filed and submitted. The ground for the motion is stated in a number of separate paragraphs, but all go to the single question of the sufficiency of the petition in error to constitute the commencement of proceedings in error, or to give the court jurisdiction of the subject-matter of the action. It appears from the petition on file, and it is admitted, that said petition is subscribed "Pam & Hurd, Attorneys for Plaintiff in Error," and by no other person or party. It is also admitted that said Pam & Hurd are not members of the bar of this state, or licensed to practice in this court, but are members of the bar of the state of Illinois, and reside in the city of Chicago, in said state; that no permission has been requested by them, or either of them, to appear as attorneys in this court, nor has such permission been granted to them, or either of them, at any time, nor have they, or either of them, been admitted by this court as attorneys for the purposes of this case. The statutes of this state regulating proceedings in error, provide:

Section 5111, Comp. Stat. 1910: "The proceedings to obtain such reversal, vacation, or modification, shall be by petition in error, filed

in a court having power to make the reversal, vacation or modification, and setting forth the errors complained of," etc.

The statutes governing pleadings in courts of record provide:

"The pleadings are the written statements by the parties of the facts constituting their respective claims and defenses." Section 4377, Id.

"Every pleading and motion must be subscribed by the party or his attorney. * * *" Section 4422, Id.

The statutes prescribing the qualification of applicants for admission to practice as attorneys at law provide:

"No one shall be admitted who shall not be a citizen of the United States, a bona fide resident of this state, at least twenty-one years of age and a person of good moral character." Section 959, Id.

And by section 966, Id., it is provided:

"Members of the bar of any other state, district or territory of the United States, who may be employed as counsel in any case pending before any of the courts of this state, may be admitted for all the purposes of the case in which they are so employed, by the court before which said case is pending, without examination."

[1] The attorney of the party to an action who is authorized to subscribe pleadings is an attorney who has the right to practice in the court wherein the case is pending; and it has been uniformly held, so far as we have been able to find, that a nonresident attorney has no such right, except as provided by statute or rule of court. In *Richardson v. Brooklyn City & Newton R. R. Co.*, 22 How. Prac. (N. Y.) 368, it was held that—

"An attorney at law, who is a nonresident of this state, has no authority or right to, and cannot, practice in the courts of this state." (We quote from the syllabus.)

And in *Newburger et al. v. Campbell*, 58 How. Prac. (N. Y.) 313, it was held that, where a judge knowingly permitted to practice in his court one not regularly admitted to practice, his judgment, rendered in a cause so conducted in violation of law, is void and will be reversed. See, also, *Kaplan v. Berman*, 37 Misc. Rep. 502, 75 N. Y. Supp. 1002. In *Ellis v. Bingham County*, 7 Idaho, 86, 60 Pac. 79, it is said:

"A brief has been filed on behalf of the respondent, signed by persons who are not members of the bar of this court. We cannot receive or recognize such briefs, and said brief is ordered stricken from the files. The action of the parties who filed such brief is in violation of the statutes and rules of this court, and such practice cannot be tolerated."

In *Anderson v. Coolin*, 27 Idaho, 334, 149 Pac. 286, a motion to strike from all the pa-

pers and files originally filed in the Supreme Court the name of a nonresident attorney who had signed the same, but who had not been admitted to practice or appear in the case, was sustained. The court said:

"We do not wish to be understood as holding that the district courts, as well as this court, have not the inherent power, as a matter of comity, to permit an attorney from a sister state or territory to present argument in any pending case; but even this prerogative should not be abused, and where attorneys from sister states or territories have business which requires their intermittent appearance in the courts of this state, it is quite proper that they should comply with the provisions of the laws of this state regulating the right to engage in the practice of their profession within this jurisdiction."

It is to be observed that the statutes of Idaho upon which that case was decided required all pleadings filed in the district courts or the Supreme Court to be signed by a resident attorney of Idaho. But as we hold that the attorney of the party who is authorized by the statutes of this state to subscribe pleadings is an attorney who, at the time the pleading is filed, is authorized to practice in the court wherein the pleading is filed (of which we will speak later), the decision last above cited is applicable to the case at bar.

A statute of Wisconsin provided that attorneys of other states which granted to Wisconsin attorneys like privileges should be admitted to practice in the courts of Wisconsin. The Supreme Court of that state held in the Matter of the Motion to Admit Ole Mosness, Esq., a Nonresident Attorney, to the Bar of that Court, 39 Wis. 509, 20 Am. Rep. 55, that he could not be admitted and licensed as a member of the bar of that state, but that the practice of the courts of record in the several states to admit members of the bar in other states to appear as counsel on the trial or argument of causes *ex gratia*, for the occasion, was what was intended by the statute, saying:

"It would be an anomaly, dangerous to the safe administration of justice, that the office should be filled by persons residing beyond the jurisdiction of the court, and practically not subject to its authority. We take it that members of the bar of this state lose their right to practice here by removing from the state. After they become nonresidents, they can appear in courts of this state *ex gratia* only. Our courts cannot have a nonresident bar."

The court further said:

"That it is difficult to believe that chapter 50 of 1855 was intended to do more than to authorize the appearance here, as counsel in the trial and argument of causes, of gentlemen of the bar of other states. If intended to do that, it was probably unnecessary. If intended to do more, it was clearly without the power of the Legislature."

For the reason that the gentleman whose admission was moved was not a resident of the state, the motion was denied. To the same effect see *In re Admission to the Bar*, 61 Neb. 58, 84 N. W. 611, and *In re Robinson*, 82 Neb. 172, 117 N. W. 352, 17 Ann. Cas. 878. The statutes of this state are in harmony with those decisions, and permit and provide for the admission of nonresident attorneys, not as members of the bar of this state, but *ex gratia*, for the occasion.

In *Youmans v. Hanna*, 35 N. D. 479, 160 N. W. 705, 161 N. W. 797, Ann. Cas. 1917E, 263, it is stated that nonresident attorneys were not entitled to practice in the courts of that state at all, except by courtesy and permission. A brief presented by a member of the bar of New Jersey who has not been licensed to practice as a counselor at law will not be received. *Duysters v. Crawford*, 69 N. J. Law, 229, 54 Atl. 823. See, also, *Fallon v. State*, 8 Ga. App. 476, 69 S. E. 592, and *Robb v. Smith*, 3 Scam. (Ill.) 46.

[2] In the present case, Pam & Hurd being nonresident attorneys, and not even having requested or been granted permission to appear in this court, and not having been admitted in this court for any purpose in the cause, no act of theirs as such attorneys can or will be recognized by the court. The petition in error, not being subscribed by any one authorized to do so, is not such a petition as will invoke the jurisdiction of the court, is a nullity, and should be stricken from the files. Indeed, the statute does not empower the court to admit nonresident attorneys for the purpose of bringing an action, but only to admit them in a pending action; and as proceedings in error are required to be commenced by the filing of a petition in error, it is clear that the proceedings are not pending until such petition is filed, so as to permit the admission of a nonresident attorney for the purposes of the case (and that is the full extent to which he can be admitted). In other words, no permission can be given by the court to a nonresident attorney to institute the proceeding.

[3-5] It is argued that, inasmuch as counsel for defendants in error filed a motion for an extension of time within which to file and serve a brief in the case, they waived their right to move for a dismissal of the proceedings in error. The motion for an extension of time to file brief was filed the same day as the motion to dismiss, and was made expressly subject to the ruling on the latter motion. Even if that had not been done, it is well settled that jurisdiction of the subject-matter of an action cannot be conferred by agreement or waiver. There being no sufficient petition in error filed in the case, there is nothing requiring or authorizing the court to consider or determine the alleged errors of the trial court.

The motion of defendants in error to dismiss the proceedings in error will have to be granted, and the proceedings in error dismissed; and it is so ordered.

Dismissed.

POTTER and BLYDENBURGH, JJ., concur.

(26 Wyo. 314)

STATE ex rel. LEAZENBY v. TRUE, State Engineer. (No. 977.)

(Supreme Court of Wyoming. Oct. 6, 1919.)

1. COURTS \S 208(20)—JURISDICTION OF SUPREME COURT SUCH AS IS CONFERRED BY CONSTITUTION.

The original jurisdiction of the Supreme Court is conferred by the Constitution, the court having only such powers in cases originally brought in such court as are directly conferred by the Constitution, or such as are necessary to a full exercise of the powers conferred.

2. COURTS \S 207(5)—SUPREME COURT HAS ONLY SUCH JURISDICTION AS TO WRITS OF PROHIBITION AS GIVEN BY CONSTITUTION.

The Supreme Court has only such jurisdiction to issue writ of prohibition and other writs as is directly conferred by the Constitution, or necessary to a full exercise of the powers conferred.

3. PROHIBITION \S 6(2)—SUPREME COURT HAS NO JURISDICTION TO ISSUE WRIT TO STATE ENGINEER, HE NOT BEING AN "INFERIOR COURT."

Under Const. art. 5, §§ 2, 3, prescribing jurisdiction of Supreme Court, and limiting its power to issue writs of prohibition to its appellate or revised jurisdiction, except as enlarged by its "general superintending control over all inferior courts," Supreme Court has not original jurisdiction to issue writ of prohibition against State Engineer to restrain him from holding a threatened hearing seeking to cancel a permit to construct a reservoir, under Comp. St. 1910, §§ 743-752, the State Engineer not being an "inferior court" within the Constitution.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Inferior Courts.]

Original proceedings in prohibition by the State of Wyoming, on the relation of John W. Leazenby, against James B. True, State Engineer. Writ denied, and petition dismissed.

Corthell, McCollough & Corthell, of Laramie, for plaintiff.

W. L. Walls, Atty. Gen., and W. E. Mullen, of Cheyenne, for defendant.

BLYDENBURGH, J. This is a proceeding invoking the original jurisdiction of this court to issue a writ of prohibition against the State Engineer to restrain him from holding a threatened hearing seeking to cancel

a permit theretofore issued to construct a reservoir to conserve and impound the waters of Harney creek, in Albany county, Wyo.

The relator alleges in his petition that on August 10, 1914, one D. C. Buntin made and filed in the office of the State Engineer an application for a permit to construct the Harney creek reservoir in due form, under the provisions of chapter 59 (sections 743-752), Wyoming Compiled Statutes 1910, and the application is set out in full in the petition. That the State Engineer then in office on the 25th day of September, 1914, approved said application, and indorsed thereon:

"The State of Wyoming, State Engineer's Office—ss.:

"This is to certify that I have examined the foregoing application, and do hereby grant the same subject to the following limitations and conditions:

"Primary Permit. Application for secondary permit describing lands to be irrigated to be filed prior to August 1, 1915.

"Construction of proposed works shall begin within one year from date of approval.

"The time for completing the work shall terminate on December 31, 1919.

"Witness my hand this 25th day of September, A. D. 1914.

"A. J. Parshall, State Engineer."

And that on July 31, 1915, the State Engineer made the following indorsement on said application:

"Notice of commencement of work recorded July 31, 1915. Time for filing secondary application extended to January 31, 1916. (See letter from D. C. Buntin, July 30, 1915.)

"James B. True, State Engineer.

"July 31, 1915."

That said Buntin on the 28th day of February, 1917, sold, assigned, and transferred to the relator all his rights under said permit; that W. C. Thomas and John H. Davis, copartners as Davis & Thomas, on April 24, 1918, filed an application in the office of the State Engineer for the cancellation of the relator's permit for the reasons that Buntin had failed to file his secondary application; had failed to begin the construction of the proposed work within one year from the date of approval of the application; that Davis & Thomas hold interest in the waters of Harney creek, which is greatly injured by having the Buntin application stand of record; had expended large sums of money in constructing the Columbus reservoir; and accompanied said application for cancellation by affidavits supporting the statements contained therein, all being set out in full in the petition; that on June 18, 1919, the State Engineer notified relator that a hearing would be had before the State Engineer for the purpose of hearing and determining the allegations contained in the application of Davis & Thomas to cancel his permit; that on June 24, 1919, Davis & Thomas, by their attorney,

and the relator, by his attorney, appeared before the State Engineer, and thereupon the relator objected and protested against the State Engineer holding said hearing on the ground that the State Engineer was without jurisdiction and authority to hold said hearing, and had no power conferred upon him to hear and determine the cancellation of relator's permit, whereupon the State Engineer announced his decision and determination that he had jurisdiction to hear and determine the said matter and to cancel said permit, and thereupon adjourned the said hearing until June 28, 1919; that relator's project is not of the character mentioned in sections 746 and 747 of the Wyoming Compiled Statutes, and was not, in the opinion of the State Engineer, such as to require the appointment of an assistant engineer or the supervision of said work, but was supervised and constructed by the relator himself, and was completed by the relator prior to December 31, 1918, without supervision on the part of, or under the authority of, the State Engineer. Then follows the allegation that the State Engineer has no jurisdiction or authority to hold the hearing or cancel the permit, and that he is usurping judicial or quasi judicial power, and that he intends and threatens to proceed further with said hearing, and to take evidence concerning the compliance of the relator with the conditions of said permit, and to decide the question of the cancellation of the permit.

It is further alleged that the relator has no adequate remedy other than the writ of prohibition prayed for, and that he has expended \$3,600; that he needs all the water that can be stored in said reservoir for use in irrigating his lands underlying the same, and if the defendant is permitted to proceed with the hearing, and to cancel said permit, he will be deprived of the use of such waters for an indefinite time during the hearings and determination of the matter before the State Engineer, the Board of Control, and the various appeals to the courts, and will be compelled to produce and examine witnesses at great expense, without any security or recourse for costs or expenses, and if his permit is canceled he would be deprived of the right to proceed to apply the waters to beneficial use, and to complete his appropriation of the public waters, whereby he would suffer great and irreparable injury. It is then stated that the real parties in interest are Davis & Thomas, the protestants upon whose application the proceedings before the defendant have been taken and conducted. Then follows the prayer for a writ of prohibition to issue to restrain the defendant, his successors in office, and all persons acting under or in aid of them, from further proceedings in the matter of the hearing pending this proceeding, and that upon a hearing in this proceeding such writ be made absolute; that the relator be restored to all his rights, etc.

Upon the presentation of the petition, an alternative writ of prohibition and an order to the State Engineer to show cause on July 26, 1919, why said writ should not be made absolute, was issued.

The defendant filed a demurrer to the petition, setting up:

"First. That it does not appear from the petition of the plaintiff on file herein that the plaintiff has any right to, or cause for, the writ of prohibition prayed for in his petition. Second. That the petition of the plaintiff on file herein does not set forth the facts sufficient to entitle the plaintiff to the relief prayed for or to any relief of any kind or character. Third. That the court has no jurisdiction of the subject-matter or the subject of the action. Fourth. That the facts stated in the plaintiff's petition are not sufficient to constitute a cause of action."

The case was heard on the demurrer, the attorney for Davis & Thomas joining in the argument in behalf of the demurrer.

It was claimed on behalf of the defendant that he was an administrative officer, and that the duties in relation to the control and distribution of the waters of the state were of an administrative character; that under the provisions of chapter 59, Wyoming Compiled Statutes 1910, he was given the power to cancel any permit for noncompliance with any of the provisions of the chapter, and that the language, "and the state engineer is hereby authorized to cancel any permit wherein the provisions of the above sections have not been, or are not being, complied with," contained in section 748, gives such authority, "the above sections" referring to all the preceding sections of the chapter, and the hearing contemplated in this case was merely for the purpose of ascertaining the facts upon which to exercise such administrative functions, and therefore could not be reached by a writ of prohibition; that the statute provides for appeal to the Board of Control, and from it to the district court, and thence to this court, and the writ of prohibition cannot be used in place of an appeal proceeding or proceeding in error; "that the State Engineer is not an inferior court, nor a tribunal of any kind whose executive acts in the line of his prescribed duties are subject to control by the writ of prohibition."

On the other hand, it is contended on behalf of the relator that the writ of prohibition is not only to restrain inferior courts or judicial tribunals, but also to restrain the exercise of judicial or quasi judicial functions or power by administrative tribunals or administrative officers who attempt to usurp such powers without lawful authority; that the hearing proposed and the cancellation of the permit is a judicial proceeding and determination of property rights between adversaries, and of a judicial character; that no power is attempted to be given to the State Engineer to cancel such

a permit as that of the relator; that section 748, and the language employed therein, "above sections," refers to sections 746 and 747 solely as the sections mentioned in section 748, and to no other sections of the chapter; that if the law attempted to give to the State Engineer judicial power it would be unconstitutional; that the State Engineer had no power to impose the condition as to time for filing a secondary permit, and it is therefore void; that this is a proper case for a writ of prohibition, and no other adequate remedy exists.

We are, at the outset, confronted with a question of jurisdiction—whether this court has original jurisdiction to issue a writ of prohibition in a case of this kind against the State Engineer. In the earlier cases in this court, where the original jurisdiction of this court was invoked to issue writs of prohibition, it was contended that this court had power to issue the writ only in cases coming here on proceedings in the nature of appeal or proceedings in error. *Dobson v. Westheimer et al.*, 5 Wyo. 34, 36 Pac. 626; *State ex rel. Mau v. Ausherman*, 11 Wyo. 410, 72 Pac. 200, 73 Pac. 548. But in those cases it was held that the original power to issue the writ was not confined to cases which first reached this court by appellate proceedings, but it was held that by the provision of the Constitution giving "general superintending control over all inferior courts" this court was vested with original jurisdiction in proper cases to issue writs of prohibition to restrain the action of inferior courts in excess of their jurisdiction.

[1] The original jurisdiction of this court is conferred by the Constitution, and it has only such power, in cases originally brought here, as is directly conferred by that instrument, or that is necessary to a full exercise of the powers conferred. 15 C. J. 730, 731, 1025; 7 R. C. L. 1030, 1072, 1076, 1077; 32 Cyc. 623.

[2] And this applies to the writ of prohibition and other writs. 22 R. C. L. 26. The sections of the Constitution applicable are sections 2 and 3 of article 5, which are as follows:

"Sec. 2. The Supreme Court shall have general appellate jurisdiction, coextensive with the state, in both civil and criminal causes, and shall have a general superintending control over all inferior courts, under such rules and regulations as may be prescribed by law.

"Sec. 3. The Supreme Court shall have original jurisdiction in quo warranto and mandamus as to all state officers, and in habeas corpus. The Supreme Court shall also have power to issue writs of mandamus, review, prohibition, habeas corpus, certiorari, and other writs necessary and proper to the complete exercise of its appellate and revisory jurisdiction. Each of the judges shall have power to issue writs of habeas corpus to any part of the state upon petition by or on behalf of a person held in actual custody, and may make such writs returnable be-

fore himself or before the Supreme Court, or before any district court of the state or any judge thereof."

In the Constitutions of a number of the states original jurisdiction is given the Supreme Court to issue writs generally without limitation, and in such cases it is generally held that the writ of prohibition may issue to any inferior tribunal having judicial or quasi judicial powers, whether called a court or not, and even in extreme cases to strictly administrative boards or officers who attempt to usurp judicial functions. 22 R. C. L. 14, 15, 17; 32 Cyc. 601. But it was originally only directed to a court. It is defined by Blackstone as a writ "directed to the judge and parties of a suit in any inferior court, commanding them to cease from the prosecution thereof upon suggestion that either the cause originally or some collateral matter arising therein does not belong to that jurisdiction but to the cognizance of some other court." 3 Black. Com. 112. But it will be noticed that the original power granted this court by the Wyoming Constitution is much more restricted than in the states referred to. The power to issue these prerogative writs is confined to its appellate and revisory jurisdiction, except as enlarged by its "general superintending control over all inferior courts." And as to state officers, the original jurisdiction is limited to quo warranto and mandamus.

In *Dobson v. Westheimer*, supra, this court intimated at least that its original jurisdiction to issue the writ of prohibition was confined to inferior courts. Chief Justice Groesbeck, in the opinion in that case, said:

"So it appears that, either under the common law or by virtue of a statute, the writ will not lie except to prevent the encroachment of jurisdiction by courts, or, at the furthest, bodies exercising quasi judicial functions."

And *State ex rel. Mau v. Ausherman* goes no further than to hold that, under the power of "superintending control," this court has original jurisdiction to issue the writ of prohibition to inferior courts; Judge Potter in the opinion in that case, after discussing this provision of the Constitution, saying:

"We are of the opinion, therefore, that this court is vested with jurisdiction in proper cases calling for its exercise to issue writs of prohibition to restrain the action of inferior courts in excess of their jurisdiction."

It then remains to consider whether the writ of prohibition asked for here is directed to one of the inferior courts of the state.

The State Engineer is a constitutional state officer, endowed with certain administrative duties relating to the public waters of the state, but is nowhere therein mentioned as a court or given judicial functions, and it would seem that a constitutional provision using the words "inferior courts" was intended to

mean those courts mentioned or provided for in the Constitution. But we are not without authority for the proper construction of this constitutional language. The Constitution of South Carolina in this respect is as follows (section 4 of article 4):

"The Supreme Court shall have appellate jurisdiction only in cases of chancery, and shall constitute a court for the correction of errors at law, under such regulations as the General Assembly may by law prescribe: Provided, the said court shall always have power to issue writs of injunction, mandamus, quo warranto, habeas corpus, and such other original and remedial writs as may be necessary to give it a general supervisory control over all other courts in this state."

This provision is substantially like the one in the Wyoming Constitution. In the case of *State ex rel. Richland County v. Columbia*, 16 S. C. 412, the Supreme Court of South Carolina said:

"It will thus be seen that this court has power to issue certain specified writs in any case where such a remedy may be appropriate (*Wallace v. Hayne and Mackey*, 8 S. C. 374), and that it also has power to issue such other original and remedial writs as may be necessary to give it a general supervisory control over all other courts in the state. Accordingly it has been held that when this court is asked to issue a writ which is not among those specifically named in the above-cited section of the Constitution, it must be made to appear that the writ is asked for to enable this court to exercise some supervisory control over some one of the courts of this state, as this court has no power to issue such a writ except to some one of the courts of this state for the purpose above indicated. * * * 'This unrestrained right, as to the writs specified, does not attach to "other original writs," in which that now sought is included. The very qualification which is annexed shows that the power is restricted, and that a more limited jurisdiction was intended.' * * * Whenever this court is asked to issue one of the writs not specifically mentioned in the above-cited section of the Constitution, it is necessary to make it appear: (1) That the writ is to go to one of the courts of this state; (2) that such writ is demanded for the purpose of enabling this court to exercise some supervisory control over the court to which the writ is to be directed. * * * Hence the first inquiry is whether the writ asked for is to go to one of the courts of this state; and, second, whether such writ is demanded for the purpose of enabling this court to exercise some supervisory control over the court to which it is to be directed. The body to which the writ is to be directed is the body in which the municipal authority of the city of Columbia is vested, called in the act incorporating said city 'The Mayor and Aldermen of the City of Columbia,' and the questions are whether that body is such a court as is contemplated by the Constitution, and, if so, whether the writ is demanded for the purpose of enabling this court to exercise some supervisory control over such body acting in its judicial capacity."

And upon rehearing of the jurisdictional question in *State ex rel. Richland County v.*

Columbia, 17 S. C. 80, where it was argued that "because the act * * * sought to be restrained is an act of a judicial nature it must necessarily be regarded as the act of a court, and therefore this court would have original jurisdiction to issue the writ," that court said:

"It does not follow, however, that a judicial act can only be performed by a court. There is no reason why the Legislature may not entrust the performance of acts of a judicial nature to persons and bodies corporate who do not constitute one of the courts of the state, and it is the constant habit to do so. The Legislature has at various times conferred upon clerks, sheriffs, and many other officers the power to perform judicial acts, in the sense that they involve the exercise of judgment and discretion; and we do not understand that it was ever supposed that such officers were thereby constituted courts. * * * There is necessarily involved in the idea of a court that of a tribunal empowered to hear and determine issues between parties, upon pleadings, either oral or written, and upon evidence to be adduced under well-defined and established rules, according to settled principles of law."

And in *Hunter v. Moore*, 39 S. C. 304, 17 S. E. 797, approving the decision in *State v. Columbia*, supra, the court said:

"It was there conclusively determined that the Supreme Court, in the exercise of its original jurisdiction, has no authority to issue a writ of prohibition, unless it is directed to one of the courts of the state, for the purpose of enabling the Supreme Court to exercise a supervisory control over the court to which it is directed. * * * So that the only remaining question in this case is whether the writ of prohibition asked for here is to be directed to one of the courts of the state for the purpose of keeping it within the limits of its jurisdiction. It seems to us too clear for argument that the town council of Yorkville is not one of the courts of the state referred to in section 4 of article 4 of the Constitution, though invested, it may be, with certain judicial powers for certain prescribed purposes."

[3] So here it seems to us too clear for argument that the State Engineer is not one of the inferior courts of this state referred to in section 2 of article 5 of the Constitution.

As to whether a court of general original jurisdiction, like our district courts, would have authority to issue a writ of prohibition against an administrative officer such as the State Engineer, when it is alleged that he has usurped judicial powers without authority of law, there seems to be some conflict of authority, and it is not necessary to decide in this case, and we do not decide. The questions raised by the parties in this case as stated herein are interesting and important, but, as we hold that this court has no original jurisdiction to issue the writ of prohibition in a case of this character, it becomes not only unnecessary, but improper, for us to consider or determine those questions in this case.

We hold that this court, under the Consti-

tution, has no original jurisdiction to issue a writ of prohibition to the State Engineer, and therefore the demurrer will be sustained, the writ will be denied, the order to show cause quashed, and the petition dismissed. Writ denied and petition dismissed.

BEARD, O. J., and POTTER, J., concur.

(93 Or. 440)

STATE v. GANONG et al.

(Supreme Court of Oregon. Sept. 16, 1919.)

1. EMINENT DOMAIN ⇐265(1)—STATE LIABLE FOR ATTORNEY'S FEE ONLY WHEN ALLEGED AND PROVED.

In view of L. O. L. §§ 577, 6860, 7424, 7434, 7442, 7448, 7459, 7495, and 7503, state condemning land for highway is liable for attorney's fees under section 6868, as amended by Laws 1913, p. 81, providing for "reasonable attorney's fees to be fixed by the court at the trial" only where the attorney's fee is alleged and proved by defendant and tried by a jury where the other facts are tried by a jury.

2. STATES ⇐215—STATE NOT LIABLE FOR COSTS IN ABSENCE OF STATUTE.

The state is not liable for costs and disbursements unless there is some statute which expressly or by clear and necessary implication includes it, since the mere general terms of a statute giving costs do not include the sovereign.

3. EMINENT DOMAIN ⇐241—STATE CAN ABANDON PROCEEDING TO CONDEMN LAND.

In state's proceeding to condemn land for highway, court had no power to enter a judgment compelling payment of award, since state could have abandoned proceeding.

4. EMINENT DOMAIN ⇐241—JUDGMENT PROVIDES FOR COSTS AND DISBURSEMENTS THOUGH PROCEEDING ABANDONED.

The trial of an action in which land is condemned for public use is followed by a judgment which is made up of two distinct parts; one relating to value of land to be paid for in event land is actually taken, the other relating to costs and disbursements to which defendant is entitled, regardless of whether plaintiff does or does not take the land.

5. COSTS ⇐207—WHERE STATUTE ALLOWS ATTORNEY'S FEE IT MUST BE ALLEGED AND PROVEN.

A litigant upon whom the statute confers the right to an attorney's fee must allege the amount claimed and offer evidence in support of the allegation, notwithstanding that court has special knowledge of the subject.

6. COSTS ⇐203, 206—SUCCESSFUL PARTY MUST FILE VERIFIED COST BILL.

Costs and disbursements cannot be allowed a successful litigant unless he pleads his costs and disbursements by filing a verified cost bill, and if the defeated litigant desires to contest the cost bill, he must do so by filing verified

objections; the two verified papers constituting the pleadings.

Bennett, J., dissenting in part.

Appeal from Circuit Court, Clackamas County; Robert Tucker, Judge.

Proceedings by the State of Oregon by and through the State Highway Commission, composed of S. Senson and others, against Joseph W. Ganong and others. From that part of the judgment awarding the defendants attorney's fees, plaintiff appeals. Judgment modified.

The sole question involved in this appeal is whether or not the defendants are entitled to attorney's fees in a condemnation proceeding brought by the state to condemn a right of way for the Pacific Highway across defendants' premises.

It is urged by the state that no attorney's fee is recoverable in a proceeding of this kind, where the state itself is a party plaintiff; and the state further contends that if such a fee is recoverable at all there must be an allegation in relation thereto in the pleadings before the case is submitted to a jury, in order to justify the taxing of the same.

In this case there was no allegation in the answer as to the amount which would be reasonable as an attorney's fee, the only allusion thereto being in the prayer that the defendants "have judgment for their costs and disbursements herein, including a reasonable attorney's fee." This was the condition of the pleading up to the time the defendants were about to rest, at which time it was stipulated in effect that if the defendants were entitled to a reasonable fee at all the court might fix the same; but the plaintiff insisted upon its contention that the defendants were not entitled to any attorney's fee at all.

Upon this stipulation the jury was sent out for deliberation, and thereafter the amount of attorney's fee was taken up before the court, and the plaintiff again objected to any attorney's fee upon the following grounds: (1) That there are no allegations in any of the pleadings which will support a verdict or judgment awarding the same, or permit the introduction of any testimony in support thereof, and that only such facts as are alleged in the pleadings may be proved by the evidence or supported by the verdict, and the judgment cannot be in excess of such allegations; (2) that there is no statute allowing attorney's fees, fixed by the court, to be recovered from the state, where it is the plaintiff, in proceedings of this kind.

Thereupon counsel for defendants moved the court for permission to amend their answer, by including therein an allegation to

the effect that \$300 was a reasonable sum to be fixed and allowed by the court as an attorney's fee. This amendment was allowed over the objection and exception of plaintiff, and the court afterwards fixed the attorney's fee at \$300, which was taxed by the clerk as part of the costs.

George M. Brown, Atty. Gen., and I. H. Van Winkle, Asst. Atty. Gen., for the State.

Jos. E. Hedges, of Oregon City, and Wood, Montague & Hunt, of Portland, for respondents.

BENNETT, J. (after stating the facts as above). Section 6872, L. O. L., enacted by the Legislature in 1905, authorized the state to commence proceedings for the appropriation of real property for public use, and contains the following provision:

"The procedure in said suit, action or proceeding shall be, as far as applicable, the procedure provided for in and by the laws of this state for the condemnation of land or rights of way by public corporations or quasi public corporations for public use or for corporate purposes."

Section 9 of chapter 237, Laws 1917, gives to counties, in the first instance, the right to bring proceedings to appropriate rights of way for state highways, and then provides:

"In case of neglect or refusal to so acquire said right of way, the state shall have the power, through the commission, to acquire said right of way either by donation, purchase, agreement, condemnation, or through the exercise of the power of eminent domain in the same manner as is provided by law for acquiring property for other public uses."

Section 577, L. O. L., adopted in 1862, provided:

"In all actions or suits prosecuted or defended in the name and for the use of the state, or any county or other public corporation therein, the state or public corporation shall be liable for and may recover costs in like manner and with like effect as in the case of natural persons."

At the time of the enactment of section 6872, *supra*, authorizing the appropriation of real property, etc., generally by the state, and providing that the procedure should be the same as in the nature of condemnations by public corporations, the law did not make such public corporations liable for any attorney's fee, except statutory costs, the law as to costs and disbursements in such cases then reading as follows:

"The costs and disbursements of the defendant shall be taxed by the clerk, and recovered off the corporation; but if it appear that such corporation tendered the defendant, before commencing the action, an amount equal to or greater than that assessed by the jury, in such case the corporation shall recover its costs and disbursements off the defendant." L. O. L. § 6868.

In 1913 (Laws 1913, p. 81), however, the foregoing section was amended so as to read as follows:

"The costs and disbursements of the defendant, including a reasonable attorney's fee to be fixed by the court at the trial, shall be taxed by the clerk and recovered from the corporation, but if it appear that such corporation tendered the defendant before commencing the action an amount equal to or greater than that assessed by the jury, in such case the corporation shall recover its costs and disbursements from the defendant, but the defendant shall not be required to pay the plaintiff's attorney fee."

And it is under this amendment the attorney's fee of \$300 was claimed by the defendants and adjudged to them by the court.

One of the questions, and perhaps the most far-reaching and serious one, in the case is whether or not this latest amendment applied to condemnation proceedings brought directly by the state.

On behalf of the plaintiff it is urged that when the Legislature in 1905 provided for condemnation proceedings by the state, and that in such proceedings the procedure should be, as far as applicable, the procedure provided for in and by the laws of this state for the condemnation of land or rights of way by public corporations for public use; that it adopted in such condemnation proceedings only the laws governing condemnations by other public corporations as they then stood, and not as they should thereafter be amended. And to support this contention the plaintiff refers the court to the following cases; *State v. Caseday*, 58 Or. 429, 115 Pac. 287; *Skelton v. Newberg*, 76 Or. 126, 148 Pac. 53; *Martin v. Gilliam County*, 89 Or. 394, 173 Pac. 938.

On the other hand, the defendants suggest a distinction between the statutes adopting the provisions of a specific enactment, and the adoption by a special act of general provisions of the law, by a general clause in the later enactment, and contend that, while the rule contended for by the plaintiff is the general rule in cases where some specific enactment is adopted by section and chapter, yet when the provision is general, and refers to general procedure, as in this case, a different rule applies, and subsequent modification of the general practice will be deemed to be within the intent of such adoption.

In support of this contention the defendant cites the decisions of a number of states and the texts of Endlich on Interpretation of Statutes, and Lewis' Sutherland on Statutory Construction.

It seems this contention is well founded, both in principle and upon authority, and should be sustained.

In Lewis' Sutherland on Stat. Const. (2d. Ed.) § 405, it is said:

"There is another form of adoption wherein the reference is not to any particular statute,

or part of a statute, but to the laws generally which govern a particular subject. The reference in such case means the law as it exists from time to time, or at the time the exigency arises to which the law is to be applied."

To the same effect is the doctrine as stated by Endlich on Statutory Construction, § 493.

In the California case of *Ramish v. Hartwell*, 126 Cal. 443, 58 Pac. 920, the court on this subject (speaking of the general rule invoked by plaintiff here) says:

"This rule is subject to a qualified exception in cases of adoption into a special act of the provisions of law then in force by virtue of general laws. In such cases, subsequent modifications of the general law will be deemed to be within the intent of such adoption, so far as they are consistent with the purposes of the particular act."

In *State v. Williams*, 237 Mo. 178, 140 S. W. 894, the court says:

"The rule of construction, where one statute adopts another, is that, if the adopting statute specifically designates the title or date of the statute adopted, then the repeal or amendment of the statute thus adopted will not affect the adopting statute," but "when a statute like the one now under consideration refers to the general provisions of the law on a given subject for its interpretation, then an amendment of the general laws on that subject affects a corresponding amendment of the statute adopting them."

This seems to be the rule generally agreed upon by the authorities; also the natural and appropriate construction of the language of section 6872, L. O. L., and section 9, c. 237, of the Laws of 1917.

The language in the former section, providing that the procedure in a condemnation proceeding by the state shall be "the procedure provided for in and by the laws of this state for the condemnation of lands for rights of way by public corporations," seems to refer to the laws of the state at the time of the proceeding by the state, and not to the laws as they were at the time of the enactment of the section.

Section 9, c. 237, Laws 1917, is still plainer, "in the same manner as is provided by law for acquiring property for other public uses." Indeed, at the time this latter section was enacted, the provision for an attorney's fee generally in such condemnation proceeding was existent.

Any other construction of these sections would be confusing and create an incongruous condition, under which there would be two entirely different methods of procedure in civil trials of the same identical nature; one where other public corporations were parties, and another where the state itself was a party.

The amendment here in question is by no means the only change in the general procedure, since the authorization of the condemnation proceedings by the state in 1905. On

(the contrary, there have been many other changes.

Section 126 of the Code, passed in 1909, changed the manner of the selection of the jury. Section 132 was amended in 1905 at a later date than the passage of section 6872, and provided for instructions in writing, when required by either party; and in 1911 the manner of rendering the verdict generally in civil cases was entirely changed by a provision that three-fourths of the jury might find a verdict, instead of the unanimous verdict which has been previously required.

If these changes were not to apply to the procedure in a condemnation action brought by the state, because the changes were made after the enactment of the law authorizing condemnation proceedings directly in its behalf, it would mean that in all such proceedings the trial courts would be compelled to go back to the old law, and we would have the confusion resulting from two different methods of trying such proceedings.

Besides this, it is only fair that the state should be governed, when it goes into court, by the same rule which it has provided for other litigants. The provision for an attorney's fee in case of condemnation by public corporations must be deemed to be founded on justice; and, if it is just in the case of counties, or other public corporations, that a party who is haled into court without fault in a condemnation proceeding should recover a reasonable attorney's fee, it is also equally just and right when the proceeding is brought by the state. It would ill befit the state to provide a rule that other public corporations should pay an attorney's fee in such proceedings upon the ground that it was only justice, and then attempt to escape similar liability itself. It ought not to be presumed that the Legislature had intended any such unseemly result. It ought to be presumed, unless clearly provided to the contrary, that when the state goes into court and initiates a civil proceeding it is bound by the same rules which it has declared to be just and fair in regard to other litigants.

It seems, therefore, that the state is liable for an attorney's fee, in a condemnation proceeding where it has made no tender, or where a larger sum than it has tendered has been recovered, the same as any other public corporation.

The cases cited on behalf of appellant are easily distinguishable from this case. In *State v. Caseday*, *supra*, the trial was a criminal one; and the question was whether the defendant, in alternating with the state in exercising its challenges, should exercise two of its challenges to the state's one in each turn (the defendant having double the number of the state's challenges in a criminal proceeding), or whether each side should exercise only one challenge in turn, thereby leaving the defendant with half of his chal-

allenges after the state's challenges were all exhausted. It was very properly held that the Criminal Code, being entirely independent of the Civil Code, and its provisions in regard to the selection of the jury and the number of challenges being entirely different from that of the Civil Code, the provision of the Civil Code alternating challenges one by one, which was entirely inappropriate to the provisions of the Criminal Code as to the number of challenges, did not apply.

The Criminal Code, adopting some of the provisions for the formation of trial juries, did so by express reference to chapter and title of the Civil Code. "The trial jury is formed in the manner prescribed in chapter 2, title 2, of the Code of Civil Procedure," etc. The general rule already alluded to, that where one enactment adopts specially, either by words or chapter and title, the provision of some other act, that subsequent changes in the adopted act, in the act referred to, are not adopted or carried over, was applied.

There is no question about this general rule, and there was no occasion for the court to consider the exception, and the court did not consider it, or pass upon it in any way.

In *Skelton v. Newberg*, supra, the question was whether the judgment should be reversed, because it had not been entered on the day on which the verdict was rendered, in accordance with the law of 1907 (Laws 1907, p. 312). Previous to that time the provision was that the judgment should be entered within two days from the time the verdict was rendered. As a matter of fact, the judgment had not been entered in accordance with either statute, it not having been entered until 24 days after the verdict. The court held that both statutes were directory only, and that the judgment could not be reversed on that ground.

It was provided in the condemnation act then under consideration that proceedings should be "in the same manner as in an action at law, except as in this title otherwise provided." However, it was "specially provided" in the condemnation act that judgment should not be given appropriating the land until the damages sustained by the defendant were paid into court. Of course, in such a case the provisions of the general law were inapplicable.

In that case the court again refers to the general rule that—

"Where the provisions of one statute are incorporated into another by mere reference, a subsequent change in the former will not disturb the terms of the latter."

But the exception seems to have been in no way called to the attention of the court, and, as we have seen, the question was in no way before the court.

In the case of *Martin v. Gilliam County*, supra, the question was an entirely different

one, being the question of whether or not chapter 222, Laws of 1915, extending the budget law over districts and cities, was constitutional. It was held that it was not because it amended a previous act in effect by mere reference to its title.

The doctrine announced in that case may have been entirely proper and applicable under the circumstances, but it would be carrying it much too far, and would result in utter chaos in our judicial procedure, to attempt to apply it to provisions in relation to procedure like those now under consideration; for the instances under our practice in which the proceedings in one class of cases have been regulated by the adoption of the proceedings pointed out in other provisions of the Code, and in that way alone, are manifold; and yet these provisions have been constantly accepted, and the courts have been proceeding thereunder in many cases for years.

As we have already seen, a very large portion of the proceedings in criminal cases are those thus adopted and applied from the Civil Code. We would be without any provisions whatever for the regulation of the proceedings in condemnation cases, if such adoption by reference was not valid.

Section 6860, L. O. L., being a part of the general act providing for the appropriation of lands by railroads and other corporations, provides:

"Such action shall be commenced and proceeded in to final determination, in the same manner as an action at law, except as in this title otherwise specially provided."

So in section 7042, L. O. L., in regard to proceedings by a wife to compel the support of her husband, the only provision in regard to the practice is:

"The practice in such cases shall conform as nearly as may be to the practice in divorce cases, and the court shall have power to enforce its orders as in a suit for divorce, or other suits in equity."

And the Code is full of similar provisions, where one law is made applicable by mere reference to the proceedings under it in another law. Indeed, in this very action there would be no provision whatever for any proceeding by the state to condemn, or any provision regulating the proceedings, if this provision that "the proceeding in said suit, action or proceeding shall be, as far as applicable, the procedure provided in and by the laws of this state for the condemnation of lands by public corporations" is not valid and effectual.

It is further contended by the appellant, however, that the defendant could not recover such an attorney's fee in this particular proceeding, because there was no allegation in the pleading as to what would be a reasonable fee; but it does not seem to me

that any such allegation was necessary. The provision of the law is that "the costs and disbursements of the defendant 'including a reasonable attorney's fee to be fixed by the court at the trial' shall be taxed by the clerk and recovered from the corporation." It seems clear that the Legislature intended this fee as a part of the costs, to be fixed by the court and taxed by the clerk in a summary way the same as any other costs.

It is true that in most items of costs provided for by statute the amount per item is fixed by law, as in case of witness fees at so much per day and so much per mile, but there is always a question of fact involved in each item of every cost bill just the same. The questions as to how many days the witness actually did attend, whether his testimony was material, how many miles he traveled, etc., are all questions of fact, which must be settled by the determination of the court. Yet it would be unreasonable to say that all of these things must be alleged in formal pleadings at the commencement of the action. Such a rule would be utterly impossible. And it would be just as unreasonable to hold that the defendant must, in its answer, allege what would be a reasonable attorney's fee to be fixed by the court, in advance of the actual litigation. The reasonableness of the attorney's fee would depend entirely upon developments in the case, which the defendant could not know at the beginning of the action. Under our practice the defendant must swear to his answer, and to require him to allege and swear to something which he could not know, and which would depend wholly and entirely upon future developments, would be not only to invite but compel him to perjury.

A case like this is clearly distinguishable from the ordinary proceeding to recover on a promissory note or in the matter of a mechanic's lien. There the plaintiff is the moving party, and the fee in the first instance is largely theoretical, and it seems necessary to make the amount of it an issue of fact.

But here the law provides that (where there is no tender or the tender is exceeded by the verdict) the defendant shall recover such a fee in every case. The law does not say that if he pleads it or asks for it he shall recover it, but he shall absolutely be entitled to some fee, and the only question to be passed upon is the amount of the fee, which shall be fixed by the court in every case, without regard to the pleading, and then shall be taxed by the clerk, the same as other costs and disbursements.

The only difference between the taxing of this and any other item of cost is that in ordinary disbursements the amount is fixed by law per item, and the question of fact arising is as to what items the prevailing party is entitled to recover; while here, by

reason of the nature of the item, it cannot be fixed arbitrarily by law, and is left to the discretion of the court. But the principle is no different from that involved in the taxing of any other item of cost.

In this case there seems to be no question as to the amount of the fee, or the reasonableness of the sum fixed by the court, if the defendant is entitled to recover costs at all. In this view of the case it is unnecessary to inquire into the question of whether or not the amendment of the pleading at the close of the trial was timely or within the proper discretion of the court.

Judgment of the court below will be affirmed.

HARRIS, J. [1] I agree with the reasoning employed by Mr. Justice BENNETT, and I concur in the conclusion reached by him concerning the effect which the amendment of a previously adopted statute has upon the adopting statute; but I cannot concur in the conclusion that chapter 49, Laws 1913, empowers the judge to fix and allow an attorney's fee without a pleading claiming it and without evidence proving it.

[2] The state is not liable at all for costs and disbursements, unless there is some statute which expressly or at least by clear and necessary implication includes it, because the rule, universally recognized and universally applied, is that the mere general terms of a statute giving costs do not include the sovereign. 10 R. C. L. 194. The right of a private person to an affirmative judgment against the state for costs and disbursements must be measured and determined by the cold language of the statute, and by nothing else. Section 577, L. O. L., declares that—

"In all actions or suits prosecuted or defended in the name and for the use of the state, * * * the state * * * shall be liable for and may recover costs in like manner and with like effect as in the case of natural persons."

Section 6860, L. O. L., provides that an action for the condemnation of land "shall be commenced and proceeded in to final determination in the same manner as an action at law, except as in this title otherwise specially provided." Section 6868, L. O. L., as amended by chapter 49, Laws 1913, states that:

"The costs and disbursements of the defendant, including a reasonable attorney's fee to be fixed by the court at the trial, shall be taxed by the clerk and recovered from the corporation, but if it appear that such corporation tendered the defendant before commencing the action an amount equal to or greater than that assessed by the jury, in such case the corporation shall recover its costs and disbursements from the defendant, but the defendant shall not be required to pay the plaintiff's attorney fee."

Manifestly, the Legislature has expressly included the state.

The jury returned a verdict fixing \$750 as the damages to be paid for taking the land. Upon the return of the verdict a judgment was entered on June 14, 1918, reciting the finding of the jury and ordering that upon the payment of the sum of \$750 the land be appropriated unto the state for the purposes of a highway; and this same judgment also adjudged that the defendants recover from the plaintiff their costs and disbursements, "together with the sum of \$300, which is hereby fixed and allowed to said defendants as a reasonable attorney's fee." Five days afterwards, on June 19th, a second judgment was entered, reciting that the plaintiff "has paid into this court the sum of \$750, being the amount of damages assessed by the jury and found for said defendants in this cause," and it was adjudged that the premises "be and the same are hereby condemned and appropriated to the plaintiff * * * for a right of way for a state highway."

[3] The court did not have the power to enter a judgment compelling payment of the award, for if the state desired to do so it could have abandoned the proceeding. The purpose of the trial was simply to ascertain and fix the amount which should be paid if the state concluded to take the land. *Oregonian R. Co. v. Hill*, 9 Or. 877; *Oregon R. Co. v. Bridwell*, 11 Or. 282, 3 Pac. 684; *McCall v. Marion County*, 43 Or. 536, 541, 73 Pac. 1030, 75 Pac. 140. However, section 6868, L. O. L., as amended by chapter 49, Laws 1913, provides that—

"The costs and disbursements of the defendant, including a reasonable attorney's fee * * * shall be * * * recovered from the corporation. * * *"

[4] In other words, the plaintiff must, aside from the exceptions named in the statute, pay the costs and disbursements of the defendant; and if there has been a verdict by the jury the plaintiff must also pay a reasonable attorney's fee. *Warm Springs Irr. District v. Pacific Live Stock Co.*, 89 Or. 19, 173 Pac. 265. The trial of an action in which land is condemned for a public use is followed by a judgment which is made up of two distinct parts: One, the part which relates to the value of the land, the plaintiff must pay only in the event the land is actually taken; while the other, the part which relates to the costs and disbursements, must, in all cases where the landowner is entitled to costs and disbursements, be paid at all events, regardless of whether the plaintiff does or does not take the land. Originally, section 6868 included only costs and disbursements, and no provision was made for a reasonable attorney's fee until the amendment of 1913. Obviously it was the purpose of the Legislature to compel the payment of a reasonable attorney's fee if a condemnation action proceeded as far as a verdict; and in order to accomplish that purpose the law-

makers directed that the amount of a reasonable attorney's fee should be included with and become a part of the costs and disbursements, because by including the item for the attorney's fee with the costs and disbursements the defendant could enforce the collection of the attorney's fee if the plaintiff declined to take the land after the jury fixed its value.

The amendment of 1913 declares that this reasonable attorney's fee "shall be taxed by the clerk." That officer, however, has nothing to do with fixing the amount. The statute says that the amount is to be fixed, not by the "judge," but by the "court"; and the amount is to be fixed by the Court "at the trial." It is true that the circumstance that the word "court" appears in the statute is not conclusive; but it is also true that the employment of the word "court," instead of the word "judge," is highly significant. If the word "judge" had been used, that circumstance, it must be conceded, would greatly strengthen the position of the defendants, and the strength of their position would be further augmented if, besides using the word "judge," instead of the word "court," the words "at the trial" had been omitted. The statute, however, does not employ the word "judge"; nor does it omit the words "at the trial"; and consequently the presence of the words "court" and "at the trial" are at least significant, if not very persuasive. See *Warm Springs Irr. District v. Pacific Live Stock Co.*, 89 Or. 19, 173 Pac. 265. The language of chapter 49, Laws 1913, so far as it relates to the allowance of a reasonable attorney's fee, is substantially like every other statute that had ever been enacted prior to 1913 in this state for the allowance of an attorney's fee. See sections 7424, 7434, 7442, 7448, 7459, 7495, and 7503, L. O. L.

[5] The words "shall allow a reasonable attorney's fee" or the words "a reasonable attorney's fee shall be allowed," and the like, have never been construed to mean that a party is entitled to the allowance of an attorney's fee in the absence of allegations and proof. In this jurisdiction the rule has always been that a litigant upon whom the statute confers the right to an attorney's fee must, in order to exercise that right, allege the amount claimed, and offer evidence in support of the allegation; and if the litigant fails to allege some amount or to prove some amount he must fail, and the judge cannot allow some amount in despite of the absence of allegations or evidence merely because he happens to have special knowledge upon the subject, any more than he could in like circumstances fix the value of a horse, alleged to have been converted, merely because he happens to have special knowledge about horses and their value. The practice in this jurisdiction is illustrated by section 7424, L. O. L., and the construc-

tion placed upon it by this court. This section is a part of the mechanic's lien statute, which was enacted in 1885 (Laws 1885, p. 16), and, so far as it relates to attorney's fees, reads as follows:

"In all suits under this act, the court shall, upon entering judgment for the plaintiff, allow as a part of the costs all moneys paid for the filing and recording of the lien, and also a reasonable amount as attorney's fees."

The language of section 7424, it will be observed, is just as imperative as the words in chapter 49, Laws 1913; and yet every recorded decision, without a single exception, has been to the effect that a claimant under section 7424 must claim an attorney's fee by alleging and proving it. *McInnis v. Buchanan*, 53 Or. 533, 542, 99 Pac. 929; *Sattler v. Knapp*, 60 Or. 466, 120 Pac. 2. Indeed, the language found in most of the sections of the Code, to which attention has already been directed, is not less mandatory than the words in chapter 49, Laws 1913. Nor does the circumstance that the attorney's fee is associated with the "costs and disbursements" of the trial differentiate chapter 49, Laws 1913, from any of the other sections of the Code which have been mentioned. In section 7424 the court shall "allow as a part of the costs all moneys paid for the filing and recording of the lien, and also a reasonable amount as attorney's fees." It is said in section 7434, L. O. L., that "the court shall allow such attorney's fees as may be reasonable, to be taxed as costs." We read in section 7448, L. O. L., that—

"The court shall, upon entering judgment for the plaintiff, allow as a part of the costs all moneys paid for the filing and recording of the lien, and also a reasonable amount as attorney's fees."

Section 7459, L. O. L., declares that a lien claimant "shall be entitled to recover out of the proceeds of the sale of said property, or from the person owning the same, the cost and expense of making and recording said lien, together with such sum as the court shall adjudge reasonable as attorney's fees in any suit brought to foreclose said lien." Section 7495, L. O. L., states that the lien claimant shall be entitled to recover the expense of making and recording the lien, "together with such sum as the court shall adjudge reasonable as attorney's fees." In section 7503, L. O. L., it is stated that in all suits brought to foreclose certain liens "the court shall, upon entering judgment for the plaintiff, allow as a part of the costs in said suit all moneys paid for the filing and recording of the lien and also a reasonable amount as attorney's fees." The act of 1913 was framed in the light of prior legislation providing for attorney's fees and in the light of the construction placed by the courts upon such prior legislation; and consequently

the same practice should prevail in the application of the statute of 1913 as has prevailed in the application of prior like legislation. The amendment of 1913 contemplates that the question of the amount of an attorney's fee is one of fact to be submitted to the triers of fact upon pleadings and evidence the same as any other disputed question of fact and in conformity with the practice which has without exception been followed from the beginning in this jurisdiction. If the amount is to be fixed by the "judge," why does the statute command that it be fixed at the "trial"? If the amount is to be fixed without evidence, then why does the statute command that it be fixed "at the trial"? The obvious intent of the statute is that the defendant shall claim an attorney's fee by alleging it so that the opposing party may appear "at the trial" with witnesses and litigate the question before the "court" exactly as any other disputed fact is litigated. The statute contemplates that the amount of the attorney's fee must be: (1) Alleged; (2) proved by evidence; and (3) tried by a jury if the other facts are tried by a jury.

[8] It is true that in *Portland Sash & Door Co. v. Parker*, 61 Or. 203, 121 Pac. 1135, and in *Wills v. Zanello*, 59 Or. 291, 117 Pac. 291, it was stipulated by the litigants that the court could fix the amount of an attorney's fee, and, based upon such stipulation, the court did fix the fees. But in neither of those cases were any of the questions now under consideration raised or discussed or decided, and hence neither of those decisions should be regarded as a precedent. All the arguments that have been here advanced in support of the position taken by the defendants, including the argument growing out of the difference between fees allowed by statute and those stipulated for by contract as well as the argument based upon the records made in *Portland Sash & Door Co. v. Parker*, 61 Or. 203, 121 Pac. 1135, and *Wills v. Zanello*, 59 Or. 291, 117 Pac. 291, and also the argument predicated upon the holdings made in some of the other states, were presented and considered in *Columbia River Door Co. v. Todd*, 90 Or. 147, 175 Pac. 443, 860; and in that case this court squarely decided that the attorney's fee allowed by the statute was an issuable fact to be pleaded and proved by evidence. The act of 1913 was not intended to dispense with pleading and evidence. Not even "costs and disbursements" can be allowed a successful litigant in any suit or action unless he pleads his "costs and disbursements" by filing a verified cost bill, and if the defeated litigant desires to contest the cost bill he must do so by filing verified objections, and these two verified papers constitute the pleadings. The statute of 1913 does not contemplate that the person presiding "at the trial" shall be a compulsory witness and at the same time

and in the same proceeding be the judge of his own testimony. There was no evidence upon the subject of attorney's fees, and there was no stipulation fixing the amount of an attorney's fee; and therefore to allow an attorney's fee is to repudiate an express ruling made less than one year ago, and after the most careful and deliberate consideration, in *Columbia River Door Co. v. Todd*, 90 Or. 147, 175 Pac. 443, 860, as well as to overrule every precedent dealing with the subject. *McInnis v. Buchanan*, 53 Or. 533, 542, 99 Pac. 929; *Sattler v. Knapp*, 60 Or. 466, 120 Pac. 2. The judgment appealed from should be modified by striking out the item of \$300 for attorney's fee.

BENSON, BURNETT, and JOHNS, JJ., concur in the opinion of Justice HARRIS.

McBRIDE, C. J., and BEAN, J., concur in the opinion of Justice BENNETT.

(94 Or. 171)

ANDERSON v. COLUMBIA CONTRACT CO.*

(Supreme Court of Oregon. Sept. 23, 1919.)

1. FISH ⚡5(3)—WHETHER DESTRUCTION OF FISH TRAPS BY TUGBOAT WAS NEGLIGENCE FOR JURY.

In an action by the owner of a fish trap against the owner of a barge for damages resulting to the trap, the questions whether or not the defendant negligently failed to maintain sufficient lights, to keep a lookout, or to see and avoid the trap, or operated the flotilla at a dangerous speed, or negligently failed to stop the tugboat and her tow and avoid the fish trap, were properly for the jury.

2. NAVIGABLE WATERS ⚡1(6) — COLUMBIA RIVER IS A NAVIGABLE STREAM.

The Columbia river is a navigable stream, and as such is a common highway "and forever free," and the right of navigation therein is not only given by the common law, but is preserved by the statute admitting the state of Oregon into the Union.

3. FISH ⚡3—PARAMOUNTCY OF RIGHT OF NAVIGATION DOES NOT EXTINGUISH COMMON RIGHT OF FISHERY.

The paramountcy of the right of navigation does not extinguish the common right of fishery, although the former does, whenever there is a necessary conflict, limit the latter and compel it to yield, so far as the right of fishery interferes with the fair, useful, and legitimate exercise of navigation rights, but the navigator must use ordinary care and due regard to property rights of fishermen.

4. NAVIGABLE WATERS ⚡26(2)—UNAUTHORIZED OBSTRUCTION TO NAVIGATION DOES NOT PERMIT ITS NEGLIGENT DESTRUCTION.

The public is entitled to navigate upon any part of the navigable waters of a stream without unlawful obstructions, and an obstruction erected under grant of authority beyond the

limits of the orders of authorization is unlawful, and a nuisance only to the extent the authority was exceeded, and that it is wholly or partly unauthorized does not necessarily give a navigator authority to destroy it negligently.

5. TRIAL ⚡296(3) — INSTRUCTION OMITTING REFERENCE TO NEGLIGENCE CURED BY SUBSEQUENT INSTRUCTION.

In an action for destruction of a fish trap by a tug, an instruction as to defendant's negligence that "it is charged" "that the boat was being operated outside of and beyond the channel or course in which vessel should be operated," while insufficient, when standing alone, for omission to allege "negligently operated," the error was cured by another instruction covering negligent operation.

6. FISH ⚡5(3)—WHETHER DESTRUCTION OF FISH TRAP BY TUGBOAT WAS BY NEGLIGENT NAVIGATION QUESTION FOR JURY.

In an action for the negligent destruction of a fish trap by a tugboat, an instruction that it was the "duty of defendant to operate and navigate said vessel in the channel or usual course in which vessels navigating said river should be operated and navigated" held erroneous, since it was not negligence per se to operate the boat outside of the usual course followed by vessels; the matter being a question of fact for the jury.

7. FISH ⚡5(3)—EVIDENCE SUFFICIENT TO SHOW AUTHORIZED CONSTRUCTION OF FISH TRAP.

Where plaintiff, in an action for damages for injuries resulting from his fish trap being struck by defendant's tugboat, was authorized by both the state of Washington and the United States to erect and maintain the trap, evidence held to show that a part, if not all, of the portion of the trap injured or destroyed was erected in accordance with such permits and was a legal obstruction.

8. COURTS ⚡7—ACTION FOR DESTRUCTION OF FISH TRAP MAINTAINABLE IN STATE OTHER THAN WHERE LOCATED.

Where no part of a fish trap was driven into the earth, except piling, all of which was driven by the owner with the intention of removing at the end of the season, the trap was "personal property," and an action against the owners of a tugboat for its destruction was transitory, and could be maintained in a state other than where the trap was located.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Personal Property.]

9. DAMAGES ⚡39, 174(1)—EVIDENCE OF DAILY CATCH ADMISSIBLE IN ACTION FOR DESTRUCTION OF FISH TRAP.

In an action against the owner of a tugboat for destruction of plaintiff's fish trap, although such trap may not have "rental value," in the usual sense of the term, yet it has a usable value, which plaintiff would be entitled to recover, and evidence as to the amount of the fish catch just prior to injury or destruction and just after repair, together with evidence of the catch of other nearby traps between

⚡ For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

*For opinion on petition for rehearing, see 185 Pac. 231.

such times, was competent evidence, not for the purpose of measuring the compensation, but for estimating the usable or rental value.

Department 1.

Appeal from Circuit Court, Multnomah County; C. U. Gantenbein, Judge.

Action by Peter Anderson against the Columbia Contract Company. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

The Columbia Contract Company, an Oregon corporation having its principal office in Portland, appealed from a judgment for \$1,050 which Peter Anderson obtained against it for damages done to his fish trap by the company's towboat and barges. Anderson owned a pound net fish trap on the Washington side of the Columbia river. The waters of the river are affected by the ebb and flow of the ocean tides at the place where the trap is located. The fish trap was constructed by driving piling into the bed of the river and attaching web or nets to the piling in the manner described in *Monroe v. Withycombe*, 84 Or. 328, 331, 165 Pac. 227. The extreme width of the heart of the Anderson trap was approximately 50 feet; the lead was about 350 feet long, with the piling in it set from 8 to 10 feet apart; and hence the trap was about 400 feet over all.

About 300 feet above the Anderson trap, and on the Washington shore of the river, was a light, and back further "up in the woods" was a second light. These two lights are known in the record as the range lights. On the Oregon side of the river, and above the Anderson trap, is a place called "Bugby Hole," where another light is kept; and between Bugby Hole and the Anderson trap is a bar in the river, called "Puget Bar." Upon leaving Bugby Hole, masters of vessels navigate Puget Bar by getting in line with the two range lights and steer on that course until the bar is crossed.

Along the entire length of the Anderson trap the water is about 17 feet in depth, except at the "inner end," where it is "about 8 or 10 feet." About 1,800 feet above the Anderson trap, on the Washington side of the river, is another trap, known as the "Brandt trap." There is no obstruction between these two traps. Referring to the towboat and barges operated by the defendant, one witness stated that there "was water enough" between the two traps "so that you could go pretty close by the shore."

We cannot speak any more definitely of the width of the river at the place where the Anderson trap is located than to say that it is between 2,000 feet and one mile. Puget Bar ends at a point above the Anderson trap. According to the testimony of one witness for the plaintiff, "after you get across the bar, and down the river, the whole river is deep,

and you can go anywhere." Another witness for Anderson stated that "It is deep water clear across" opposite the Anderson trap. J. O. Church, who was employed by the defendant as master of the towboat Samson and was thoroughly familiar with the presence and location of the Anderson trap, explained that, if it be assumed that the river is 2,000 feet wide at the Anderson trap, "you will probably have 500 feet there" beyond the outside end of the trap to "navigate in." The plaintiff contended that there "is 3,000 or 4,000 feet of channel there—deep water across the channel."

The witnesses differed in their opinions as to how far vessels usually ran outside the Anderson trap when passing up or down the river. The estimates given by the witnesses for the plaintiff range from 800 to 1,000 feet. Capt. Church, a witness for the defendant, testified: "I should judge the steamships ran in within 250 feet." J. E. Copeland, a master of steamboats with many years of experience, stated that the course usually followed by him before the trap was put in ran about 20 feet from it; but after the trap was installed he made a change in his course, by changing one-eighth of a point in the distance from Puget Bar to the range light, and this changed course passed the end of the trap at a distance of about 200 feet.

The Columbia Contract Company was engaged in transporting rock down the river to the jetty at the mouth of the river, and for that purpose the company used three barges and a towboat called the Samson. Each barge, when loaded, carried about 800 tons of rock and drew about 10 feet of water. The Samson drew between 14 and 14½ feet of water. Each of the barges was about 140 feet long and approximately 40 feet wide. The Samson was about 125 feet long, with a 25-foot beam. At some time in 1911, probably September 28th, the defendant was taking the Samson and three barges loaded with rock down the river. One barge was lashed to the bow of the Samson, while a second barge was lashed on one side, and the third barge was lashed on the other side of the first barge and towboat, making of the towboat and barges what counsel have termed in their briefs a "spike formation." The flotilla was approximately 120 feet wide. The Samson, with its barges, passed Bugby Hole about 3 a. m., and at that time it was so foggy that the range lights above the Anderson trap could not be seen. The fog made its appearance on the river about midnight, and in a short time became so thick that the range lights were completely obscured from view and could not be seen by fishermen on the river. One fisherman, Christian Tholo, was operating a gill net in the channel of the river a short distance above the Anderson trap, and upon hearing the fog signal of the Samson he took in his net. He could not see the range

lights; nor could he see either the Oregon or Washington shore, and after changing the course of his gasoline boat several times he finally found himself at the end of the Brandt trap, where he tied his boat. Another fisherman, Olaf Vog, was likewise operating a gill net in the channel of the river near to and a short distance above the Anderson trap. When he reached what he supposed was the end of his drift or the place where he "should start to pick up," he took up his gill net, and although he "wanted to get over to the Oregon shore" he found himself on the Washington side at the Anderson trap, where he tied up "and laid down in the boat."

Not being able to see the range lights, upon leaving Bugby Hole the master of the Samson navigated his vessel by clock and compass, by noting the time shown by the clock and by observing the course recorded in his course book. He explained that 14 minutes of running would have brought the flotilla to the Anderson trap; that at the end of 11 minutes he slowed down, and at the end of 12 or 13 minutes he stopped the engines and drifted. After Puget Bar is crossed, and while passing the Brandt and Anderson traps, vessels, when following the usual course, are not navigated on a tangent, but are steered along the line of a slight curve. The two traps are on the outer side of this curve. The usual course taken by vessels is farther out from the Brandt trap than from the Anderson trap, and yet Tholo, the fisherman who had tied up his boat at the Brandt trap, says that the Samson and the barges passed within 20 feet of the Brandt trap. According to this witness the Samson with its barges proceeded down the river through the waters between the Brandt and Anderson traps, and then ran on through the latter trap. The flotilla ran through the lead of the Anderson trap at a point between the heart and inner end of the lead, taking out 24 piling, and ran so close to the heart of the trap that only one or two piling next to the heart and in the lead remained standing.

Anderson repaired the trap, and at the end of two weeks from the date of the accident was able again to operate it. He sued the Columbia Contract Company for the total sum of \$1,618.60. This total sum embraced two items—one for \$818.60, the cost of repairing the trap, and the other \$800, the amount of the "money and profits" which Anderson alleges he could and would have earned if the trap had not been injured.

The complaint contains six specifications of negligence. The plaintiff alleges: (1) That, although there was a fixed channel and course in which vessels navigating the river should be operated, the defendant negligently failed to keep the tugboat within the limits of "said channel, and carelessly and negligently navigated said vessel outside and be-

yond said fixed course and channel, and into and against said fish trap"; (2) that the defendant negligently failed to maintain sufficient lights upon the vessel, so that objects lying in the stream could be seen and avoided; (3) that the defendant negligently failed to maintain a lookout, and neglected to keep a sufficient watch ahead; (4) that the defendant negligently failed to see and avoid striking the trap; (5) that the defendant negligently operated the vessel at a dangerous and unsafe rate of speed; and (6) that the defendant negligently failed to stop the vessel and to run aside, so as to avoid the fish trap, after the trap was or should have been seen by the defendant.

In its answer the defendant denies that it was guilty of negligence in any particular. As a further answer to the complaint the defendant avers that the fish trap was unlawfully built and maintained, and in such a manner that it obstructed the navigable channel of the river and was a menace to navigation; that the trap was unlawfully maintained in two particulars: (1) That it extended from the shore to a point in the navigable channel in the river; and (2) "that the signals and lights were not maintained thereon as required by law." The defendant alleges that at a time when it was lawfully navigating the river on a dark and foggy night, and while moving slowly down the stream "in the channel thereof," and "solely because the said fish trap was so located that it obstructed the navigable channel of the said river, the said steamboat, with its tow, ran into said fish trap."

The plaintiff replied by traversing the affirmative allegations of the answer.

Wirt Minor, of Portland (Teal, Minor & Winfree, of Portland, on the briefs), for appellant.

A. M. Dibble, of Portland (Malarkey, Seabrook, and Dibble of Portland, on the briefs), for respondent.

HARRIS, J. (after stating the facts as above). The foregoing statement may be summarized by saying that the defendant attempted to navigate the river at a time when it was so foggy that one could not see ahead and the range lights ceased to be an aid to navigation; that the defendant left Bugby Hole with the intention of following the usual course taken by vessels across Puget Bar and past the Anderson trap; that the towboat and barges were successfully navigated across Puget Bar; that the river is between 2,000 feet and a mile wide at the point where the Anderson trap is located; that between 500 and 4,000 feet of that width opposite the Anderson trap is sufficiently deep for the navigation of vessels; that the usual course followed by vessels is between 200 and 1,000 feet from the outer end of the Anderson trap; that, instead of following the

usual course, as the master of the Samson says he intended, the flotilla, because of some controverted reason, got out of the usual course of vessels at a point at least 1,800 feet, and probably more, above the Anderson trap, and proceeded on down the river outside of the usual course, but in waters deep enough for the navigation of the towboat and barges, to and through the Anderson trap.

[1] It is appropriate here to add to what already has been said that the master of the Samson testified that he did not see the Brandt trap at all, and that it was so foggy that he did not see the Anderson trap until he was about 100 feet from it. On the other hand, Christian Tholo testified that the fog lifted before the Samson reached the Anderson trap, and that when the boat was "in front of the lower range light" (300 feet above the Anderson trap) it was "swinging," and that at that time he saw the light on the end of the Anderson trap. The witness Vog corroborated the testimony of Tholo by saying that after the flotilla went through the trap "I was looking around, and I could see the shore, the house ashore, and the woods back of the house." Anderson explained that his house was 600 feet below the front range light; and hence, if his testimony is taken as true, the trap, which was 300 feet below the range light, was 300 feet above the house. The Samson was displaying a red light on the port side and a green light on the starboard side, as well as two white lights on the masthead, as required by the regulations. There was a white light on the outside of each barge. These lights, however, served to enable others to see the Samson rather than to enable the Samson to see other objects. In addition to the lights already mentioned, the Samson was equipped with both an arc and a search light. The master of the vessel stated that the search light is not used in foggy weather, for the reason that such a light hinders rather than aids navigation. Besides the master, who was at the time of the accident at the Samson's wheel, there was a sailor on duty on the Samson as a lookout. There was a man on each barge, but each of these three men was asleep.

As already stated, Capt. Church testified that at the end of 11 minutes he slowed down, and at the end of 12 or 13 minutes after leaving Bugby Hole he stopped the engines and drifted; but opposed to this evidence there was the testimony of Christian Tholo, who told the jury that "when she passed me she had the speed that she usually had," and that after he saw the Samson she was going, so far as he could observe, "as she usually goes when it is clear." There was testimony for the plaintiff to the effect that vessels either anchored or tied up in heavy fogs; but there was also evidence for the defendant to the effect

that only loaded ocean-going vessels, whether with or without a tug, anchored, and that towboats with barges never anchored or tied up on account of the fog. The master of the Samson testified that, if the towboat had been equipped with a stern wheel, he could have backed out after seeing the trap and thus avoided it; but since the boat was equipped with a propeller an attempt to back out at any time after he saw the Anderson trap would have resulted in the flotilla swinging around and striking the trap broadside, and thus causing greater damage to the trap. He also stated that when he discovered his predicament he started the engines and went through the lead of the trap as straight as he could, and by so doing did the least possible damage, and that if he had not done this the flotilla would have taken out the heart of the trap. It is apparent, from this brief account of the evidence, that the questions of whether or not the defendant negligently failed to maintain sufficient lights, or negligently failed to keep a lookout, or negligently failed to see and avoid the fish trap, or negligently operated the flotilla at a dangerous rate of speed, or negligently failed to stop the Samson and her tow and avoid the fish trap, were all properly submitted to the jury. There was evidence upon both sides of these controverted questions, and it was therefore the province of the jury to determine the facts. The trial court did not commit error, as contended by the defendant, in asking the jury to decide whether the corporation was negligent in respect to any of those five specifications of negligence.

Much of the discussion in the briefs relates to the allegation that the defendant "negligently failed to keep and maintain said tugboat within the limits" of the fixed channel and course in which vessels were usually operated. The defendant has urged numerous objections to the instructions given by the court, contending that some of them were erroneous and that several of them were inconsistent with each other. The position taken by the defendant is rested largely upon the application which it contends should be made of the rule which gives paramountcy to the right of navigation.

[2, 3] The Columbia river is a navigable stream, and as such is a common highway "and forever free." This right is a public one, and it is not only given by the common law, but is preserved by the statute admitting the state of Oregon into the Union. *Johnson v. Jeldness*, 85 Or. 657, 661, 167 Pac. 798, L. R. A. 1918A, 1074. The right of fishery is likewise a common right. The right of navigation is paramount, for the reason that it is of the most importance to the public weal. *Davis v. Jenkins*, 50 N. C. 290, 293; *Post v. Munn*, 4 N. J. Law, 61, 7 Am. Dec. 570; *Flanagan v. City of Philadelphia*, 42 Pa. 219, 228. Stated in general terms, the right of fishery must give way to

the right of navigation. Expressed in more accurate language, the paramountcy of the right of navigation does not extinguish the right of fishery, although the former does, whenever there is a necessary conflict, limit the latter, and compel it to yield so far as the right of fishery interferes with the fair, useful, and legitimate exercise of the right of navigation. Speaking of the abstract right of the public, it may be said, as expressed in 1 Farnham on Waters, § 27:

"The public is entitled to the free, uninterrupted, and unobstructed use of every part of the stream, from bank to bank and throughout the length of the channel, which at the ordinary stage of the water is of such depth and of such accessibility with respect to the current or main body of the stream as to be capable of navigation by boats * * * either up and down or across, or from the main stream onto any particular part in question, or thence onto the body of the stream; and this whether such part has ever been so used, and whether there is any present or anticipated necessity for so using it."

Continuing to employ general terms when referring to the right of navigation, in the abstract, a boat has a right to "take her course," and to go when and where it is necessary to go, and is not obliged to stop or go out of her way, or wait upon the movements of those who are managing a fishing seine or net; and yet this right of navigation, which entitles the public to the unobstructed use of every part of the stream which is capable of navigation by boats, and authorizes a boat to "take her course," cannot be exercised without regard to the rights of others. The navigator of a public stream must manage his craft with ordinary care and with due regard to the rights, property, and lives of others. 1 Farnham on Waters, §§ 27, 31, 33; Spry Lumber Co. v. The C. H. Green, 76 Mich. 320, 332, 43 N. W. 576. While a boat may "take her course," nevertheless a navigator cannot with impunity do unnecessary damage to a fisherman or his property; but, upon the contrary, the paramount right of navigation must be exercised fairly, and not arbitrarily, and with due regard to the subordinate right of fishery, and a boat must be so navigated as not to do unnecessary damage. 1 Farnham on Waters, § 33a; Gould on Waters (2d Ed.) § 87; Porter v. Allen, 8 Ind. 1, 65 Am. Dec. 750; Lewis v. Keeling, 46 N. C. 299, 307, 62 Am. Dec. 168; Post v. Munn, 4 N. J. Law, 61, 7 Am. Dec. 570. For example, if nets are placed across the channel of a river, so as to be a bar to navigation, a vessel may, if reasonably necessary to do so, run over the nets; but, if a navigator is warned or ought to have known of his approach toward the net of a fisherman, he is liable for damage resulting from his negligent failure to avoid doing damage, if he can do so without prejudice to the reasonable prosecution of his

voyage. Horst v. Columbia Contract Co., 89 Or. 344, 350, 352, 174 Pac. 161; Hopkins v. Norfolk & S. R. Co., 131 N. C. 463, 42 S. E. 902; Cobb v. Bennett, 75 Pa. 326, 329, 15 Am. Rep. 752; Wright v. Mulvaney, 78 Wis. 89, 46 N. W. 1045, 9 L. R. A. 807, 23 Am. St. Rep. 393. The ruling in Wright v. Mulvaney is of peculiar interest, for the reason that there, as here, a pound net fish trap was injured by a boat with a tow, and some of the other material particulars were like the facts presented here. The court says:

"But it does not necessarily result from this [the paramount right of navigation] that the navigator may carelessly and negligently run his vessel upon the nets of fishermen and destroy them, and escape liability therefor merely because he did not do so maliciously or wantonly. Such a proposition shocks any proper sense of justice. The benefit which the navigator is entitled to claim by reason of his paramount right is, we apprehend, that when the two rights necessarily conflict the inferior must yield to the superior right. But he may not by his own negligence unnecessarily force the two rights into conflict, and then claim the benefit of the paramount right."

[4] When it is said that the public is entitled to navigate upon any part of the navigable waters of a stream without obstruction, it must always be understood that reference is made to unlawful, and not lawful, obstructions. An obstruction placed in a stream may be authorized by competent authority, and consequently the right of navigation is limited by that kind of an obstruction. Gould on Waters (2d Ed.) § 87; Davis v. Jerkins, 50 N. C. 290, 293; Flanagan v. City of Philadelphia, 42 Pa. 219, 232; Lewis v. Keeling, 46 N. C. 299, 306, 62 Am. Dec. 168; Pound v. Turck, 95 U. S. 459, 24 L. Ed. 525. If authority is granted for the erection of an obstruction in a navigable stream, and the obstruction is so placed as to be partly beyond the limits of the authorization, then in that event the obstruction is unlawful, and a nuisance only to the extent that the authority has been exceeded. Knox v. Chaloner, 42 Me. 150, 156; Renwick v. Morris, 3 Hill (N. Y.) 621, affirmed in 7 Hill (N. Y.) 575. Even though an obstruction is wholly or partially unauthorized nevertheless this lack of authority for the erection or maintenance of the obstruction does not necessarily operate as authority to a navigator negligently to destroy the obstruction. 1 Farnham on Waters, § 33; Dimes v. Petley, 15 Q. B. 276, 19 L. J. Q. B. N. S. 449, 14 Jur. 1132; The Brinton, 66 Fed. 71, 13 O. C. A. 331.

[5, 6] We may now direct attention to some of the instructions which the court gave to the jury. After defining negligence, and explaining that the plaintiff could recover if the defendant was, and he himself was not, guilty, of negligence, the court told the jury,

(184 P.)

in instruction No. 3, that "it is charged" in the complaint "that at said time the said boat was being operated outside of and beyond the channel or course in which such vessels should be operated"; and then follows an enumeration of the remaining five specifications of negligence. Having referred to the first specification of negligence in the language already quoted, and having enumerated the other five specifications, the court, in instruction No. 4, then said:

If you find the defendant was "guilty of any one or more of said charges, and if you so find that any one or more of said charges which you may so find defendant guilty of constituted negligence or lack of due care," and that such acts caused the injury, then "plaintiff is entitled to a verdict," unless his own negligence contributed to the injury.

The jury was properly told, in instruction No. 5:

"That in operating its said vessel the duty rests upon defendant to operate the same in a reasonably careful manner, so as to avoid colliding with or injuring structures along the shore."

The next instruction related to the right and duty of the defendant when navigating in the fog, and the succeeding instruction referred to the duty of maintaining a lookout. The next instruction, No. 8, reads as follows:

"It was also the duty of defendant to operate and navigate said vessel in the channel or usual course in which vessels navigating said river should be operated and navigated."

In instruction No. 9 the jurors were told:

"If you find from a preponderance of the evidence, therefore, that defendant failed to perform any one or more of these duties, then defendant was negligent, and not in the exercise of due care."

Instruction No. 26 is important, because it was given at the request of the defendant. This instruction begins by saying that if the jury found that the plaintiff had obtained permits from the state of Washington and the United States, and had erected and maintained the trap in the place and manner provided by such permits, and if the jury further found—

"that the defendant was careless and negligent in piloting, operating and navigating its towboat Samson, and in thereby causing the same to run into and against the said fish trap of plaintiff, and that the fish trap was thereby damaged and injured, the plaintiff is entitled in such case, and in such case only, to recover from the defendant the amount of his damages: Provided that the negligence of the defendant which occasioned the injury consisted in the failure of the defendant to keep and maintain its towboat within the limits of the navigable channel of the Columbia river and outside and beyond the fixed course and navigable channel of said river, or that the defendant failed to keep and maintain adequate and sufficient lights

upon its towboat, so that objects lying in the Columbia river could be seen and avoided, or that the defendant failed to keep and maintain a lookout upon its towboat, and failed to keep and maintain a sufficient watch ahead, or that the defendant, through negligence in looking ahead, failed to see the fish trap; or that, having seen the fish trap, the defendant failed to use such means as were available to avoid striking and injuring the same, or that the defendant operated and propelled its towboat at a dangerous rate of speed, or at an unsafe rate of speed with regard to the condition of the weather, the atmosphere, and the circumstances and conditions surrounding the locality where the accident complained of is alleged to have occurred, or that the defendant, having means to stop its towboat, or to turn aside and thus avoid the fish trap after the same was seen, failed to employ said means efficiently, or to take proper and timely steps to stop its towboat or to turn aside and thus avoid the said fish-trap."

Instruction No. 8 was clearly erroneous. Instruction No. 3, standing alone, is not strictly accurate, for the reason that it states that the complaint charges that "the boat was being operated outside," instead of including the element of negligence, and saying that the boat was being "negligently" operated outside, of the channel. However, when this instruction is construed in connection with instruction No. 4, then the two, when taken together, harmonize with the complaint. The plaintiff does not rely in his complaint upon the bald fact that the defendant got outside of the channel usually followed by vessels; but he relies upon the charge that the—

"defendant carelessly and negligently failed to keep and maintain said tugboat within the limits of said channel, and carelessly and negligently navigated said vessel outside and beyond said fixed course and channel."

The position of the plaintiff with respect to instructions 3 and 4 is made plain by the following excerpt taken from his printed brief:

"By said instructions, 3 and 4, the court charged the jury that it was alleged in the complaint that appellant carelessly and negligently operated its boat outside of and beyond the channel or course in which vessels should be operated, and that if the jury found, not only that appellant did this, but that its action in so doing resulted from negligence or a lack of due care, and they also found that such negligence caused the damages to the trap, respondent was entitled to recover, unless he was himself guilty of contributory negligence.

"In other words, the court instructed the jury that before they could find against appellant for navigating outside the channel or usual course of vessels they must find that it did so unnecessarily and because of negligence and a want of due care. It was properly left to the jury to say from all the circumstances, taking into consideration the location of the trap and the width of the channel, whether appellant's

action in going outside of the usual channel and course of vessels was the result of an unfair or negligent exercise of its right of navigation."

Instruction No. 26 is entirely consistent with instructions 3 and 4, and is in harmony with the construction which the plaintiff places upon these two instructions. Instruction No. 8, however, told the jury that it was the duty of the defendant to navigate its vessel in the channel and the usual course taken by boats. When this instruction is considered in the light of all the instructions which had been previously given, and in connection with instruction No. 9, it was equivalent to charging the jury that, if the defendant got outside of the channel or usual course taken by vessels, that fact alone and of itself convicted the defendant of negligence; for, after saying in instruction No. 8 that it was the duty of the defendant to operate its boat in the usual course taken by other vessels, the court said in instruction No. 9 that, if "defendant failed to perform any one or more of these duties," then the defendant was negligent. It was not negligence per se for the defendant to navigate the flotilla outside of and beyond the course usually followed by vessels. It was a question of fact for the jury to say whether the defendant failed to exercise ordinary care in the navigation of its flotilla. It may fairly be assumed that the defendant concedes that when its flotilla left Bugby Hole its captain intended to follow the usual course taken by vessels, and did not intend to go between the Brandt and Anderson traps; the defendant does not contend that the business in which it was engaged required it to go outside of the usual course, or to navigate the waters between the Brandt and Anderson traps; and consequently the ultimate question of fact is whether the defendant failed to use due care when transporting the rock down the river, and although a failure to keep within the usual course taken by vessels is not negligence as a matter of law, nevertheless as stated in *Porter v. Allen*, 8 Ind. 1, 4 (65 Am. Dec. 750) "though it was proper for the jury to consider the fact" that the boat was not in the usual and ordinary channel where boats are usually run, "in connection with the other facts proved in the case, still it was alone insufficient to control the verdict."

The charge to the jury should, of course, in this as in all cases, be considered as a whole, with the view of ascertaining, if possible, whether the rights of the appealing litigant were so prejudiced as to prevent a fair trial. Instruction No. 8 was not a mere parenthetical statement made during the course of the charge, but it stands out as prominently as any other single instruction appearing in the charge, and it contains plain language which the jury could not

have misunderstood; and hence a reversal of the judgment becomes necessary.

[7] The defendant insists that the Anderson trap was an unlawful obstruction. The plaintiff was authorized by both the state of Washington and the United States to erect and maintain the trap. All the evidence shows that the trap was neither above nor below the place indicated in the permits, although there is a controversy as to whether or not the trap extended farther out into the river than allowed by the permit given by the United States. The defendant argues that all that part of the trap which was taken out when the flotilla went through the lead was beyond the limits fixed by the permit. The evidence shows conclusively that the 24 piling taken out were either in whole or in part within the limits of the federal permit. The defendant argues that the trap exceeded the length allowed by the permit by 180 feet. Even though it be assumed that the trap was 180 feet too long, still it must be remembered that the heart was 50 feet wide, and if to this width is added the distance covered by the 1 or 2 piling left standing next to the heart, and also the distance covered by the 24 piling taken out, it will be seen that only a part of the obstruction was unlawful, in the sense that it exceeded the authority given to the plaintiff. If, on the other hand, the trap did not extend beyond the point allowed by the permit, then all of it was authorized, and no part of it was an illegal obstruction. No part of the trap was within the usual course followed by vessels going up or down the river.

[8] The defendant has urged with much vigor that this is a local action, and therefore triable only in the state of Washington. The plaintiff first obtained a permit from the United States in 1901, and he operated under that permit until 1912, when he received a new permit. In each year of that period, except possibly 4 or 5 years when he did not put in the trap, the plaintiff drove the piling for his trap and completed its construction a short time before the fish began to run, and then, when the fishing season ended for that year, he pulled out the piling and removed the trap. No part of the trap was driven into the earth, except the piling; and all the piling were driven by the owner with the intention on his part of removing them at the end of the season; and hence the trap was only personal property. *Johnson v. Pacific Land Co.*, 84 Or. 356, 184 Pac. 564; *Roseburg National Bank v. Camp*, 89 Or. 67, 173 Pac. 313. The trap was only an appliance used by the plaintiff in the exercise of his right to fish. The action is not one for trespass upon real property; nor is it prosecuted on account of any assault upon the right of fishery. The trap was personal property, and was used as an appliance by the plaintiff, a salmon fisher-

man; and when that appliance was damaged, the result was not different in principle from the situation presented by some person negligently breaking an ordinary trout rod, which the owner was using for casting from the bank into a stream, and even though the trout fisherman owned the bank upon which he stood while casting. The injury complained of was damage to the trap, and the action is transitory.

[9] The next question relates to the measure of damages. The court said to the jury that if the plaintiff was entitled to recover at all he was entitled "to such damages as you may find from a preponderance of the evidence will fairly compensate him for the loss he has suffered," and that—

"There are two elements of damage to be considered by you: First, you will consider and determine from the evidence the reasonable amount that it would be necessary to expend to repair plaintiff's trap and restore it to the same or as good condition as it was before the injury; second, you will determine from the evidence the value of the use of plaintiff's trap during such time as it was necessarily delayed by the injury to it. The sum of these two elements so determined by you would be the amount plaintiff is entitled to, if entitled to any sum."

Besides evidence relating to the cost of repairing the trap there was testimony concerning the number of fish caught by the Anderson trap before the accident, and also after the trap was repaired, as well as testimony about the catch made by other traps in that locality and on the same side of the river. The Anderson trap had been in operation from September 10, 1911. There was evidence to the effect that the catch made by the Anderson trap averaged 1,500 or 1,600 pounds a day for a few days before the accident; that the fish "generally run steady on that place there, right along; when we have a run, we have one at about the same time as the other places." The plaintiff testified that the "run of silver side salmon" continued during the period of two weeks while his trap was out of repair, "because the rest of the traps above me and below me had lots of fish at the time when she was broke off"; that during those two weeks the traps above and below his trap "were catching up to a couple of tons a day"; that after the trap was repaired the average catch was "about 1,600 or 1,700 pounds per day." Charles Brandt, who was an experienced trap fisherman and thoroughly familiar with the Anderson trap, testified that he knew the reasonable value of the use of the Anderson trap, and that its value was "between \$50 and \$60 a day" during "the time she was broke down"; however, he also stated that he never knew of a trap having been rented for a money rental, but that all the leases coming to his knowledge had been "on the shares." This witness further explained that the An-

derson trap "was a trap that caught the fish, and she is the best trap there is in" that locality, that he "would be willing to pay the man \$50 a day for the use of that trap," and that "I go on the basis of what catch she is making" when estimating the value of the trap. The weather conditions, according to all the evidence, were favorable. The foregoing is substantially all the evidence relating to the value of the use of the trap.

The defendant contends that it was error to receive evidence of the average catch of the Anderson trap before and after the accident; that the testimony about the catch made by other traps, located above and below the Anderson trap, was erroneous. The defendant took the position that the occupation of a fisherman is uncertain and precarious, and that his profits are necessarily speculative, and for that reason the defendant requested, but the court refused to give, the following instructions:

"The value of the fish trap of the plaintiff, if you should find that the plaintiff is entitled to recover is a matter of easy determination, and inasmuch as the trap is put in for one season only, I charge you that the measure of damages for the use of the trap is interest upon such value as you may find the trap to have had at the time of this injury for such period as you may deem reasonable, but not over the period of one year at the rate of six per centum (6%)."

The law aims to allow full and complete compensation to an innocent party who has been damaged by the breach of a contract or the commission of a tort. In practice, the law does not prove false to its theory by banning profits merely because of their nature as profits; but, upon the contrary, the law endeavors faithfully to realize its aim by allowing compensation for profits which it is reasonably certain would have been made, if the wrong complained of had not been done. *Allison v. Chandler*, 11 Mich. 542; 8 R. C. L. 501; *Bredemeler v. Pacific Supply Co.*, 64 Or. 576, 131 Pac. 312; *Fields v. Western Union Tel. Co.*, 68 Or. 209, 217, 137 Pac. 200; *McGinnis v. Studebaker*, 75 Or. 519, 146 Pac. 825, 147 Pac. 525, L. R. A. 1916B, 868, Ann. Cas. 1917B, 1190; *Feeney & Bremer Co. v. Stone*, 89 Or. 360, 171 Pac. 569, 174 Pac. 152; *Fletcher v. Fischer*, 182 Pac. 823. In the absence of malice the law endeavors to compel reparation rather than punishment. When attempting to compel reparation, the difficulties encountered by the administrators of the law consist in the application rather than in the interpretation of the rules prescribed for the measurement of damages. There is no single rule applicable alike to all cases, involving profits which may be taken into account, when fixing the amount of compensation for the breach of a contract or the commission of a tort. In some cases profits constitute either the sole or one of the elements of damages, and therefore are to be taken as

the measure of the amount of compensation; and in other cases profits constitute only an item of evidence to be taken into consideration, together with other evidence, by the jury when fixing the amount of compensation.

If the complaint is strictly construed, it must be interpreted to mean that the plaintiff is suing for profits as an element of damages, and hence, if entitled to recover on his theory of the case, he would be entitled to have this element of damage measured by the amount of the profits. The instruction of the court, however, is based on the theory that the plaintiff is entitled to recover the value of the use of the trap, and we think that the theory of the trial court is correct and in harmony with the principle which supports the holding in *Williams v. Island City Milling Co.*, 25 Or. 573, 37 Pac. 49. One witness testified that he never knew of a trap having been rented for a money rental, and hence it may be that the trap does not have a rental value, in the same sense that the words "rental value" are used when referring to a storeroom or a dwelling house in a city; and yet the trap did have a usable value. The trap was usable for only one purpose, and it was valuable for that and no other purpose, and the damages must, in order to award compensation, be ascertained by an inquiry into the value of the use of the property to the injured party for the time he was deprived of it. Past results ought to be of some aid in fixing the usable value, and in the very nature of things one of the first inquiries that one would naturally make when estimating the usable value of the trap would be: How many fish did the trap catch? Admission of evidence concerning the catches made by the trap before the injury is fully supported by the doctrine stated in *Williams v. Island City Milling Co.* See, also, the luminous opinion in *Standard Supply Co. v. Carter*, 81 S. C. 181, 62 S. E. 150, 19 L. R. A. (N. S.) 155. While the past success of the trap is not controlling, it is nevertheless one of the factors which may be taken into consideration, not as the measure of damages, but to aid the jury in estimating damages. *Post v. Munn*, 4 N. J. Law, 61, 63, 7 Am. Dec. 570; *Wood Transfer Co. v. Shelton*, 180 Ind. 273, 101 N. E. 718. See, also, *Jacobs v. Cromwell*, 216 Mass. 182, 103 N. E. 383.

That there was a good run of fish during the two weeks is evidenced, the plaintiff says, by the fact that the weather conditions were good, by the significant circumstance that other traps in the same locality, but less favorably situated than the Anderson trap, caught each day "up to a couple of tons a day," and by the important fact that, when the Anderson trap was repaired, it caught each day from 1,600 to 1,700 pounds of fish. Does not this evidence of the catches made during the two weeks, as well as the catches made immediately afterwards, serve to make

more certain any inference of usable value that may be drawn from prior results? Obviously the testimony about the run and catch of fish during the two weeks when the trap was out of repair and the catches made by the Anderson trap when again put in repair constituted data which would be very helpful in fixing the usable value of the trap for those two weeks. The fishing season is of comparatively short duration, and consequently the usable value of the trap might be negligible at one time of the year and considerable at another. In brief, the evidence under discussion was competent, not for the purpose of measuring the compensation to be paid to the plaintiff, but for the purpose of aiding the jury in estimating the usable or rental value of the trap.

There are other exceptions presented by the record, but, since the questions arising out of them are not likely to recur upon a retrial, we deem further discussion unnecessary.

The judgment is reversed, and the cause is remanded for a new trial.

MCBRIDE, C. J., and BURNETT and BENSON, JJ., concur.

(98 Or. 525)

KILLINGSWORTH et al. v. CITY OF PORTLAND et al.

(Supreme Court of Oregon. Sept. 23, 1919.)

1. MUNICIPAL CORPORATIONS \S 512(3) — QUESTIONS OF LAW AND FACT NOT REVIEWABLE ON WRIT OF REVIEW.

In writ of review proceeding to set aside street improvement proceedings and assessment of the expense thereof, the court will not consider question whether the street improved was a part of a bridge approach; such question being a question of fact, or mixed law and fact, not reviewable under writ of review.

2. MUNICIPAL CORPORATIONS \S 512(3)—CITY COUNCIL'S DETERMINATION AS TO BENEFITS FROM IMPROVEMENT CONCLUSIVE.

In writ of review proceedings, to set aside street improvement proceedings, court will not review question of whether property assessed was actually benefited, or whether apportionment of cost made by assessment was just or fair; the city council's determination as to benefits being conclusive.

3. MUNICIPAL CORPORATIONS \S 413(1)—VIADUCT MAY BE CONSTRUCTED AS PART OF STREET IMPROVEMENT.

Amended Portland City Charter 1913, \S 190, subs. 1-4, providing in subdivision 4, that council "shall" levy tax for construction of bridge to cost more than \$15,000, does not preclude council from providing for construction of viaduct, as part of street, at cost of more than \$15,000, by assessment under old charter

sections 373 and 374, incorporated into amended charter by section 284 of amended charter.

4. STATUTES \Leftarrow 158—IMPLIED REPEAL NOT FAVORED.

Implied repeals are not favored.

In Banc.

Appeal from Circuit Court, Multnomah County; J. P. Kavanaugh, Judge.

Proceeding for writ of review by W. M. Killingsworth and others against the City of Portland and another, to review certain proceedings of the City of Portland. Judgment upholding validity of proceedings, and plaintiffs appeal. Affirmed.

The purpose of this proceeding is to set aside, by writ of review, certain proceedings of the city of Portland, whereby the city authorized and entered upon the improvement of Union avenue, in said city, from the south line of Bryant street to the south line of Columbia Slough road, and assessed the cost of the same to the property in the vicinity of said street and supposed to be benefited thereby. A very large part of the improvement consists in the building of a viaduct over the railroad track of the Oregon-Washington Railroad & Navigation Company, where said track intersects said Union avenue.

It is claimed by the plaintiffs and petitioners for the writ of review that the improvement is for the benefit of the general public, and of small, if any, benefit to the abutting owners; that the assessments are out of proportion to the benefits conferred upon the different pieces of property; and that a part of the property assessed is not benefited at all, but rather damaged by the improvements. It is also claimed that the street in question is an approach to the interstate bridge across the Columbia river, which forms a link in the Pacific Highway, and that therefore the improvement should be considered as a part of said bridge.

Further, it is claimed that by reason of an amendment to the city charter, providing that the city shall levy taxes not to exceed one-half mill on each dollar, to provide for the construction of bridges and the filling of streets across gulches and ravines, the power, which it is conceded the city previously had, to assess the costs upon the property benefited, is taken away and destroyed, and therefore, as a matter of law, the city council was without any jurisdiction to make this assessment, and the proceedings against the property of the petitioners are without jurisdiction and void.

Malarkey, Seabrook & Dibble and M. A. Zollinger, all of Portland, for appellants.

W. P. La Roche, City Atty., and L. E. Latourette, Deputy City Atty., both of Portland, for respondents.

BENNETT, J. (after stating the facts as above). [1] It seems clear that in this review proceeding we cannot inquire into the question of whether or not the street improved was a part of the approach to the Columbia river bridge. That is a question of fact, or mixed law and fact, which cannot be tried out upon a writ of review. In *Smith v. Portland*, 25 Or. 297, 301, 35 Pac. 665, 666, it is said:

"The authorities * * * fully sustain the position that the writ of review only brings up the record of the inferior court, and that the superior court, upon review, tries the cause only by the record, and only as to questions of jurisdiction, and as to error in proceeding. It will not on review try questions of fact."

And again:

"If courts will not examine the evidence when in the record, they certainly will not examine it when, as in this case, it is no part thereof."

In *Elmore Packing Co. v. Tillamook County*, 55 Or. 218, 223, 105 Pac. 898, 900, it is said:

"A recital in the petition of independent facts cannot aid the record sought to be reviewed. It must show the facts presented by the record from which the error appears."

And in *McCabe-Duprey Tanning Co. v. Eubanks*, 57 Or. 44, 49, 110 Pac. 395, 396, it is said:

"The writ of review only lies to review the action of the lower court, when it has exceeded its jurisdiction or has exercised its functions erroneously; that is, in a manner not authorized by law. * * * Error of the court in passing upon the sufficiency of the pleadings is not an erroneous exercise of jurisdiction. Even if error was committed, it was done in the rightful exercise of jurisdiction, and is not reviewable in this proceeding."

In this case it does not appear from the record brought up by the writ that the street in question, or the part of the street improved, was a mere approach to the bridge in any immediate sense. Indeed, it seems to be conceded that it was two miles or more away from the bridge; and, as far as the record brought up here by the city council shows, it was only an approach to the bridge in the same sense that any street or highway leading to the bridge would be an approach. At any rate, that is a question of fact, which we cannot inquire into in this proceeding, and we have no definite and certain means of arriving at the truth in regard thereto.

[2] Neither can we, in this proceeding, inquire as to whether the property assessed was actually benefited, or as to whether the apportionment of the cost made by the assessment was just or fair. In *King v. City of Portland*, 38 Or. 402, 429, 63 Pac. 2, 9 (55 L. R. A. 812), which is a leading case in

this state upon this subject, and in which the question was carefully and elaborately considered by Mr. Justice Wolverson, it is said:

"But we are inclined to believe that the better doctrine deducible from adjudged cases, including those of the Supreme Court of the United States, is that the assessment will be upheld wherever it is not patent and obvious from the nature and location of the property involved, the district prescribed, the condition and character of the improvement, the cost and relative value of the property to the assessment, that the plan or method adopted has resulted in imposing a burden in substantial excess of the benefits, or disproportionate within the district as between owners."

In *Hughes v. Portland*, 53 Or. 370, 394, 100 Pac. 942, 951, it is said by Mr. Justice R. S. Bean, delivering the opinion of the court:

"The extent to which the property is benefited and the proportionate share of the cost of the improvement which shall be charged against it is left to the judgment of the council, and, when it has exercised its judgment, its decision—in the absence of fraud or demonstrable mistake of fact—is conclusive, except as a right of appeal may be given by the charter."

And in *Wagoner v. La Grande*, 89 Or. 192, 202, 173 Pac. 305, 308, it is said by Mr. Justice McCamant, quoting from *Page & Jones on Taxation*:

"The question of benefit to the property owner is not a judicial question, unless the court can plainly see that no benefit can exist, and this absence of benefit is so clear as to admit of no dispute or controversy by evidence."

And further:

"Plaintiffs contend that the council erred in fixing the district to which the expense should be chargeable. This determination is a legislative act, which the court cannot review."

These authorities seem to be conclusive in this state, and they are in line with the general authorities. *Cooley on Taxation*, vol. 2, p. 1180, presents the matter thus:

"With the wisdom or unwisdom of special assessments, when ordered in cases in which they are admissible at all, the courts have no concern, unless there is plainly and manifestly such an abuse of power as takes the case beyond the just limits of legislative discretion."

It is perfectly plain here that it is not apparent, and this court is in no position to say, that the property in question was not benefited by this improvement, or to pass intelligently upon whether the improvement was a benefit or not, or, if so, to what extent. Therefore, if the city council had authority to act in this matter at all, and to make an assessment of this kind thereon, then its action is beyond the power of this court to review in this proceeding.

The most serious and difficult question in the case arises on the construction of the provisions of the amended charter authoriz-

ing and enjoining the levy of a general tax to make improvements of the class to which viaducts, like the one forming part of this improvement, belongs. In deciding this question it will be necessary to trace somewhat the history of the authority for street improvements in the city of Portland.

In 1903 (Sp. Laws 1903, c. 1, art. 4) the state Legislature granted to the city of Portland a charter among the provisions of which, in regard to local improvements, were the following:

"Sec. 373. The terms 'improve' and 'improvement,' as used in this chapter in reference to streets, shall be construed to include all grading or regrading, paving or repaving, plank-ing or replanking, macadamizing or remacadamizing, graveling or regravelling, and all manner of bridgework and roadway improvement or repair, and all manner of constructing sidewalks, crosswalks, gutters and curbs, within any of the streets in the city of Portland, or any part of any such street.

"Sec. 374. The council, whenever it may deem it expedient, is hereby authorized and empowered to order the whole or any part of the streets of the city to be improved, to determine the character, kind, and extent of such improvement, to levy and collect an assessment upon all lots and parcels of land specially benefited by such improvements, to defray the whole or any portion of the cost and expense thereof, and to determine what lands are specially benefited by such improvement, and the amount to which each parcel or tract of land is benefited."

Section 284 of the amended charter, adopted in 1913, continues the sections of the old charter, in regard to public improvements, heretofore quoted, as ordinances, except as the same may be inconsistent with other provisions of the new charter, that section being as follows:

"Sec. 284. That so much of sections 362 to 421, both inclusive, of the charter of 1903, as is not inconsistent with the provisions of this charter, shall remain in full force and effect as ordinances only, subject to repeal and amendment and to the enactment of new legislation by the council in the manner and subject to the restrictions in this section provided upon the subject of improvements of whatever nature to be paid for by local assessment. Such sections shall be known as the Local Improvement Code. No repeal of any portion thereof, amendment thereto nor new legislation upon the subject shall be made by the council except by ordinance which shall be published in full and in its final form in the city official newspaper at least thirty days before its final passage. Notice shall be given in the city official newspaper and by publishing conspicuous advertisements in one or more daily papers published in the city of Portland, having a circulation of not less than 1,500, not less than five times, the last of such notices to be published not less than ten days before the final adoption of any such amendment, repeal or new legislation. Upon the adoption of any amendment to or the repeal of any part of such Local Improvement Code or the adoption of any new legislation upon the subject, the whole Local Improvement Code

shall be printed in pamphlet form and the Auditor shall be furnished with a sufficient number of copies thereof for distribution to all persons inquiring for the same. The council, in the exercise of its general legislative powers, may provide in its discretion for the performance of any public work by or on behalf of the city and for the method of payment thereof, but said Local Improvement Code must provide for the giving of not less than ten days' notice by publication, or by mailing to persons interested, (a) of the intention to make any improvement, and (b) of any proposed assessment against property owners for the same, and the right shall be preserved to the owners of sixty per centum in extent of the property affected by any assessment for a local improvement, except for street opening or sewers, to defeat the same by remonstrance."

Section 190 of the new charter is as follows:

"The council, on or before the 31st day of December in each year shall levy upon all property not exempt from taxation, taxes to provide for the payment of expenses of the city for the ensuing year as follows:

"1. A tax not to exceed 8 mills on each dollar valuation to provide for the payment of the general expenses of the city, including maintenance and repair of sewers and paved streets, except as hereinafter in this section provided, which shall be credited to the general fund.

"2. A tax sufficient to meet the interest on the bonded indebtedness of the city, to be credited to the bonded indebtedness interest fund.

"3. A tax of not less than four-tenths of one mill on each dollar valuation for the purchase, payment or redemption of the bonded indebtedness of the city, to be credited to the sinking fund.

"4. A tax not to exceed one-half mill on each dollar valuation to provide for the construction of bridges elsewhere than across the Willamette river, the filling of streets across gulches and ravines, the estimated cost of bridges not to be less than \$15,000 and the fills \$20,000; and the construction of overhead or underground crossings across railroad tracks; provided that this section shall not release any company or corporation having a franchise or otherwise liable, from paying its full share of the cost of construction of bridges, fills or crossings as provided by the terms of its franchise or otherwise existing."

It is contended by the plaintiffs and petitioners, that subdivision 4 of the section just quoted is inconsistent with the provisions of the old improvement sections, which authorized the assessment of abutting property for bridge work and viaducts, where such bridge work is to cost in excess of \$15,000—in other words, that the provision that the council "shall" levy a tax not to exceed one-half mill to provide for the construction of bridges, the estimated cost of which is greater than \$15,000, is mandatory, not only in the sense that it enjoins and commands the levy of a tax for that purpose, but also in the sense that it prohibits the building of such bridges and fills in any other way, and that it impliedly repealed that part of the

sections carried over into the new improvement code by section 284, which authorized the building of such bridges in any case by assessment.

[3] We cannot approve of this reasoning. The effect of it would be that a bridge which cost up to \$14,999 would be built entirely by local assessment, while a bridge costing \$15,001, or more, would be built entirely by general tax on the public, without regard to the fact that it might be of just as great local benefit as the smaller bridge or fill, or might be entirely local in its purpose. Such a construction would be obviously unjust, and ought not to be adopted, unless the language is very plain and compelling.

It is plain that a bridge or fill costing more than \$15,000, or \$20,000, might be almost entirely local in its purposes; as, for instance, where it was not part of any general line of traffic, but furnished the only means of communication from its own locality to the general city streets. In such case there would be no public benefit, except that of furnishing access to the particular locality, and this measure of public benefit exists, and must necessarily exist, in all local improvements. Again, the general public may already have a direct means of travel, generally paralleling the line of the proposed improvement, and the benefit of the improvement may be wholly or chiefly to give the abutting property access to these general lines of travel at both ends of the improvement. In either of these cases it would be plainly just that a part or all of the expense of the improvement, including the fills and bridges, should be assessed upon the abutting owner.

We think the provisions of sections 373 and 374 of the old charter, carried into the new by section 284, and the provisions of section 190 of the new charter, must be construed together, and that under their terms the city council still has power and it is in its discretion, and it may at its option (subject to the limitations of the charter) pay for such bridges wholly or partly by assessment (if 60 per cent. of the property owners do not remonstrate), or, if it has funds for such improvement, out of the half-mill tax provided by section 190. In other words, the provisions of subdivision 4, § 190, while perhaps mandatory as to the levying of a tax, is not mandatory, but permissive, as to what bridges, or what proportion of the cost of such bridges, shall come from that fund.

This conclusion seems strengthened by the latter clauses of section 284 of the new charter, which, as we have seen, provides:

"The council in the exercise of its general legislative power, may provide, in its discretion for the performance of *any public work* by or on behalf of the city and for the method of payment thereof, * * * and the right shall be preserved to the owners of 60 per centum in ex-

tent of property affected by any assessment for a local improvement, to defeat the same by remonstrance."

[4] Implied repeals are not favored, and it must be supposed that the charter intended to preserve the provisions of sections 373 and 374, except where the same are plainly and clearly repugnant to some other provisions of the charter. We think, in this case, they are not at all repugnant. In *Hochfeld v. Portland*, 72 Or. 190, 195, 142 Pac. 824, the court had under consideration the provision in the old charter, authorizing the city to levy a two-mill tax on the property of the city, to provide a fund for the construction of bridges in the city, which should not cost less than \$15,000. Mr. Justice Burnett, delivering the opinion of the court, says:

"This does not restrict the council to any particular manner of improving a street. The clause mentioned is permissive, and not mandatory."

We think there has been no change in the charter which affects the power of the council in regard to the manner of building bridges or making improvements, or takes away the right to build by assessment, even if the levying of a tax to provide a fund for that purpose should be construed as mandatory. It still leaves the council the discretion to build out of that fund, or in the other ways provided by the charter, if that fund should be insufficient, or if the circumstances are such as to make it just to build as a local improvement.

This construction seems to be in line with the authorities generally in similar cases. In *Planting Co. v. Tax Collector*, 39 La. Ann. 455, 458, 1 South. 873, 876, there was a levee district which originally had power to make assessments against the property benefited to build levees. A provision of the Constitution of that state was that the—

"General Assembly may divide the state into levee districts. * * * To that effect it may levy a tax not to exceed five mills on the taxable property, situated within the boundaries of said district subject to overflow."

It was claimed that this provision was—

"a provision of the means for the exercise of the prior power granted, which is restrictive and impliedly prohibitive of a resort to any other means."

But the court refused to accept this theory, saying:

"It is obvious that the object of the last clause * * * was not to exclude the power of local assessment, but simply to confer the power of taxation."

In *Copeland v. Springfield*, 166 Mass. 498, 44 N. E. 605, there was a charter of the city providing that the entire expense of constructing sidewalks should be assessed upon the abutting owners. Afterwards a general law was passed, applicable to all cities, providing that such cities "may construct walks in any streets * * * and may assess upon abutters not more than one-half of the expense." The city was proceeding under the old law and assessing the entire cost to the abutting owners. It was claimed the later act repealed the old law by implication, and that the assessment was invalid. The court held there was not such a repeal, but that both laws stood, and gave the city a choice of remedies.

In *Borough of Greensburg v. Young*, 53 Pa. 282, the act in question provided that the city might provide for "improving the streets and alleys" and "also to assess, levy and collect a tax for such purposes." It was claimed that this language excluded any power to levy local assessments for such purposes, but the court held otherwise.

In volume 1, Page and Jones on Assessments, § 228, it is said:

"Accordingly, of two constructions, one of which will cause inconsistencies between parts of statutes in pari materia, and the other of which will reconcile the statutes and prevent inconsistencies, the latter will prevail. Repeals by implication are not favored. Hence, if by one construction two statutes passed at different times may be construed together, so as to give full force and effect to each, and by another construction they are inconsistent, so that the later statute will operate as an implied repeal of the prior statute, the former construction will be preferred."

And again in section 237 of the same work it is said:

"Since it is within the power of the Legislature to confer upon a public corporation both the power to levy a general tax and the power to levy a local assessment, with discretion to determine in which method it will pay for the improvement in question, a grant of power by the Legislature to a public corporation, authorizing it to levy a general tax to pay for a certain kind of public improvement, does not abrogate another grant of power authorizing such corporation to levy special assessments to defray the expense of such improvements."

Judgment of the lower court is affirmed.

(93 Or. 565)

KUNTZ v. EMERSON HARDWOOD CO.

(Supreme Court of Oregon. Sept. 30, 1919.)

1. PLEADING ¶106(2)—IDENTITY OF CAUSES NOT ESTABLISHED BY PLEA THAT OTHER ACTION WAS FOR SAME AMOUNT.

Identity of causes of action is not established by a plea of other action pending, stating that the other action was for the same amount.

2. PLEADING ¶8(9)—PLEA OF IDENTITY OF PARTIES AND SUBJECT-MATTER OF OTHER ACTION A CONCLUSION OF LAW.

It is no more than a conclusion of law for a plea of other action pending to say that it involves the same parties and the same subject-matter.

3. PLEADING ¶8(9)—PLEA THAT NEW TRIAL WAS GRANTED AFTER TIME ALLOWED BY LAW A CONCLUSION OF LAW.

Allegation of reply to plea of other action pending, that order granting new trial in such action was entered after the time allowed by law, is a mere conclusion of law.

4. ABATEMENT AND REVIVAL ¶15—GRANT OF NEW TRIAL AFTER TIME LIMITED DOES NOT AFFECT JUDGMENT OF NONSUIT.

The granting of new trial after the time limited by L. O. L. § 175, as amended by Act Feb. 18, 1911 (Laws 1911, p. 152), providing that the motion shall be determined within 60 days from the entry of judgment, and not thereafter, and if not determined within that time shall be conclusively taken and deemed as denied, does not affect the prior judgment of nonsuit, so that such action is not pending, as regards a plea of abatement to a subsequent action for the same cause, maintainable under section 184, notwithstanding the nonsuit.

5. MASTER AND SERVANT ¶289(5) — WHETHER EMPLOYÉ WAS AT WORK IN SCOPE OF EMPLOYMENT QUESTION FOR JURY.

Under the evidence, in action for death of employé, held that it was a question for the jury whether he, in going from his place as an off-bearer for a rip saw to another place in the same room to put on a belt, was within the scope of his employment.

6. NEGLIGENCE ¶101 — CONTRIBUTORY NEGLIGENCE REDUCES RECOVERY UNDER EMPLOYERS' LIABILITY ACT.

For an employé to go from his place as an off-bearer for a rip saw to another place in the room to put on a belt, in doing which he was killed, was at most, contributory negligence, which under Employers' Liability Act, §§ 1, 4, 6, merely reduces recovery for his death from failure of the employer to use every means practicable for protecting life from machinery.

7. MASTER AND SERVANT ¶270(14) — EVIDENCE OF WANT OF RULES IN FACTORY NOT OBJECTIONABLE FOR REMOTENESS.

It was permissible, in an action for death of employé in putting on a belt, to show that eight months before the accident there were no rules or regulations in the factory regarding adjustment of the belt, objection of remoteness going rather to its weight than its competency.

8. MASTER AND SERVANT ¶274(7)—DISREGARD OF WARNING EVIDENCE OF CONTRIBUTORY NEGLIGENCE.

As tending to show contributory negligence, as basis for reduction of damages under Employers' Liability Act, master may show that when deceased started to put on belt he was warned, by the man in charge of the saw at which he worked, not to put it on, but to leave it alone.

9. MASTER AND SERVANT ¶270(1)—LABOR COMMISSIONER'S CERTIFICATE EVIDENCE THAT EMPLOYER COMPLIED WITH HIS DUTY WITHIN FACTORY ACT.

Defendant, in an action under Employers' Liability Act for death of a servant in putting on a belt, was entitled to have admitted the labor commissioner's certificate for the year, that the factory conformed to the Factory Act, L. O. L. § 5040 et seq., as prima facie evidence of performance of master's duties to the extent required by the Factory Act.

10. DEATH ¶95(2) — DAMAGES RECOVERABLE UNDER EMPLOYERS' LIABILITY ACT LIMITED TO PROSPECTIVE EARNINGS.

Recovery for death under Employers' Liability Act, § 4, is limited to the net amount which decedent would probably have saved from his earnings considering his age, health, ability, habits of industry, and mental and physical skill, so far as affecting his capacity for earning or rendering services or accumulating.

11. EVIDENCE ¶157(5)—RULES OF EMPLOYER NOT PRINTED MAY BE SHOWN BY PAROL.

Any one knowing the rules regulating employment and duties of operatives in a factory may testify thereto, they not being written or printed, and the law not requiring that they should be.

Appeal from Circuit Court, Multnomah County; Robert G. Morrow, Judge.

Action by Katherine Kuntz against the Emerson Hardwood Company. Judgment for plaintiff, and defendant appeals. Reversed, and remanded for new trial.

The plaintiff is the widow of George Kuntz, who was employed by the defendant as an off-bearer for a rip saw in its factory. This machine was situated in what is designated in the pleadings as the dimension room. In a room above was another saw known as the trimmer saw. This latter machine was operated by means of a belt running from a small pulley on it down to a large pulley about 32 inches in diameter by 10 inches face, mounted on a line shaft about 42 inches above the floor in the dimension room. This pulley was situated about 10 feet from where the decedent stood in doing his work for which the pleadings admit he was employed. It is alleged, in substance, in the complaint, that the shafting for pulleys involved was out of alignment, by reason of which the belt came off the pulley frequently; that there was no guard over the pulley nor belt-shifting de-

vice; that the defendant had failed to provide any rules for the conduct of the work, or any system of signals whereby the trimmer saw operator could notify the engineer in charge of the motive power of the mill to slow down the machinery while the belt was being replaced; that the defendant was careless in failing to warn the decedent about the danger incident to the work of putting on the belt; and generally, that the defendant failed to use every device, care, and precaution which was practicable to be used for the protection of the life and limb of its employes. It is said also in the complaint that it was customary for the trimmer operator on the floor above, whenever the belt came off the pulley, to direct the decedent to replace it, all of which was known to, and acquiesced in by, the defendant; that on June 19, 1917, while the decedent was working as such off-bearer, the belt came off, and the trimmer operator called down to him to put it on again, in pursuance of which he attempted to do so, and, without having means for the purpose, took a stick with which he attempted to adjust it, but by reason of the great speed with which the pulley was running, and because it was not guarded, and there was no belt-shifting device, the stick was caught by the pulley and hurled with great force against his chest, resulting almost immediately in his death.

It is charged that the defendant had elected not to conform to the legislation known as the Workmen's Compensation Act (Laws 1913, p. 188) or to avail itself of the benefits thereunder. After alleging the expectancy of the decedent and his earning capacity, the complaint concludes with an allegation of the damages suffered by the plaintiff.

The answer admits the capacity in which the decedent was employed, and that he died as the result of injuries received while so employed. After further admitting that the defendant had elected not to conform to the Workmen's Compensation Law, the other allegations of the complaint are denied. Affirmatively the answer imputes the injuries and the death of Kuntz solely to his own carelessness and negligence, in that he violated the rules of the defendant by leaving his place of work, and going beyond the contract and scope of his employment for the purpose of replacing the belt, for which latter service he was not hired or employed. Further, his death is imputed to his contributory negligence, and it is alleged, too, that his demise was, so far as the defendant is concerned, wholly accidental, unavoidable, unforeseen, and not preventable by the exercise of the lawful degree of care.

It is further stated:

"That prior to the commencement of the above action the plaintiff commenced an action in the above-entitled court against this defend-

ant praying for the same amount claimed in this action."

Under this head the answer goes on to say that in the preceding action a judgment of nonsuit was granted against the plaintiff and in favor of the defendant, whereupon the plaintiff filed a motion for a new trial, which was allowed February 19, 1918, and the defendant appealed to the Supreme Court of this state, which appeal is still pending. Finally, in this defense it is said:

"That said action involves the same parties and the same subject-matter, and until the same has been abated or dismissed or otherwise disposed of this action is not maintainable and constitutes a bar to the present action."

The new matter of the answer is traversed by the reply, and respecting the plea of *lis pendens* the plaintiff, finally pleading, alleges:

"The truth and fact to be that said cause was partly tried; that a nonsuit in favor of defendant was erroneously granted by the court, contrary to the law governing said cause; that thereafter said nonsuit was set aside, but that the order setting the same aside was made and entered after the time allowed by law; that from said order the defendant appealed to the Supreme Court; that said appeal was only taken for the purpose of delay, and for the further purpose of keeping the plaintiff out of her just rights, and not for the purpose of determining any legal rights of the defendant; and that said appeal is wholly void by reason that no appeal lies from a void order; that no action is now pending between the parties to this litigation except this action; that the former action has been wholly disposed of."

The circuit court denied the motion for nonsuit at the close of the plaintiff's case, and the trial resulted in a verdict and judgment in favor of the plaintiff, from which the defendant appeals.

F. S. Senn, of Portland (Senn, Ekwall & Recken, of Portland, on the brief), for appellant.

Chester A. Sheppard, of Portland (John E. Owen, of Portland, on the brief), for respondent.

BURNETT, J. (after stating the facts as above). [1-4] In respect to the plea of *lis pendens*, both the answer and the reply are affected by a common error, that of pleading conclusions of law rather than the facts from which a court might be enabled to reach the desired deduction. It is not sufficient in the answer to state merely that the former action was for the same amount. The identity of causes of action is not established by equality of the amounts demanded. Neither is it more than a conclusion of law to say that the pending action involves the same parties and the same subject-matter. The issues in the former case should be recited with sufficient clarity so

(184 P.)

that the court might be enabled to determine that the two actions were identical. In the reply it is not enough to say that the order granting a new trial was entered after the time allowed by law. The pleading does not inform us of the date of filing the motion for a new trial or of granting the same. Hence we are unable to discern from the reply whether the order was entered out of time or not. The plea of *lis pendens*, therefore, does not state facts sufficient to constitute a defense, and it is enough to say in that regard that it can avail the defendant nothing here. At the argument, however, it was conceded that the order allowing the new trial was made 61 days after the motion was filed. Treating of such a motion, section 175, L. O. L., as amended by the act of February 18, 1911 (Laws 1911, p. 152), provides that:

"The motion shall be heard and determined during the term, unless the court continue the same for advisement, or want of time to hear it, but said motion shall be heard and determined by the court within sixty days from the time of the entry of judgment, and not thereafter, and if not so heard and determined within said time, the said motion shall be conclusively taken and deemed as denied."

This statutory disposition of such a motion is imperative, and leaves no room for any other construction than that the former action ended in a judgment for nonsuit, which does not bar another action for the same cause. L. O. L. 184.

[5] The principal contention of the defendant, as stated in the briefs, is that as the decedent, having left his regular place of work as off-bearer while undertaking to put on the belt, was a mere volunteer, and was acting beyond the scope of his employment, a nonsuit was proper or a directed verdict should have been granted. Under the initiative act of November 8, 1910, known as the Employers' Liability Act (Laws 1911, p. 16), all owners, contractors, subcontractors, corporations, or individuals whatsoever engaged in the operation of any machinery are charged with the duty of protecting the same and covering it securely to the fullest extent that the proper operation thereof permits, and the act requires that all machinery other than that operated by hand power, whenever necessary for the safety of employes in or about the same or for the safety of the general public, shall be provided with a system of communication by means of signals, so that at all times there may be communication between the employes and the operators of the motive power. The first section of the act closes with this provision:

"And generally, all owners, contractors or subcontractors and other persons having charge of, or responsible for, any work involving a

risk or danger to the employes or the public, shall use every device, care and precaution which it is practicable to use for the protection and safety of life and limb, limited only by the necessity for preserving the efficiency of the structure, machine or other apparatus or device, and without regard to the additional cost of suitable material or safety appliance and devices."

Section 4 of the act as it stood when the occurrences narrated in the pleadings happened reads thus:

"If there shall be any loss of life by reason of the neglects or failures or violations of the provisions of this act by any owner, contractor, or subcontractor, or any person liable under the provisions of this act, the widow of the person so killed, his lineal heirs or adopted children, or the husband, mother, or father, as the case may be, shall have a right of action without any limit as to the amount of damages which may be awarded."

Section 6 declares that—

"The contributory negligence of the person injured shall not be a defense, but may be taken into account by the jury in fixing the amount of the damage."

It was in evidence that when the belt came off anybody who happened to be there put it on, and one witness said, "I guess everybody around the mill has put it on." Another witness said that the decedent had put on the belt. So far as that act being within the scope of his employment is concerned, the case is governed in principle by *Beaver v. Mason, Ehrman & Co.*, 73 Or. 36, 143 Pac. 1000, 7 N. C. C. A. 876. In that case the plaintiff's decedent was a boy who was employed as a messenger in and about a seven-story building occupied by the defendant firm. He received his fatal injuries while he was attempting to operate an elevator. There was some evidence to the effect that he had been seen by other employes running the elevator before the accident. There was other testimony on behalf of the defendant that those in authority over him had warned him not to meddle with the elevator and he had been told to keep away from it. But it was held that the court could not declare as a matter of law that it was not within the measure of his duties, Mr. Justice Ramsey saying:

"Under the evidence it was a proper question for the determination of the jury, as it is shown that he did operate it frequently, and the defendant's officers may have had knowledge thereof and acquiesced therein. Under the issues and the evidence, it was for the jury, and not the court, to determine that question. We cannot say that there was no evidence to support the contention that they allowed him to operate it."

By analogy, the same principle is taught in *Wheeler v. Nehalem Timber Co.*, 79 Or. 506, 155 Pac. 1188. Some loggers in the employ of the defendant were working in the woods

during cold weather. Some of them had built a fire in a decayed stump for the purpose of warming themselves. No rule had been established respecting that practice, but the foreman knew of it and did not forbid it. While the plaintiff was engaged in his labor this burning stump fell upon him and injured him. The holding was that there was enough evidence to present to the jury the question of whether or not the kindling of the fire promoted the employer's business. See, also, *Stool v. Southern Pacific Co.*, 88 Or. 350, 172 Pac. 101, in which a section hand was held to be within the scope of his employment while walking on the track a few minutes before the time to begin work, and proceeding toward the place where he was at work the day before, and where he expected to continue his labors.

[6] It is not necessary, however, to rest the decision of this case exclusively on the proposition that the act of the decedent in going from his place as an off-bearer for the rip saw to another point in the same room to put on the belt was within the scope of his employment. The Employers' Liability Act requires that the owners of such machinery shall use every device, care, and precaution which it is practicable to use for the protection and safety of life and limb, limited only by the necessity for preserving the efficiency of the machine. That duty is extended not to any particular life or limb, but generally, the only limitation being the necessity for preserving the efficiency of the machine. It has often been held that a violation of a statutory duty of this kind is negligence per se. The section giving a cause of action to the widow of a decedent bases that right upon the general fact that—

"If there shall be any loss of life by reason of the neglects or failures or violations of the provisions of this act by any owner, contractor, or subcontractor, or any person liable.
* * *

It is not the life of any particular employe, whether careful or negligent, which is to be protected, but the language is general and comprehensive, so that if there shall be any loss of life the action will lie. Still, further, it is said that the contributory negligence of the individual injured shall not be a defense, but may be taken into account by a jury in fixing the amount of damage. The most that can be said of the act of Kuntz in leaving his station and going to put on the belt is that it was negligence on his part, and this is no defense, but only goes to lessen the amount of recovery for the accident. The defendant gave evidence, in substance, that it had provided a millwright whose duty it was to do that kind of work. Let us suppose that the millwright had gone to put the belt in position, had operated like Kuntz did, and had been injured like he was. A cause of action

would have at once arisen in favor of the millwright's widow, for the reason that the neglect of the defendant to comply with the statute, if proved, was negligence per se and entered into the injury as an ingredient thereof. The difference between the supposed case and the instant one is only in degree. In each case all that is left to the defendant shown to be guilty of a violation of the statute fastening upon it the charge of negligence per se is to lessen the amount of recovery by showing negligence of the decedent. The principle is the same in both cases.

The old rule was that an employe assumed the ordinary risks of his employment, and that if his own negligence contributed to his injury the law would not apportion the fault, but would deny a recovery. The obvious purpose of the Employers' Liability Law was to change this rule and make a more equitable adjustment of the casualties of hazardous occupations. In order to escape liability the defendant must be without fault, and the fair adjustment of responsibility, if he is negligent, is worked out by reducing the amount of recovery in proportion to the negligence of the injured party. The greater his negligence the more should the recovery be reduced, even to a nominal sum, if his fault should require it; but that is a question for the jury to determine.

[7, 8] Complaint is made that the court was in error in allowing a witness to testify that he had inspected the factory of the defendant in November preceding the occurrence of the accident in June, and that there were no rules or regulations regarding the adjustment of the belt in question. The objection was that it was not part of the *res gestæ* and too remote. It was indeed not part of the *res gestæ*, but it was permissible to prove that there were no rules at that time, and that the same condition continued up to and including the time of the accident. The objection of remoteness goes rather to the weight of the testimony than to its competency. The trial court refused an offer of the defendant to show that at the time Kuntz started to put on the belt he was warned by the man in charge of the rip saw, with whom he worked, not to put on the belt, but to leave it alone. In this the court was in error. At least it was competent to show that he went there in spite of the remonstrance of his fellow workmen, as it would indicate a recklessness or want of care on his part tending to support the charge that he was negligent, with a view of reducing the claim for damages.

[9] The defendant sought to have admitted in evidence a certificate of inspection given it by the state labor commissioner, in force and effect for one year after November 9, 1916, to the effect that in the judgment of the commissioner the factory where the accident

happened conformed to what is known as the Factory Act, filed in the office of the secretary of state February 25, 1907 (Laws 1907, p. 302). That act requires the owner or individual operating a factory, mill, or workshop where machinery is used to provide and maintain in use belt-shifters or other mechanical contrivances for the purpose of throwing on or off belts or pulleys while running, where the same are practicable with due regard to the nature and purpose of said belts, and the danger to employes therefrom, and further requires reasonable safeguards for gearing, belting, shafting, couplings, and machinery of other or similar descriptions which it is practicable to guard, and with which the employes are liable to come in contact while in the performance of their duties, together with other precautions largely in the same line with the Employers' Liability Act (L. O. L. 5040). It is required in section 5046, L. O. L., that—

"Whenever upon any examination or re-examination of any factory, mill, or workshop, store or building, or the machinery or appliances therein to which the provisions of this act are applicable, the property so examined and the machinery and appliances therein conform, in the judgment of the said labor commissioner, to the requirements of this act, he shall thereupon issue to the owner, lessee, or operator of such factory, mill or workshop, * * * a certificate to that effect, and such certificate shall be prima facie evidence as long as it continues in force, of compliance on the part of the person, firm, corporation, or association to whom it is issued, with the provisions of this act."

As indicated by its title, the factory act is designed to provide "for the protection and health of employes in factories, mills, or workshops where machinery is used," etc. In the title to the Employers' Liability Act we find that it is to provide "for the protection and safety of persons engaged * * * about any machinery or in any dangerous occupation," etc. The requirements noted are common to both statutes. "Things equal to the same thing are equal to each other." Consequently, if the certificate mentioned is prima facie evidence that, for instance, the owner of a plant has provided reasonable safeguards for the machinery therein under the factory act, the same document is prima facie evidence of compliance with the same requirement under the Employers' Liability Law. It is true that the latter enactment compels the use of every practicable safety device "without regard to additional cost," but this does not establish any more stringent rule than that imposed by the earlier statute. The limitation stated by the factory act is practicability "with due regard to the ordinary use of such machinery and appliances and the dangers to employes therefrom." Cost is not considered as an element in the canon of duty. Its essential ingredients are

the use, not cost, of the machinery, together with the safety of the operatives. The factory statute, therefore, prescribes a rule of evidence of which the defendant was entitled to avail itself, and the court was in error in refusing to receive the certificate. *Ramaswamy v. Hammond Lumber Co.*, 78 Or. 407, 152 Pac. 223.

[10] Another assignment of error is that the court was wrong in directing the jury that the plaintiff was entitled to recover such sum of money as would wholly compensate her for the pecuniary loss suffered by her, limited only by the amount asked for in the complaint. The rule established by this court in *McClagherty v. Rogue River Electric Co.*, 73 Or. 135, 140 Pac. 64, 144 Pac. 569, is, in substance, that the recovery is limited to the net amount which the decedent would probably have saved from his earnings by his skill or bodily labor in his trade or calling, taking into consideration his age, health, ability, habits of industry, and mental and physical skill, so far as they affect his capacity for earning money or rendering services to others, or accumulating property. The instruction on that point should have conformed substantially to the rule thus established.

[11] The court was right in refusing to grant a nonsuit or to direct a verdict for the defendant and in its admission of the evidence respecting the lack of rules and regulations a few months before the occurrence of the accident. Having in mind the new trial to be awarded, it is proper to say that the court ought to have been more liberal in admitting evidence about the rules regulating employment and duties of operatives in the defendant's mill. The law does not require them to be in writing, and unless they are written or printed, involving the principle that the document itself is the best evidence of its contents, any one who knows the rules may testify to what they are. There was error in excluding evidence of the warning given the decedent to stay away from the belt, in not admitting the certificate of the state labor commissioner, and in the court's definition of the measure of damages. The judgment is reversed, and the cause remanded for a new trial.

HARRIS, J. (concurring specially). I agree in all the opinion written by Mr. Justice BURNETT, except that portion which relates to the certificate issued by the labor commissioner. I do not concur in all that is said about the certificate, although I do assent, on the authority of *Ramaswamy v. Hammond Lumber Co.*, 78 Or. 407, 428, 152 Pac. 223, to the conclusion that the defendant was entitled to introduce the certificate as evidence.

The Factory Inspection Act was adopted

by the Legislature in 1907, and is codified in sections 5040 to 5057, L. O. L., inclusive. In 1911 the legal voters of the state exercised the power of the initiative and enacted the Employers' Liability Act. Chapter 3, Laws 1911. The Factory Inspection Act provides for the issuance of a certificate by the labor commissioner, and this certificate is by that statute declared to be prima facie evidence of compliance with the provisions of the act. The Employers' Liability Act makes no provisions for the issuance of a certificate.

The Employers' Liability Act is wider in its scope and more exacting in its requirements than is the Factory Inspection Act; and consequently a certificate issued by the labor commissioner under the authority of the Factory Inspection Act is only prima facie evidence that the employer has gone as far in the performance of his duty as is required by the Factory Inspection Act. 5 Labatt's Master & Servant (2d. Ed.) 5870. Whenever and wherever the Employers' Liability Act adds to the duty placed upon the employer by the Factory Inspection Act, the certificate is no evidence at all that the employer has performed such added duty. The certificate is prima facie evidence of performance to the extent, and only to the extent, that the Factory Inspection Act requires performance.

BEAN and JOHNS, JJ., concur.

(94 Or. 211)

HURST v. LARSON et al.*

(Supreme Court of Oregon. Oct. 7, 1919.)

1. CUSTOMS AND USAGES ⇨16—NOT ADMISSIBLE TO ADD TO OR CONTRADICT CONTRACT.

Under L. O. L. § 727, subd. 12, evidence of usage is admissible only as a means of interpreting act, contract, or instrument, where true character thereof is not otherwise plain, and is not admissible to add new terms or stipulations to contract or contradict explicit terms thereof.

2. CUSTOMS AND USAGES ⇨15(1)—AS TO DUTY OF BUYER OF POTATOES TO FURNISH CAR.

Where contract for sale of potatoes did not specify who was to furnish the means of transportation, evidence of a custom requiring buyer of less than a carload of potatoes to furnish car was admissible under L. O. L. § 727, subd. 12.

3. CUSTOMS AND USAGES ⇨13—INCORPORATION OF GENERAL CUSTOM IN WRITTEN CONTRACT UNNECESSARY.

A general custom known to both contracting parties respecting the subject-matter of their stipulation is in a certain sense a law covering them, so that it is not necessary to mention it in writing.

4. COSTS ⇨32(1)—ON VERDICT IN HIS FAVOR, DEFENDANT ENTITLED TO COSTS AND DISBURSEMENTS.

Where verdict was adverse to plaintiff, defendant was entitled to judgment for costs and disbursements.

Department 2.

Appeal from Circuit Court, Clackamas County; J. U. Campbell, Judge.

Action by W. S. Hurst, doing business as W. S. Hurst & Co., against E. A. Larson and another. Judgment for defendants, and plaintiff appeals. Affirmed.

The plaintiff, contending that he has been and is ready, able, and willing to perform his part of the agreement hereinafter mentioned, charges that the defendants have refused to deliver the property for which he contracted. The contract is as follows:

"W. S. Hurst & Co. have this day bought from E. A. Larson and H. Larson of Molalla and the said E. A. Larson and H. Larson have this day sold to said W. S. Hurst & Co. the following: 300 sacks Burbank potatoes, at 90c per 100 lbs., to be delivered f. o. b. Liberal, and shipped to the said W. S. Hurst & Co., at Portland. The above potatoes to be sound, merchantable goods, free from imperfections, cuts, culls, knobby or rough, ill shaped stock, and to be well sorted to common quality and in size not less than 3 inches in length and — in diameter. Must be sacked in good, sound, clean No. 1 secondhand sacks. Sacks to be full mouthed and to average 115 pounds per sack.

"Remarks: Sacks to be furnished by buyers. Delivery to be made on or before Nov. 15, buyers' option. E. A. Larson, Hans Larson, "Seller.

"Paid on account —

"Dated at Canby, this 29th day of Sept., 1916.

"W. S. Hurst & Co.,

"Buyers."

Among other things, after admitting the execution of the instrument, the defendants answer as follows:

"That at the time of signing said alleged agreement it was the custom of plaintiff and for two or three years last past it had been the custom of plaintiff and of other buyers of potatoes to purchase from farmers and producers in and around, Liberal, Canby and other nearby points in Clackamas county, Or., potatoes grown individually by said farmers and producers, in less than carload lots, and at the time of shipping the same plaintiff and other buyers would furnish a car for loading the same, and then notify said farmers and producers, who would then load their potatoes in the cars so furnished by plaintiff and other buyers, thereby making full carload lots, which said custom was known to plaintiff and his agents and to said defendants at the time of signing said agreement, and said alleged contract was made with reference to such usage and custom.

"That the said 300 sacks of potatoes referred to in said alleged agreement were and are less than a carload lot."

⇨For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

*Rehearing denied December 2, 1919.

This matter was traversed by the reply. The trial in the circuit court resulted in a verdict and judgment for the defendants. The plaintiff appeals.

Herbert A. Cooke, of Portland, and Paul C. Fischer, of Oregon City (Sever & Cooke, of Portland, and Paul C. Fischer, of Oregon City, on the briefs), for appellant.

O. D. Eby, of Oregon City, for respondents.

BURNETT, J. (after stating the facts as above). The assignments of error are three. The first two are based upon the admission of the testimony of the two defendants respecting the custom alluded to in their answer. The third is predicated upon the entry of judgment against the plaintiff and in favor of the defendants for the costs and disbursements incurred. In effect, the testimony of E. A. Larson, defendant, on the subject of custom, was that it had been the practice, in the vicinity where he resided and the potatoes in question were produced, for the buyer to furnish the cars for their transportation, in all cases that he knew of, and that the farmers there raise small tracts of potatoes and the buyer orders the car and informs the grower when he gets the car there ready for loading. The testimony of the other defendant was practically the same.

[1] It will be observed that the contract requires the potatoes to be delivered by the defendant "f. o. b. Liberal, and shipped to the said W. S. Hurst & Co. at Portland." It is silent about the means of carriage on board which the produce was to be placed, or who was to furnish the same. Under our statute, L. O. L. § 727, subd. 12, evidence may be given of "usage, to explain the true character of an act, contract, or instrument, where such true character is not otherwise plain; but usage is never admissible except as a means of interpretation." It is plain, therefore, that no new terms or stipulations can be added to a contract by proof of usage. Neither can the plain, explicit terms of a written agreement be contradicted by such testimony. It is otherwise where it is not plain what the true character of the instrument is, or where the stipulation is silent upon something necessary to the complete performance thereof. In *Holmes v. Whitaker*, 23 Or. 819, 324, 31 Pac. 705, 706, speaking of the silence of the contract respecting who should furnish the boat upon which the property which was the subject of sale was to be transported, it is said:

"Hence proof of usage or custom, if any prevailed, is admissible to supply these details upon which the contract is silent, if such usage or custom was known to the plaintiffs at the time the contract was made."

[2] In the feature under consideration, the *Holmes-Whitaker* Case is not materially different from the one in hand, and hence it was competent here to take the testimony of the defendants respecting the custom governing such matters, and it was a proper issue in the case upon which the defendants were entitled to give evidence.

[3] Much reliance is placed by the plaintiff on the case of *Culp v. Sandoval*, 22 N. M. 71, 159 Pac. 956, L. R. A. 1917A, 1157, holding, in effect that, where an individual has agreed to perform an act, whatever is necessary to such performance is a part of the agreement, and it is implied that he must furnish the means of accomplishing the act; hence, when a vendor has contracted to sell goods f. o. b. cars, he must procure the cars and load the goods thereon. That precedent is not applicable to the present contention, because in that case no custom was pleaded, while here it is stated in defense that the custom existed and was known to the plaintiff, so that if this be true it must have entered into the negotiations of the parties automatically without express mention of it. By analogy it may be said that a general custom known to both contracting parties respecting the subject-matter of their stipulation is, in a certain sense, the law governing them, so that it is not necessary to mention it in the writing. Or, as said in *Sawtelle v. Drew*, 122 Mass. 229, quoted with approval in the *Holmes-Whitaker* Case:

"A custom, within the meaning of the law, if general, is incorporated into and becomes a part of every contract to which it is applicable; if local, of every contract made by parties having knowledge of or bound to know its existence."

There was no error in receiving the testimony of the defendants about the custom.

[4] The verdict was adverse to the plaintiff. No exception is noted respecting the rulings of the court prior to the rendition of the verdict, except the objections to the testimony already considered. These being unavailable, the judgment for the defendants for costs and disbursements follows as a necessary consequence, so that there is no error to be predicated on the third assignment. The judgment is affirmed.

BEAN, BENNETT, and HARRIS, JJ., concur.

(100 Or. 514)

STULL v. PORTER et al.

(Supreme Court of Oregon. Oct. 7, 1919.)

1. APPEAL AND ERROR ¶880(3)—JUDGMENT AGAINST CODEFENDANT NOT GROUND FOR APPEAL BY OTHER DEFENDANT.

Where a justice rendered judgment against two defendants for a tort, but only one appealed to the circuit court, which rendered judgment against such appealing defendant alone, the nonappealing defendant cannot complain on appeal to the Supreme Court of the terms of the circuit court's judgment against his codefendant, and his appeal to the Supreme Court will be dismissed.

2. JUDGMENT ¶239 — AGAINST DEFENDANTS SUED FOR TORT MAY BE AS TO ONE OR MORE.

In an action for tort, defendants may be liable jointly or severally, and, under L. O. L. § 180, judgment may be given for or against one or more of them, while, under section 181, in its discretion the court may render judgment against one or more, a several judgment being proper, leaving the action to proceed against the other.

3. JUDGMENT ¶241 — THOUGH SEPARATE AGAINST JOINT TORT-FEASORS THERE CAN BE BUT ONE RECOVERY.

Though plaintiff has two judgments against the two defendants for their tort, she can enjoy only one recovery.

In banc.

Appeal from Circuit Court, Coos County; John S. Coke, Judge.

Action by Emma Jane Stull against T. F. Porter and Roscoe Bunch. From judgment against defendant Porter, both defendants appeal, and plaintiff moves to dismiss the appeal of defendant Bunch. Motion to dismiss such appeal allowed.

T. T. Bennett and B. Swanton, both of Marshfield, for the motion.

John D. Goss, John C. Kendall, and Herbert S. Murphy, all of Marshfield, opposed.

BURNETT, J. The plaintiff brought an action in a justice's court against the defendants Porter and Bunch, charging them with the tort of killing her two dogs, laying her damages in the sum of \$250. The result of a jury trial there was a verdict and consequent judgment against them for the full amount claimed. Porter alone appealed to the circuit court and did not serve his notice upon his codefendant. Bunch did not appeal. At the trial in the circuit court the plaintiff ignored Bunch and proceeded as if Porter were the only defendant entitled to be heard there, obtaining a judgment against Porter alone for the full amount of damages claimed. Both defendants have appealed from the circuit court judgment to this court.

[1] The case is now before us on the plaintiff's motion to dismiss the appeal of Bunch.

The justice's judgment was rendered by a court having jurisdiction both of the subject-matter and of the persons of the defendants. Either defendant had a right to appeal to the circuit court, and, unless he served his codefendant as well as the plaintiff, Porter could not bind Bunch by his appeal. The latter had a right to be satisfied with the judgment in the justice's court. Of course, if Porter's appeal would adversely affect the interest of Bunch, Porter could not carry it on without having served Bunch with notice and thus made him a party to the appellate procedure. On the other hand, if Bunch wished to appear in the circuit court on the appeal and participate therein, he was obliged to adopt the method prescribed by the statute, which is to serve his notice and give the undertaking required. Moreover, the judgment of the circuit court is not against Bunch, but against Porter only. As he is not affected by its terms, Bunch has no cause of complaint in this court. In short, he did not pursue the formula necessary for him to gain admission into the circuit court. He was a stranger to the proceedings there, not only on account of his neglect, but also because the judgment of the circuit court is not against him and does not affect his interest. Hence he has no standing in this court.

Opposing the motion to dismiss, the defendants rely upon *Cauthorn v. King and Bell*, 8 Or. 138. There, Cauthorn sued the defendants in the justice's court in trover and obtained a judgment against Bell alone. The case was decided here on a construction of the record showing that both defendants answered in the justice's court and that they both appeared in the circuit court. But how they both appeared is not stated in the opinion. It is urged that because on appeal from the justice's court the cause is heard anew upon the issues tried in the court below, L. O. L. § 556, the appeal by one party brings up the case as to all parties, whether served or not. This construction would mean that the costs and expenses of an appeal could be visited upon a codefendant against his will, and also that any defendant could get the benefit of an appeal by a codefendant without tendering any security or undertaking for such an appeal. As stated in *Clagget v. Blanchard*, 8 Dana (Ky.) 41, cited here on behalf of Bunch:

"We consider it entirely certain that the Legislature did not intend to require or authorize the circuit court, upon an appeal by one defendant who had been served with the justice's warrant, to try the case and give judgment against another, who had neither been served with the warrant, nor appeared before the justice, nor united in the appeal, nor appeared in the circuit court, nor been summoned to do so; and neither this nor any other statute, nor any known practice, authorizes that court to issue

a summons or other process against a person thus situated."

The Kentucky statute alluded to provided in substance that one or more of several individuals against whom a judgment is rendered by a justice may appeal, that such appeal by one shall place the cause for trial in a court of appeals, as fully as if taken by all, and that such court shall proceed therein and render "judgment between all those who were parties to the judgment of the justice." If, under such a statute, relating not only to issues but also to parties, the court will decline to take notice of a party who is not subject to its process, much more must we decline, in a case like this before us, to entertain the appeal of a party who is not affected by the judgment appealed from and who was not before the court rendering it. The case indeed is heard in the appellate court on the issues involved in the inferior court, but only as they affect the parties to the appeal. A different case might be presented if the action were one in which only a joint judgment or none could be rendered against the defendants. Under such conditions we would be compelled to decline to hear even the appealing defendant unless he had served his notice of appeal not only upon the plaintiff but also upon his codefendant.

[2] Since this is an action for tort, the defendants may be liable jointly or severally, and under section 180, L. O. L., "judgment may be given for or against one or more of several plaintiffs, and for or against one or more of several defendants." Further, in section 181, L. O. L., it is said:

"In an action against several defendants, the court may, in its discretion, render judgment against one or more of them, whenever a several judgment is proper, leaving the action to proceed against the others."

It did not necessarily follow, therefore, that because the parties were sued jointly the only result would be a joint judgment. There was, however, a joint judgment in the justice's court, from which either party defendant had a right to appeal. Inasmuch as his appeal could not make worse the situation of his codefendant, Porter had a right to pursue his own remedy without compelling his codefendant to participate. Being thus left out of the appeal, if Bunch had wished to gain the benefit of such procedure, he ought to have initiated one on his own behalf and entered the circuit court by the statutory door thus provided for him. Since he did not pursue this course, Bunch was not properly before the circuit court and that tribunal could not render any judgment for or against him. It had a right to consider the appeal of Porter and render judgment according to the merits of the case as pre-

sented respecting him, with the right reserved to Porter, the party to that judgment, to appeal to this court. Bunch was a stranger to the portion of the proceeding occurring after the lapse of the period in which he was entitled to appeal to the circuit court.

[3] It is argued that the result is that the plaintiff has two judgments for the same demand. However this may be, she can enjoy only one recovery. The rights of the parties in that matter can be worked out by post-judgment procedure.

The motion to dismiss the appeal of Bunch is allowed.

(98 Or. 510)

KOHLHAGEN v. CARDWELL et ux.

(Supreme Court of Oregon. Oct. 7, 1919.)

1. EVIDENCE \S 471(10) — CONCLUSION ADMISSIBLE AS TO MATTER DIFFICULT TO STATE OTHERWISE.

In an action on a note, which defendants claimed to have paid by the delivery of butchered hogs, it was not error to permit plaintiff's bookkeeper to testify that when she returned to the shop it would have been impossible for her to have overlooked 36 hogs, the number claimed to have been delivered, had they been there, though the testimony was in some sense a conclusion.

2. EVIDENCE \S 150—EXPERIMENT TO DETERMINE CAPACITY OF WAGONS IN CARRYING HOGS.

In an action on a note claimed to have been paid by defendants by the delivery of 36 butchered hogs, testimony as to an experiment in loading hogs on wagons, such as defendants claimed had been used in the delivery, introduced by plaintiff, *held* admissible, in so far as it had any effect at all.

3. COSTS \S 185—MILEAGE FOR NONRESIDENT WITNESSES FROM STATE LINE ALLOWED.

The court properly taxed against defendants as costs single mileage from the state line to the place of trial for plaintiff's witnesses, who came at his request from outside the state without being subpoenaed after they entered the state; it being desirable that they should testify orally to the jury, in view of the conflicting evidence.

Department 2.

Appeal from Circuit Court, Douglas County; J. W. Hamilton, Judge.

Action by George Kohlhausen against W. W. Cardwell and Emma P. Cardwell, his wife. From a judgment for plaintiff, defendants appeal. Affirmed.

This is a very remarkable and unusual case. The plaintiff sues upon a promissory note. The defendants admit the note, but claim to have paid the same by the delivery of 36 head of hogs, weighing 7,772½ pounds,

at the market price of 15 cents per pound, amounting to the total of \$1,165.87. The plaintiff denies this payment in toto, and denies that he ever received 36 hogs, or any hogs at all, from the defendant at the time in question, or upon the debt in question.

The defendant is corroborated in his claim that he delivered the hogs by his son and his wife and by the testimony of two hired men, who testified that they helped to butcher the hogs and haul them to Roseburg and deliver them to plaintiff. In addition to this, the defendant's story is corroborated, to some extent, by the testimony of people who lived along the road between defendant's ranch and Roseburg, and who claim to have seen him hauling hogs in the direction of Roseburg at about the time in question. The defendant claims to have delivered the hogs at plaintiff's butcher shop in Roseburg, just at noon, and at a time when the plaintiff himself was not actually present. He claims to have delivered the hogs to James Kookan and George Hoefling, who were employees of the plaintiff working at the butcher shop in question. Defendant also testifies that one Andy Morgan, who was working for him at the time, in his prune orchard, assisted in butchering the hogs, and rode with him on the wagon which he was driving to town, and helped to deliver the hogs to the plaintiff.

On the other hand, the plaintiff testified that he never received any hogs from the defendant on the debt, and plaintiff's books fail to show that any were received. Kookan and Hoefling, the two employees of plaintiff to whom defendant claims to have delivered the hogs, testify positively that no hogs were delivered. These witnesses are corroborated by Fred Neurither, who worked in the back of plaintiff's shop, and Alice Mann, the bookkeeper, and also by plaintiff's daughter, Florence Kohlhaugen. All of these witnesses testified that no hogs were delivered by Cardwell. In addition to this testimony the plaintiff, in this last trial, offered the testimony of Andy Morgan, one of the employees of the defendant at the time the hogs are alleged to have been butchered on his ranch, and whom, the defendant testified, assisted in the butchering and in transporting the hogs to Roseburg, and delivering them there to the plaintiff. This witness testified positively that he was at work at the defendant's ranch at the time in question, but that he did not assist in butchering any hogs there, or in transporting them to Roseburg, or delivering them to the plaintiff. In fact, he testified that no hogs were butchered at defendant's ranch at or about that time.

At the trial there was a verdict for the plaintiff. There are only two claims of error occurring at the trial, both of which refer to the admission of testimony. When Alice Mann, plaintiff's bookkeeper, was on the stand, and, having testified to the particulars

in regard to her presence at the shop that day, she was asked the following question:

"Q. Now would it be possible for 36 head of dressed hogs to have come into the shop, on the 1st day of March, 1917, or about that time, before you left on March 7th, and you not know it?"

The objection to this question was overruled, and the witness answered:

"A. It would be impossible for them to come, and me not see them when I came back. I would see even 2 or 3 hogs, and certainly could not overlook 36."

This was one of the errors complained of. The other had reference to certain experiments as to the space occupied by hogs in the wagon. This will be noticed more particularly in the body of the opinion.

A. N. Orcutt, of Roseburg (Elbert B. Hermann and Rice & Orcutt, all of Roseburg, on the briefs), for appellants.

B. L. Eddy, of Roseburg, for respondent.

BENNETT, J. (after stating the facts as above). [1] We think there was no error in permitting the witness Alice Mann to testify as to whether or not the hogs could have been in the shop without her seeing them. This, of course, was in some sense a conclusion; but whether they could have been there and escaped her observation depended on a great number of small details—the general course of business, the place where hogs were hung, the arrangement of the building and position of windows and doors therein, her own position in the building, her own habits of observation and alertness of mind, and the extent to which she kept the business under her personal observation. These were all matters that could hardly have been accurately and fully reproduced to the jury. Under such circumstances, the witness is permitted to state her conclusion, which is treated as a conclusion of fact under the authorities.

In Lawson on Expert and Opinion Evidence, p. 509, the author quotes with approval from the opinion in the case of *Cavendish v. Troy*, 41 Vt. 107, as follows:

"Where the witness has had the means of personal observation, and the facts and circumstances which lead the mind of the witness to a conclusion are incapable of being detailed and described, so as to enable any one but the observer himself to form an intelligent conclusion from them, the witness is often allowed to add his opinion, or the conclusion of his own mind."

In the Vermont case quoted from, the witness was being interrogated as to the residence of another party in a certain town, and was asked:

"Q. From your opportunities of knowing, as you have now stated them, do you think it possible for T. to have lived in J. that year, and you not have known it?"

And the question was held proper.

In *Rodgers on Expert and Opinion Evidence*, p. 9, § 4, it is said:

"Witnesses are allowed to express opinions based on facts within their personal observation, when the facts cannot be so described as to enable another to draw any intelligent conclusions therefrom."

It is also claimed that there was error in permitting the evidence of certain witnesses for the plaintiff in regard to experiments made by them in loading hogs in a wagon. The defendant had testified that the hogs delivered by him were carried in two wagons, 12 in a small or ordinary wagon, which, however, had a bed 16 inches longer than an ordinary wagon, and 24 of them in a large wagon with a rack. This rack, according to the testimony of the defendant, was 14 feet long and about the width of an ordinary wagon, and that the rack on this wagon was 3 feet 6 inches high. There is a discrepancy between the testimony of this witness, as to the height of the wagon, and that of Dug Good, from whom the wagon was obtained, who testified that it was only 32, instead of 42, inches high. The testimony of the defendant is to the effect that the hogs were put in the wagon in layers, 3 in each layer lengthwise across the bed of the wagon, and then others were piled in upon these in the most convenient way. According to the testimony of the defendant, the hogs taken in by him would average about 216 pounds in weight. The experiments made by the defendant were with an ordinary wagon, and the hogs weighed 219 pounds each, and the experiment was made with eight hogs.

[2] In the matter of the experiment, there was no attempt to fill the wagon, which was only 29½ inches high, and the only effect of the testimony was to show about what space such hogs would occupy in a wagon. The testimony was to the effect that three such hogs could be laid lengthwise in a tier across the wagon. This was in accordance with the testimony of the defendant, who testified that the hogs transported were laid in the wagon in that way. The testimony was that two tiers of the hogs were 10¼ feet long, and that each hog was 16 inches one way and 12 the other, and the 3 hogs in each row filled the bed up the full width, and, when one hog was laid sideways across these, it filled the bed up to within 6 inches of the top. This testimony does not seem to have had much weight, and it probably did not influence the jury at all. Indeed, in some respects, as we have seen, it corroborated the testimony of defendant. If the large rack was 42 inches high, as testified by defendant, the testimony rather tended to show that 24 hogs could have been loaded in such a rack 14 feet long.

It is practically conceded in the brief of the learned attorney for the defendant that

the evidence had no logical effect in the case; but it is urged that—

"the jury would naturally conclude that this evidence must be beneficial to the respondent, or he would not have called the witnesses, and, being unable to figure out for themselves what benefit it was, took it for granted that it was beneficial, and that these men would not have come in and testified, unless their evidence was beneficial to the respondent."

We cannot assume that the jury were so lacking in intelligence as to be carried away and influenced by such artificial and illogical considerations. On the contrary, we must presume that they were men of ordinary and usual intelligence, and that they would decide the case according to the evidence, without reference to the mere number of witnesses called by the respective parties.

The questions involved in this case were peculiarly for the jury, involving as they did so much of conflict in the direct testimony of the witnesses, and so many conflicting circumstances corroborating each side. The jury heard and saw the witnesses, and could compare their testimony and judge of their credibility. The case seems to have been fairly tried, as the record is unusually free even from claim of error. Even if we thought that the testimony, as to the loading of these hogs, was on the whole inadmissible, it would seem a trifling thing upon which to reverse a case which had otherwise been fairly tried. It is so unlikely and improbable that the evidence substantially affected the verdict, and it is so minor and unimportant in its character, we should hesitate to reverse the case upon that ground.

Besides, we think the evidence, so far as it went and so far as it had any effect at all, was admissible. It only went to the extent of showing what space in an ordinary wagon box eight hogs would fill. The hogs were practically the same size as the average of the hogs hauled by the defendant. The average of one lot was 215 pounds and a fraction over, and the other 219 pounds and a little over, or about 4 pounds difference. This was about as close as was possible, and the wagon boxes were practically the same in width. The length of the wagon box or its height did not cut any figure so far as the experiment went, for it was not claimed that the hogs loaded on experiment filled the whole space of the wagon bed either as to length or height, so the only effect of the experiment was to show the space occupied by each hog, the number that could be put in a tier across the bed, and the length of two tiers of such hogs in the bed. For these measurements the conditions of the experiment were almost exactly similar with the conditions as to the hogs loaded by defendant. As we have already said, the evidence certainly did not go very far, and probably did not at all contradict the evidence of the defendant. Nevertheless, it might assist the

jury somewhat, in arriving at a conclusion as to how many hogs could be loaded in such wagons, to know how much space would be taken by such a hog.

The conditions do not have to be, as we understand it, exactly alike, in order to sustain the admission of the experimental testimony. Such testimony is largely in the discretion of the court, and it is only necessary that the facts of the experiment be reasonably similar to those in the main contention and not misleading in their character. In one of the Lake Labish cases—*Leonard v. S. P. Co.*, 21 Or. 555, 28 Pac. 887, 15 L. R. A. 221—the defendant contended that the fall of the bridge and the ensuing wreck was caused by some one having placed a loose rail across the rail of the defendant's track. The plaintiff, in rebuttal, produced a loose rail at the trial, and a car wheel, and undertook to show by experiment that the marks on the loose rail introduced by defendant could not have been caused in that way. The conditions were not exactly the same. The bottom rail was loose, instead of being fast to the track, and the wheel offered in evidence was only 26 inches, whereas the wheel of the locomotive was 33 inches, in diameter. It was urged that the conditions were not sufficiently similar to justify the introduction of the experiment in evidence. Mr. Justice Lord, delivering the opinion of the court, said:

"In all cases of this sort, very much must necessarily be left to the discretion of the trial court; but when it appears that the experiment or demonstration has been made under conditions similar to those existing in the case in issue, its discretion ought not to be interfered with."

In *Davis v. State*, 51 Neb. 301, 70 N. W. 984, there was a controversy as to whether or not the defendant could have unscrewed certain bolts, and drawn the spikes, and torn up the track with a monkey wrench and clawbar offered in evidence. The place in question was on a trestle, and the state was permitted to offer evidence as to experiments in tearing up a track at another place on the tracks of defendant, where the track ran along the ground and not on a trestle. The court held the evidence admissible, saying:

"It was for the jury to consider the place where the displacement of the fixtures occurred and the place where the experiment was made, and then to give such weight to the testimony of the state's witness who made the experiment as they thought it deserved."

In *Sonoma County v. Stofen*, 125 Cal. 32, 57 Pac. 681, the county treasurer, being sued for a balance of county money in his hands, claimed that he had been robbed of the money, and that the robber had knocked him down, and left him unconscious, and locked him in the vault, where he remained for a

number of hours. The vault was in his office, and was connected by doors with the sheriff's office in another part of the building. He claims to have kicked violently against the door after he became conscious and made all the noise he could in that way. The state offered evidence of witnesses, who had made experiments by kicking at the door in the vault, and the testimony of other witnesses, in the sheriff's office and other parts of the courthouse who had heard the sound made in the vault. There had been some changes in the building, and it was not shown that the climatic or atmospheric conditions were the same. It was urged that the conditions were not sufficiently similar to justify the evidence of the experiment. The court held otherwise, saying:

"Experimental evidence in corroboration or disproof depends for its value upon the fact that the experiment has been made when the conditions affecting the result are, as near as may be, identical with those existing at the time of and operating to produce the particular effect. An absolute identity is, of course, impossible; but a substantial identity must exist to give the evidence value. But this identity need not extend to nor be shown to exist as to conditions which could have had no causal operation upon the result."

The authorities are not very definite as to just how closely similar the conditions of the experiment must be to the facts in contention, in order to make the experiment admissible. We think, however, a fair statement of the rule would be that if the experiments are not likely to be misleading to the jury in any particular, and are under conditions similar, so that they would be of assistance to the jury in arriving at a correct verdict, the evidence is admissible.

We think the experiment in this case came within this rule. The hogs were practically of the same size as the average of those shipped by the defendant, and the wagon box was a standard wagon box in each case. These were the important conditions for this experiment, as far as it went. It is true that the wagons were not of the same length, but that fact was in no way misleading to the jury, for the difference was in evidence before them, and there was no attempt on the part of the plaintiff to show any more than the mere fact of how much space in length and in width the two tiers of hogs took and the height of such tiers. This was as far as the experiment went, and the length of the wagon box, or even its height, did not enter into the question at all. We think, therefore, the admission of the testimony in regard to these experiments was within the sound discretion of the court.

[3] The only other question involved refers to the taxation of costs. The plaintiff in his cost bill included mileage for the witnesses Kookan, Hoefling, and Morgan from the place where they entered the state line.

These witnesses resided out of the state of Oregon, one at Seattle, Wash., one at Pocatello, Idaho, and one in Massachusetts. They were not subpoenaed, but came as witnesses at the request of the plaintiff. It is stipulated that they actually traveled the miles claimed from the state line to Roseburg, the place where the trial was held. It is claimed on behalf of the defendant that, as these witnesses did not reside within the state of Oregon, and were not subject to subpoena in this state, and as the court did not and could not effectively order their personal attendance, the plaintiff is not entitled to recover mileage for such witnesses.

We think the question is concluded by the principles announced and the reasoning in the cases of *Crawford v. Abraham*, 2 Or. 166, and *Egan v. Finney*, 42 Or. 599, 72 Pac. 133. In the *Crawford* Case it is said:

"Mileage will not be allowed for witnesses beyond the boundaries of the state."

It is also said in that case:

"The attendance of witnesses may be procured by request of parties, or by agreement; and the party so liable may recover disbursements for proper mileage and attendance. The statutory means of compelling the attendance of witnesses is by subpoena duly served; but we are at a loss to see how any party can be injured in having to pay mileage and attendance merely for the witnesses of an adversary, who attends upon request or agreement, when the additional expense of officers' fees and mileage for issuing and serving of a subpoena, swelling largely the claim for disbursements, could do no more than procure the attendance of the witness."

In this case the witnesses might unquestionably have been subpoenaed at the state line and compelled to attend, and in that event it seems clear that they would have been entitled to their mileage from the state line, and, as is said in the *Crawford* Case, the defendant could lose nothing by the fact that they were not regularly subpoenaed. In *Egan v. Finney*, supra, the court held that the witnesses in question were not properly subpoenaed. One of them had come a long distance from Baker county. The court said:

"These witnesses attended, however, in pursuance of a request, and, as the court found that their testimony was 'material, relevant, and competent,' they are entitled to single mileage and per diem, if their oral examination was important and desirable. * * * The issue in this suit involving an inquiry as to angles, lines, courses, and distances, an examination of the transcript, in the light of the maps introduced in evidence, shows that the oral examination of these witnesses was important and desirable. They are therefore entitled to single mileage."

These decisions establish the rule that a party may recover single mileage for witnesses who reside in some other county of

the state, where their oral testimony is desirable, even although they may not have been regularly subpoenaed or served with an order of the court, and it is fully established in the *Egan* Case, as we think, that the court may look to the whole record as to the necessity and desirableness of securing the attendance of the witnesses.

It is true that in neither of these cases does it appear that any of the witnesses resided outside of the boundaries of the state, but in this regard we cannot see any distinction between the case of a witness who resides in Baker county, and one who comes across the state line into Baker county, from another state; in the latter case they are subject to a subpoena as soon as they cross the state line, and in neither case is the adverse party in any way prejudiced, or his costs increased, by the fact that they were not regularly subpoenaed and compelled to attend.

In this case, as we have already seen, it appears from the record that there was a very great conflict between the witnesses for the plaintiff and defendant on the vital point in the case. We think that, if there ever was a case where it was important and desirable that the witnesses should testify orally, so the jury could have an opportunity to observe them, and judge of their manner on the witness stand and of their credibility, this was such a case. We think, therefore, there was no error of the court in taxing single mileage for these witnesses from the state line to the place of the trial.

Affirmed.

BEAN, BURNETT, and HARRIS, JJ.,
concur.

(93 Or. 622)

KAUFMAN v. HASTINGS.

(Supreme Court of Oregon. Oct. 7, 1919.)

1. EXCHANGE OF PROPERTY §4 — TIME FOR ADJUSTING COMMISSIONS IDENTICAL WITH PERIOD FOR MAKING EXCHANGE.

Contract for exchange of properties, though providing that it may be declared canceled if a satisfactory adjustment of the real estate agent's commission cannot be effected, not providing any time therefor, time for adjustment is identical with the period named for making the exchange.

2. SPECIFIC PERFORMANCE §96 — THERE BEING NO SUCH STIPULATION, TIME IS NOT ESSENCE OF CONTRACT.

Though contract for exchange of properties names a period within which conveyances shall be executed and exchanged, there being no stipulation that time is of the essence, it will not be considered so in action for specific performance; the parties having used diligence and acted in good faith, and there not being any change of circumstances affecting the equities.

3. MORTGAGES ¶138—TRUST DEED TO SECURE DEBT CONVEYS LEGAL TITLE ONLY TO ENFORCE TRUST.

Under the laws of California, a trust deed to secure a specified debt, amounts only to an incumbrance, and conveys the legal title to the trustee only in so far as may be necessary to the execution of the trust.

4. SPECIFIC PERFORMANCE ¶10(2)—CONTRACT OF MARRIED MAN RELATING TO REALTY ENFORCEABLE AGAINST HIM.

Contract of a married man to sell real estate, though not joined in by his wife, may be specifically enforced against him.

5. SPECIFIC PERFORMANCE ¶94 — OF EXCHANGE OF PROPERTIES NOT INEFFECTIVE FOR FAILURE TO ASSIGN INSURANCE.

Specific performance of contract for exchange of realty may not be complained of because of failure to assign insurance policies; the decree covering the matter, and it being necessary to validity of such assignment that the properties be first exchanged.

Department 1.

Appeal from Circuit Court, Multnomah County; Robert Tucker, Judge.

Action by John F. Kaufman against Herman S. Hastings. Decree for plaintiff, and defendant appeals. Affirmed.

On November 6, 1916, the defendant was the owner of the lot known as No. 680 East Harrison street in the city of Portland, Or., and the plaintiff was the owner of a lot numbered 1608 Arch street, in the city of Berkeley, Cal. After making an examination of each other's property, they agreed to an exchange of the realty and executed a written contract by which the defendant agreed to assume an incumbrance of \$5,000 on the Berkeley property, which was otherwise to be free and clear of any lien or charge. The plaintiff, in turn, was to assume an incumbrance of \$4,000 on the Portland property and execute a second mortgage thereon of not to exceed \$1,000, in favor of Hastings payable on or before two years from date, with interest at 7 per cent. per annum. Otherwise the Portland property was to be free and clear of lien, excepting a municipal bonded indebtedness not exceeding \$200; the intention being to have the amount of the second mortgage cover the difference between the existing liens on the two properties.

The plaintiff alleges that about November 10, 1916, with Marie Kaufman, his wife, he made and executed a good and sufficient deed of conveyance of their property to the defendant under the terms of the contract; that on November 15th, following, the deed was duly tendered; that on November 20th, the Kaufmans duly executed a second mortgage on their Portland property in favor of the defendant for the sum of \$1,000; that on November 27th the said mortgage covering the

amount of the difference of the existing incumbrances upon the property to be exchanged, as provided in the written agreement, was tendered to the defendant; that the tenders have since remained and are now in force and effect; that the plaintiff has kept and performed all of the terms and conditions of the written contract by him to be kept and performed, and is ready, able, and willing to carry out such agreement; and that in violation thereof the defendant has failed, neglected, and refused to carry out his part.

It is further alleged that, prior to the time when the defendant repudiated his contract, it was understood and agreed that the broker would take and accept \$400 in full for his services in effecting the exchange of properties, of which amount the plaintiff was to pay \$200; that the real estate commission was then fully and finally settled and adjusted as provided in the contract; and that the writing is in full force and effect. The plaintiff prays for a decree of specific performance.

A demurrer to the complaint was filed, which was overruled by the court, and the defendant answered, admitting the execution of the written contract, but denying all other material allegations. As an affirmative defense, he alleges that on March 30, 1912, the plaintiff conveyed to the Berkeley Bank of Savings & Trust Company the identical property described in the complaint, and a copy of the deed is attached to and made a part of the answer as evidence that the plaintiff did not have and could not convey a valid title to the property. The answer further avers that A. L. Wiesenhaven acted as the agent and broker of the plaintiff in the transaction; that the defendant was to pay his commission, and, if the agent should demand more than \$203 for his services and a satisfactory adjustment could not be made, the defendant had and reserved the right to cancel and annul the contract and refuse to carry it out; that the agent, claiming \$900 as a reasonable fee for his services, proposed to the defendant to accept \$600 in full payment and declined to take any less amount; that no adjustment of the agent's commission satisfactory to the defendant was or could be arranged; that inasmuch as the claim was for \$600 and the defendant was not willing to pay more than the stipulated amount, on November 20, 1916, he exercised his right under the terms of the contract to, and did, cancel and annul the same, refused and declined to carry it out, and so notified the plaintiff.

A reply was filed denying all new matter in the answer. After the case was at issue, the defendant filed a motion for judgment on the pleadings, which was overruled. Testimony was taken, and the trial court rendered a decree of specific performance as prayed for in the complaint. The defendant appeals.

Raymond L. Sullivan, of Portland (Emmons & Webster, of Portland, on the briefs), for appellant.

C. L. Whealdon and Ralph R. Duniway, both of Portland, for respondent.

JOHNS, J. (after stating the facts as above). The contract provides that "the deeds and other conveyances necessary to complete this transaction will be executed and exchanged within fifteen days from date," and that "in the event the real estate agent or agents demand a commission in excess of two hundred (\$200) dollars, it is hereby mutually agreed that if a satisfactory adjustment of such commission cannot be effected, this agreement may be declared canceled and of no effect." Before the contract was executed, a personal examination of the respective properties was made by each party. At that time the plaintiff, who was the owner of the Berkeley property, was a resident of Portland, Or., and Mrs. Kaufman, his wife, was then in Berkeley. The defendant, who owned the Portland property, was then residing in Berkeley, where the broker Wiesenhaven had his place of business.

It is apparent that the agreement was entered into in good faith by both parties, and that each of them was then ready and willing to make the exchange when the amount of the commission could be amicably determined. Steps were at once taken to agree upon the amount. The broker first demanded \$900 for his services, which both parties refused to pay. After a conference he reduced his claim to \$800, and after a further talk with the plaintiff's wife in his office he agreed to accept \$400 in full for his services. Of this amount the plaintiff was to pay \$200, leaving the remainder to be paid by the defendant under the terms of the contract. The broker assented to this, and he and the plaintiff's wife called at the defendant's place of business and advised him of the arrangement. The broker testifies that this occurred about 3 o'clock in the afternoon of November 20th, and on that point he is corroborated by Mrs. Kaufman. It appears that on the same day, before that conversation, the defendant had notified the broker that the deal was off; but the latter testifies that he was not acting for or representing Hastings in the transaction. On that day, also, the defendant addressed a letter to the plaintiff at Portland, advising him that on account of failure to adjust a commission the deal was off. This letter was postmarked "San Francisco, November 20, 1916, 4 P. M." Assuming that the testimony of the broker is true, the letter was deposited in the post office one hour after the conversation between the defendant, the plaintiff's wife, and the broker regarding the arrangement as to the commission.

It will be noted that the contract was dat-

ed November 6, 1916. On November 11th at Portland the plaintiff executed and acknowledged his deed to the Berkeley property and forwarded it to his wife with instructions to sign and arrange for its delivery upon the receipt of the defendant's deed to the Portland property. The evidence is not clear as to when she actually executed the deed, but Joseph L. MacFarland testified that he was vice president of the Alameda County Home Builders, and that in such capacity he received the deed duly executed, on or about November 15, 1916, with instructions that it should be held in escrow until a settlement was made between Mr. Kaufman and Mr. Hastings; that, "when Mr. Hastings delivered his deed, the Kaufman deed was to be delivered to him"; and that "I gave Mr. Hastings the deed to read, and he was evidently conversant with the conditions." His evidence is corroborated by Arthur E. Weed, the bookkeeper of that company, who testifies that the tender was made "verbally, and about the thirteenth to the seventeenth of November, 1916," and that "Mr. Hastings was told that the papers were here duly executed, ready for delivery to him." It further appears that about November 25th, the deed in question was placed in the Berkeley Bank of Savings & Trust Company with such instructions and that the bank gave the defendant written notice thereof. It is also shown that on November 20, 1916, in Portland the plaintiff executed in favor of the defendant his promissory note for \$950.73, in the usual form, payable on or before two years after date, with interest, and that to secure its payment he executed and acknowledged a certain mortgage on his Portland property, which was forwarded to his wife at Berkeley with proper instructions. Mrs. Kaufman duly executed the mortgage and it was placed in the bank about November 25, 1916, and two days later the bank notified the defendant of its receipt and of the instructions. Since that time the bank has held the deed, note, and mortgage subject to the defendant's order.

[1, 2] While it is provided in the contract that "all deeds and conveyances necessary to complete this transaction will be executed and exchanged within fifteen days from date," there is no stipulation that time is of the essence of the contract. Neither is there any provision as to the time the agreement "may be declared canceled and of no effect" for the failure to make a "satisfactory adjustment of such commission." As we construe it, the time within which the commission was to be adjusted was not fixed by the contract, but would be identical with the period named by the terms and provisions, within which the exchange of properties should be made. In *Wright v. Astoria Co.*, 45 Or. 224, 228, 77 Pac. 599, it is said:

"There was no understanding or stipulation that the deed should not be delivered unless plaintiff paid the purchase price by a day certain. In equity the time of payment is not of the essence of a contract for the sale of real estate unless made so by express agreement of the parties, by the nature of the contract itself, or by the circumstances under which the contract was executed.

"Specific performance of a contract for the sale of real estate will ordinarily be decreed, even though the purchase money was not paid or tendered at the exact time fixed by the contract, when the party seeking the performance has acted in good faith, and with reasonable diligence, unless there has been such a change of circumstances affecting the equities of the parties or the justice of the contract as to make it inequitable that it should be enforced." Citing authorities.

In the instant case it appears that both parties used due diligence in trying to adjust the amount of the broker's commission; that on November 20, 1916, the amount which the defendant was to pay was ascertained and determined within the terms of the contract; that the plaintiff acted in good faith in executing and tendering the deed, note, and mortgage; and that there has not been any such "change of circumstances affecting the equities of the parties or the justice of the contract, as to make it inequitable that it should be enforced."

The agreement provided that—

"In said exchange of properties the said Herman S. Hastings will assume an incumbrance on the Berkeley property of not to exceed five thousand (\$5,000.00) dollars, said Berkeley property to be free and clear of all other incumbrances of whatsoever nature."

There is no other provision as to the character or nature of plaintiff's title. It appears that on February 1, 1912, the plaintiff executed a trust deed of his property to the Berkeley Bank of Savings & Trust Company to secure a debt to Walter H. Ratcliff, Jr., of \$5,488.94 with interest at 7 per cent. per annum, to be paid in graduated installments, which on and after February 1, 1914, were to be at the rate of \$75 per month with accrued interest. The deed recited that the plaintiff did "grant, bargain, sell, convey and confirm unto the party of the second part and unto its heirs and assigns all of that piece or parcel of land situate in the city of Berkeley, county of Alameda, state of California," as the same is described in the complaint, "to have and to hold the same to the party of the second part, and to its heirs and assigns (said party of the second part and its heirs or assigns being hereby expressly authorized to convey, subject to the trust herein expressed, the land above described) upon the trusts and confidences hereinafter expressed."

[3] The defendant insists that under the laws of California this trust deed was an absolute conveyance, and that at the time of

the execution of the contract the plaintiff did not have any title to his property to convey. He cites a number of California decisions to support his contention. While there may have been a conflict in the early decisions of that state, as to the force and effect of such a deed, we think that the question was fully and finally settled in the case of *MacLeod v. Moran*, 153 Cal. 97, 94 Pac. 604, where, in commenting upon the precedents, the opinion says:

"These decisions are based upon the fact that such a deed, though in form a grant, is really only a mortgage, and does not convey the fee. A trust deed of the kind here involved differs from such a deed only in that it conveys the legal title to the trustees so far as may be necessary to the execution of the trust. It carries none of the incidents of ownership of the property, other than the right to convey upon default on the part of the debtor in the payment of his debt. The nature of such an instrument has been extensively discussed by this court, and the sum and substance of such discussion is that while the legal title passes thereunder, and the trustees cannot be held to hold a mere 'lien' on the property, it is practically and substantially only a mortgage with power of sale. * * * The legal title is conveyed solely for the purpose of security, leaving in the trustor or his successors a legal estate in the property, as against all persons except the trustees and those lawfully claiming under them. Civ. Code, §§ 865, 866. Except as to the trustees and those holding under them, the trustor or his successor is treated by our law as the holder of the legal title. * * * The legal estate thus left in the trustor or his successors entitles them to the possession of the property until after their rights have been fully divested by a conveyance made by the trustees in the lawful execution of their trust, and entitles them to exercise all the ordinary incidents of ownership in regard to the property, subject always, of course, to the execution of the trust."

In the instant case the trust deed was executed to secure a specified existing debt. When that debt is discharged according to its terms, the plaintiff or his successor in interest is ipso facto entitled to a reconveyance of his realty.

The testimony shows that at the time the exchange contract was executed the amount of that existing debt was less than \$5,000, and that the plaintiff was not in default in any of his specified payments. According to the terms of the contract, the defendant was to assume an incumbrance upon the plaintiff's property of not to exceed \$5,000, and under the authority of *MacLeod v. Moran*, supra, we hold that the trust deed which the plaintiff executed to the bank was an incumbrance. It is shown by the record that the amount did not exceed five thousand dollars. By the payment of that sum the defendant would acquire title to the property free and clear of any charge, lien or incumbrance.

[4] The exchange contract was not execut-

ed by the wife of either party, and it is contended that—

"A contract for the sale of real estate in which the wife of the contractor is not joined cannot be specifically enforced."

The plaintiff does not seek a specific performance of the contract as against the wife of the defendant, and it is shown that the plaintiff's wife has joined in the conveyance of his property to the defendant and in the execution of the mortgage.

[5] Complaint is made of the failure to assign policies of insurance. Prior to the exchange of properties such assignments would be void. In any event, they would be a matter of minor importance and are now fully covered by the decree of the trial court. No objection whatever was made to the form or substance of the deed, note, and mortgage which were tendered.

From a careful examination of the record we are convinced that the plaintiff acted in good faith, used due diligence to carry out the exchange contract, and is entitled to specific performance. The decree of the circuit court is affirmed.

BENSON, HARRIS, and BENNETT, JJ., concur.

(93 Or. 581)

DENNISON v. JOSSI et al.

(Supreme Court of Oregon. Sept. 30, 1919.)

1. MORTGAGES ⇐316 — REINSTATEMENT OF MORTGAGE SATISFIED BY MISTAKE.

When the owner of two mortgages, intending to satisfy one, by mistake satisfies the other, mortgage, he is entitled to have the mistake corrected and the mortgage reinstated, unless rights of third parties would be prejudiced.

2. VENDOR AND PURCHASER ⇐231(1)—MORTGAGEE SATISFYING MORTGAGE BY MISTAKE HAS NO REMEDY AGAINST INNOCENT PURCHASER.

The owner of a mortgage who satisfied it by mistake is not entitled to have the mistake corrected and the mortgage reinstated as against the intervening rights of bona fide purchasers and incumbrancers.

3. VENDOR AND PURCHASER ⇐231(1)—RIGHTS OF BONA FIDE PURCHASERS AND INCUMBRANCERS WITHOUT NOTICE WHEN MORTGAGE ERRONEOUSLY SATISFIED.

Where the owner of two mortgages through mistake satisfied one which he did not intend to satisfy, and after the satisfaction was indorsed on the record, the premises were disposed of and a subsequent mortgage given, *held*, that the last purchaser and the mortgagee took the same without any constructive notice, so that the mortgagee was not entitled to have the mortgage reinstated, the purchaser and subsequent incumbrancer having no actual notice.

Department 1.

Appeal from Circuit Court, Multnomah County; Geo. W. Stapleton, Judge.

Suit by John Dennison against Mike Jossi, sometimes known as Michael Jossi, Margaret Jossi, his wife, and others, and J. Martin Pierson and others. From a decree dismissing suit, plaintiff appeals. Affirmed.

By mistake John Dennison satisfied a mortgage owned by him, and upon discovery of his mistake brought this suit for the purpose of reinstating and foreclosing the mortgage. There was a decree dismissing the suit and the plaintiff appealed.

On July 31, 1908, Chester A. Sheppard and his wife gave to John Dennison their promissory note for \$750 payable on July 31, 1911, with interest at 8 per cent. per annum, payable semiannually; and, to secure the note, they also gave a mortgage on lot 25 in block 1 in Creston, Multnomah county, Or. This is the mortgage which Dennison satisfied by mistake, and it is this incumbrance which he is seeking to have reinstated and foreclosed.

On the same date, July 31, 1908, Chester A. Sheppard and his wife gave another promissory note to John Dennison for \$750, payable July 31, 1911, with interest at 8 per cent. per annum, payable semiannually; and the Sheppards secured this note by executing a mortgage on lot 5 in block 11 in Creston.

Both mortgages were witnessed by the same witnesses, acknowledged before the same notary public, and both were presented for record at 4:41 p. m. on July 31, 1908. The instruments themselves are identical in all respects, except that one covers lot 25 in block 1, while the other embraces lot 5 in block 11 in Creston, and except that the former bears the number 22859, which appears to have been stamped upon it by the recording officer, while the latter is numbered 22858. The mortgage covering lot 5 is wholly recorded on page 474 in Book 319 of the Mortgage Records for Multnomah County. Each page of this book is numbered at the top. Immediately to the right of and a little below page No. 474 are the figures "22858," the number given by the recording officer to the mortgage on lot 5. Immediately below the figures "22858" are the words "Sheppard et ux. to Dennison," and then follows a record of the mortgage on lot 5. Nearly the entire page is required for this instrument, although there was enough of the page left to permit the recording of a small portion of the mortgage which relates to lot 25. The record of the mortgage covering lot 25, as in the case of the other mortgage, shows its identification number; for the figures "22859" appear first, and then immediately below these figures are the words "Sheppard et ux. to Dennison," and then follows a record of the mortgage cover-

ing lot 25. However, only six lines of this instrument appear on page 474, and the remainder was written on page 475. On the margin of page 475 and next to the record of the mortgage covering lot 25 is a writing signed by John Dennison which reads as follows: "Full satisfaction of the within mortgage is hereby acknowledged this 30th day of June, 1909."

The mortgage on lot 5 had been paid, and Dennison intended to satisfy that incumbrance; but for some reason he made a mistake and signed the writing which purports to satisfy the mortgage on lot 25. No payments, except one payment of interest, had been made on the note which was secured by the mortgage on lot 25. Dennison did not discover his mistake until on or about April 11, 1916, and on that date he caused to be made and he signed entries, one on the margin of page 474 and another on the margin of page 475, to the effect that the writing of June 30, 1909, was intended to apply to lot 5, but by mistake was entered on page 475.

On January 28, 1909, Sheppard and wife deeded lot 25 to J. Martin Pierson and wife; but the conveyance was not recorded until March 14, 1914. The grantors covenanted that they were the owners of the lot, and that the premises "are free from all incumbrances, except a certain mortgage of seven hundred fifty (\$750) dollars drawing 8 per cent. interest, dated July 30, 1908, given to John Dennison, which said grantees assume and agree to pay."

By an instrument dated June 3, 1914, and recorded October 9, 1914, J. Martin Pierson and his wife deeded lot 25 to E. L. and C. L. Beadell. The grantors in this instrument covenanted that the property was "free from all incumbrances, except a certain mortgage of seven hundred fifty (\$750) dollars drawing 8 per cent. per annum, dated July 30, 1908, given to John Dennison, which is past due one year and said grantees assume and agree to pay."

The Beadells and their wives transferred lot 25 to Clyde and Ludie McCoy by a deed dated October 6, 1915, and recorded October 9, 1915. This conveyance contains a covenant "that the said premises are free from all incumbrances except a certain mortgage of seven hundred and fifty (\$750) dollars drawing 8 per cent. interest per annum, dated July 30, 1908." The grantors also agreed to defend against all lawful claims and demands "save and except the above-mentioned mortgage."

By a warranty deed dated December 15, 1915, and recorded on that day the McCoy's conveyed lot 25 to Frederick C. Blatch. The grantors covenanted that the property was free from all incumbrances and agreed to defend against the demands of all persons.

By a warranty deed dated December 16, 1915, and recorded December 17, 1915, Frederick C. Blatch conveyed lot 25 to W. B.

Baugh. The grantor in this instrument covenanted that the premises were free from all incumbrances "except city liens now bonded."

On December 17, 1915, W. B. Baugh borrowed \$1,000 from W. L. Boise, trustee, and, to secure the note given by him, he executed a mortgage on lot 25. This mortgage was recorded on December 17, 1915, the date of its execution.

By a warranty deed dated March 10, 1918, and recorded March 15, 1918, W. B. Baugh and his wife conveyed lot 25 to Mike Jossi. The grantors covenanted with the grantee in this deed that "the said premises are free from all incumbrances except mortgage of \$1,000, which grantee assumes."

The trial court decided that Boise, as trustee, was an innocent mortgagee without notice, and that Jossi was an innocent purchaser without notice.

M. M. Matthiessen, of Portland (Wood, Montague & Hunt and P. P. Dabney, all of Portland, on the briefs), for appellant.

Q. L. Matthews, of Portland (Grant B. Dimick, of Oregon City, and Christopherson & Matthews, of Portland, on the brief), for respondents Jossi.

Frederick V. Holman, of Portland (John T. McKee, of Portland, on the brief), for respondent Boise.

Chester A. Sheppard, of Portland, for respondent Sheppard.

HARRIS, J. (after stating the facts as above). The mistake made by Dennison was, either wholly or in part, the result of his own individual negligence. It is possible that the recording officer who prepared the entry and attested Dennison's signature to the satisfaction of the mortgage shared in the negligence; but whether he did or not is immaterial as between Dennison and defendants Boise and Jossi. The note which was secured by the mortgage on lot 5 was paid, and after it was paid Dennison went to the courthouse for the purpose of satisfying the mortgage which covered lot 5. Dennison testified that he "went in the courthouse and laid down the mortgage," and "the man took the book, and he told me where to sign, and I signed there." While it is not necessary to decide whether the mortgage which Dennison took to the courthouse was the one covering lot 25 or the one covering lot 5, yet there are a number of circumstances from which it can be argued that the recording officer was shown the mortgage on lot 25. There is an indorsement on the back of the original instrument, covering lot 25, showing that it was recorded on page 474 of volume 819. The whole of the mortgage on lot 5 appears on that page, and only a small part of the mortgage on lot 25 is there shown; and hence there is room for the argument that the practiced eye of the recording officer did not, when he turned to page 474, overlook the record of the mortgage on lot 5. If the officer observed that page 474 contained the record of the other

mortgage, it is possible that he was guided by the number stamped on the back of the instrument and written on the record as well as by the description of the mortgaged property. Dennison was negligent, however, even though he took the mortgage on lot 5 to the courthouse; but he was still more negligent if he showed the recording officer the mortgage on lot 25.

[1-3] When the owner of two mortgages intends to satisfy one, but by a mistake satisfies the other, mortgage, he is entitled to have the mistake corrected and the mortgage reinstated, unless the rights of third parties will be prejudiced. 27 Cyc. 1433. The same rule that measures the rights of Jossi also determines the rights of Boise. If Jossi was a purchaser for value in good faith and without notice of Dennison's equity, then he is entitled to prevail; and so, too, Boise as mortgagee is entitled to protection if he took a mortgage on the lot in good faith and without notice. 19 R. C. L. 409; Lowry v. Bennett, 119 Mich. 301, 77 N. W. 935. It is conceded that neither Boise nor Jossi had actual knowledge of the mistake made by Dennison; and therefore we must inquire whether these two defendants had constructive knowledge of the plaintiff's equity.

Counsel for the defendants rely, among other precedents, upon Larzelere v. Starkweather, 88 Mich. 96, 107, where it is said that—

"There are cases which go very far in extending the doctrine of laches in applying the rule of constructive notice. We think, however, the better and certainly the safer rule to be that a mere want of caution is not sufficient—not that he had incautiously neglected to make inquiries, but that he had designedly abstained from making inquiry for the very purpose of avoiding knowledge."

It is not necessary to determine whether the language just quoted should be applied in its full literal meaning. Nor do we find it necessary to discuss the reasoning employed in *Raymond v. Flavel*, 27 Or. 219, 241, 40 Pac. 158; but for the purpose of the controversy presented here it is sufficient to follow the language found in *McDougal v. Lane*, 39 Or. 212, 214, 64 Pac. 864, where it is said in substance that a party is chargeable with notice of an outstanding equity held by a third person if, in the same circumstances, an ordinarily prudent man would have made inquiry, and if such inquiry, upon being prosecuted with ordinary diligence, would have resulted in knowledge of the equity. *Jennings v. Lentz*, 50 Or. 484, 93 Pac. 327, 29 L. R. A. (N. S.) 584, 11 L. R. A. (N. S.) 290. None of the precedents express the rule in language more favorable to the plaintiff than does the opinion in *McDougal v. Lane*; and yet, if the rights of these litigants are measured by this rule of ordinary diligence, the test that is the most

favorable to the plaintiff, it will nevertheless be found that Dennison cannot prevail.

Before making the mortgage Boise examined an abstract showing the condition of the record title. This abstract included the mortgage from the Sheppards to Dennison and the satisfaction of that mortgage, as it was recorded on June 30, 1909, the deed from the Sheppards to the Piersons, and the conveyance from the Piersons to the Beadells. The deed from Blatch to Baugh did not appear in the abstract, but the original instrument was shown to Boise. The record is not entirely clear as to whether or not the abstract submitted to Boise contained an account of the deed from the Beadells to the McCoys or an account of the deed from the McCoys to Blatch; but it is certain from the evidence that Boise either saw a recital of those two deeds in the abstract or was shown the original instruments. Boise was acting as trustee for a Mrs. Taylor. One Anderson was negotiating with Mrs. Taylor for a loan, and "he brought her to" Boise's office. Boise had noticed the references to the Dennison mortgage in the respective deeds given to the Piersons, the Beadells; and the McCoys, as well as the satisfaction of the mortgage. Boise testified that when Anderson came to his office with Mrs. Taylor:

"I says, 'I don't understand about these reservations here.' He says, 'Those mortgages are satisfied;' he says, 'I am an abstractor and I saw it myself.' I says, 'I wish you would go back to the abstractor and get a note about that.' And so he did, and he came back with a note from the abstractor showing that the mortgage was satisfied, and he assured me that he had seen it on the record, so I believed him."

In the course of the conversation between Anderson and Boise the former explained to the latter "that this was probably some real estate man drawing the deed that had copied what had been in somebody's else deed and that was the reason of it."

It is true that, as said in *Talbot v. Joseph*, 79 Or. 308, 317, 155 Pac. 184, 187, "the record is the standard which the law has erected to decide such questions, and he is bound by the terms of the conveyance as recorded, but no further"; and consequently any defect in the abstract could not be of avail to Boise. The abstract stated the whole truth as it was at that time told by the record, and when Boise completed his examination of the abstract he knew as much as he would have learned if he had gone to the records and read all the entries affecting lot 25. It is also true that, if he had gone to the courthouse, he might possibly have seen the record of the mortgage relating to lot 5; and yet he was under no obligation to examine into the title of lot 5. Nor would it necessarily follow that Boise would be chargeable with

bad faith if he had made no other inquiries than those actually made by him, even though he had gone to the courthouse, and while investigating the title of lot 25 casually noticed the record of the mortgage on lot 5. Boise did observe that two deeds made after the satisfaction of the mortgage contained reservations relating to the Dennison mortgage. Boise is a lawyer with many years of experience; and, furthermore, the terms of his trust required him to loan on first mortgages. Boise assured himself that the record in truth contained a satisfaction of the mortgage, and this, plus his knowledge of the existence of the two deeds containing covenants that the premises were free from all incumbrances, together with the statement made by Anderson, justified him as a reasonably prudent business man in making the loan.

The title to lot 25 was examined by "Mr. Schmauch and Mr. McKenzie" for the defendant Jossi. McKenzie & Co. conducted a fire insurance, money loaning, and real estate business in Portland, the city in which all the transactions involved in this litigation occurred; and W. J. Schmauch was an employé of McKenzie & Co., and as such employé "just handled the real estate." An abstract containing an accurate account of the entire record concerning lot 25 was submitted to Mr. McKenzie, who examined it. He noticed that Mr. Boise had made a loan of \$1,000, and, after making the remark that "if Mr. Boise passes on it it must be all right," he sent Schmauch to see Mr. Boise. Schmauch says that he asked Boise "if he had found the title O. K. and made the loan, and he said 'Yes.'" We think that Jossi, through his representatives, exercised all the care that could be expected of an ordinarily prudent man.

The decree is affirmed.

MCBRIDE, C. J., and BURNETT and BENSON, JJ., concur.

(93 Or. 644)

McKISSICK v. McKISSICK.

(Supreme Court of Oregon. Oct. 14, 1919.)

1. DIVORCE — 312—ORDER REFUSING MODIFICATION OF DECREE AS TO CUSTODY OF CHILD REVIEWABLE.

Order refusing motion to modify decree as to custody of child, necessarily based on matters occurring after divorce decree, which under L. O. L. § 756, is conclusive as to matters occurring before its rendition, is reviewable.

2. DIVORCE — 303(3)—PARTY SEEKING MODIFICATION OF DECREE AS TO CUSTODY OF CHILD HAS BURDEN OF PROOF.

The defeated party in divorce seeking modification of decree as to custody of child has the

burden of showing something by reason of which the established status should be disturbed.

3. DIVORCE — 298(1) — IN AWARDING CUSTODY OF CHILDREN ITS WELFARE PARAMOUNT.

It is the cardinal principle in awarding custody of children of divorced persons that the interest and welfare of the children are paramount to the rights and privileges of the parents.

4. DIVORCE — 303(2)—ON CUSTODY AWARDED MOTHER, PLACING CHILDREN IN HOME WITH GRANDPARENTS PROPER.

The mother to whom decree of divorce awards custody of child is within her rights and duty in furnishing it with a suitable home and surroundings with her parents; she finding it necessary to take employment elsewhere to support herself.

5. DIVORCE — 303(2)—MODIFICATION OF DECREE AWARDING CUSTODY OF CHILDREN TO MOTHER PROPERLY DENIED.

The motion of divorced father to modify decree awarding custody of child to its mother is properly denied; he not showing that mother was unfit to have the care of it, or that its condition would be improved over its present surroundings.

Department 1.

Appeal from Circuit Court, Multnomah County; Robert G. Morrow, Judge.

Divorce suit by Frances McKissick against Stuart McKissick. From order denying motion to modify decree as to custody of child, defendant appeals. Affirmed.

On November 7, 1917, at the suit of plaintiff, the circuit court of Multnomah county granted her a divorce from the defendant and gave her the care and custody of the minor daughter of the parties until the further order of the court, upon condition that the defendant may have the privilege of visiting the child at reasonable times and places, and with the further provision that he might have the child visit him at Portland, Or., with reasonable frequency by providing a safe and proper means of transportation and accommodations while in his care. By the decree he was required to pay to the plaintiff a fixed sum as alimony, and, further, to pay \$15 per month until further order of the court, for the maintenance and support of the child. On March 13, 1918, he filed a motion in the circuit court for a modification of the decree relieving him from paying any further alimony, costs, or attorney's fees as provided in the decree, and that he be given the care, custody, and control of the minor child. On March 30, 1918, the circuit court heard the application and denied it. From this order the defendant appeals.

H. L. Ganoë, of Portland (L. G. English, of Portland, on the brief), for appellant.

J. LeRoy Smith, of Portland, for respondent.

BURNETT, J. (after stating the facts as above) [1] Notwithstanding the contention of the defendant, this is an appealable order, as held in another feature of this same case reported in 174 Pac. 721. The court had jurisdiction of the persons and subject-matter involved in this suit and rendered a decree respecting the custody of the child. This was final and conclusive as to all matters occurring before the rendition of the decree; for section 756, L. O. L., speaking of the decree of a court having jurisdiction as aforesaid says:

"In case of a judgment, decree, or order against a specific thing, or in respect to the probate of a will, or the administration of the estate of a deceased person, or in respect to the personal, political, or legal condition or relation of a particular person, the judgment, decree, or order is conclusive upon the title to the thing, the will or administration, or the condition or relation of the person."

Nevertheless, as stated by Mr. Chief Justice Moore in *Gibbons v. Gibbons*, 75 Or. 500, 147 Pac. 530:

"The welfare of these infants is paramount to the rights of any other person. * * * The court granting the decree of divorce is authorized to modify it at any time so as to provide for the care, custody, and support of the minors, and may impose such burden upon either or both parties to the suit."

[2] The motion before us is in the nature of a new proceeding based necessarily upon matters occurring since the former decree. We cannot, in the absence of an appeal, go behind the former adjudication and make gleanings from the evidence upon which the suit was there determined or the custody of the child adjudicated. The court then determined, with the evidence before it, that, considering the best interests of the child, the mother was the proper custodian and that she was best fitted for that purpose. If the defendant would procure a new adjudication on that subject, different from the former one, he must assume the burden and show either that the plaintiff is not a suitable custodian of her own child, or that the best interest of the latter requires that its care and custody be given to him. In other words, the burden is upon him to disturb the status established by the original decree.

In his affidavit supporting his motion he says that the plaintiff took the child to Ashland, but that he has no knowledge about what disposition was made of it or in whose keeping it has been placed. He then states that about January 1, 1918, the plaintiff returned to Portland, and since about the 20th of that month has been living and cohabiting with one Frank W. Moore, as husband and wife, residing at 358 Thirteenth street in that city. He alleges upon information and belief that the plaintiff and Moore are husband and wife, and that Moore is able to care for and support her. Further deposing on informa-

tion and belief, he avers that the plaintiff has abandoned the child and has shown by her acts since the filing of the decree that she is not a fit person to have the custody of the child, and, lastly, that he himself is ready, able and willing to support it. He then produces the affidavit of Mrs. Rankin, the keeper of the rooming house at the address named, to the effect that about January 20, 1918, a man and woman giving the name of Mr. and Mrs. Frank W. Moore, and representing themselves to be husband and wife, rented a single room with but one bed and were registered in a book kept by the affiant as a register of all tenants, and that they occupied said room continuously until March 12th. She further relates in substance that on the last-named date some one inquired by telephone for Mrs. Moore, whom she called from her room to the telephone; that later in the afternoon three men called and inquired for Mrs. Moore and she let them inspect the register referred to. Then one of the men, who introduced himself as Mr. McKissick, produced two photographs of the woman, which she recognized as pictures of Mrs. Moore.

Douglas Lawson gave his affidavit to the effect that on March 12th he inquired by telephone for Mrs. Moore, and when she came to the instrument speaking he recognized the voice as that of the plaintiff, Mrs. McKissick. He further states that afterwards, on the same date, the defendant and he met the plaintiff, whereupon the former addressed her as "Mrs. Moore," and she replied, "I am not Mrs. Moore; I am Mrs. McKissick." He also narrates the circumstances of going to the rooming house and his conversation and the exhibition of the photographs as stated.

Another affiant gives a statement about the interview with Mrs. Rankin and the inspection of the register. There are other affidavits about inquiring of other individuals for the address of Mr. and Mrs. Moore, and information given in answer to such inquiry, although not in the presence of the parties. An insurance agent deposes about the application of Frank W. Moore for insurance, representing himself to be a married man, residing at the address on Thirteenth street.

The plaintiff filed her counter affidavit, denying categorically that she had ever occupied any room with Moore or cohabited with him at any time or place. She complains that almost continually since they separated, and ever since the divorce, the defendant has followed and annoyed her so that she was compelled to change her place of residence, and that on account of being afraid of him she had some of her fellow employees accompany her, and also had Moore act as her escort on numerous occasions. She says that her friends frequently gave false addresses respecting her residence when he would inquire of them for her. In substance, she says the arrangements for the room on Thirteenth

street were made for the purpose of throwing the defendant off her track, and that she never gave any other name than McKissick except as a ruse to elude him. She states that the defendant has never inquired concerning the child, has never shown any interest whatever in her, and that during all the child's life the plaintiff's parents and herself have had the entire care and custody of the infant. The plaintiff claims that when she came to Portland she did not know how long she would remain, and that, owing to her ill health, she has not been able to spare the money to bring the child to Portland, and consequently she left her with her father and mother until she could decide what she should do.

Another affiant speaks very highly of the plaintiff's parents and of their ability to take care of the child, whom they have had almost all of her life. She speaks in the warmest terms of the plaintiff's attachment to the child and of the plaintiff's good character.

Moore states that he made the application for insurance at the request of the defendant himself, and that it was a fake application. He expresses contrition for his dissimulation in the matter, and states that as soon as the plaintiff began her work at the Hazelwood store the defendant began shadowing the place, and followed and accosted the plaintiff on the streets, frequently stopping and annoying her, so that to avoid him she often had some of the girls, her fellow employees, to accompany her. The defendant never referred to the child or inquired about its welfare. Moore denies that he ever cohabited with or stayed at the room of the plaintiff, and says that he never knew her to conduct herself otherwise than as a true and virtuous woman. He says that for some time from January 20th he was confined to his home at 427 Salmon street by an attack of fever. In this he is corroborated by the owner of the Salmon street address, who declares that Moore had not resided at any other address during the time mentioned in the affidavit of Mrs. Rankin.

Mrs. Rankin supplies an affidavit on behalf of the plaintiff, denying that she kept a register at her house. She declares that she supposed that matter had been stricken from her affidavit which she was asked to sign on behalf of the defendant, that Moore was on the premises only a few times after renting the room, and that she knew Mrs. McKissick was ill for some time while rooming there. This is substantially the showing made in the matter before us.

[3] We remember as the cardinal principle that the best interest and welfare of the child are paramount to the rights or privileges even of the parents. By innuendo the defendant

charges his former wife, the mother of his child, with unchaste conduct. He does not pretend to give evidence of any act in flagrante delicto. The landlady, it is true, says that Moore and a woman represented as his wife occupied her room from January to March. The effect of that affidavit is greatly weakened by the subsequent declaration of the same affiant denying important statements made therein. Moreover, both Moore and the plaintiff deny any meretricious relations between them. The plaintiff had divorced the defendant and owed him no duty. She had a right to keep company with Moore and to receive his legitimate attention. From the weight of the testimony, we conclude that it is much such a case as described by Mr. Justice McBride in *Matthews v. Matthews*, 60 Or. 451, 119 Pac. 766, thus:

"It appears that the plaintiff is not an adulteress, and that she is a woman of good moral character, who has been guilty of certain indiscreet conduct which age and experience will, no doubt, correct."

[4] So far as the custody of the child is concerned, the decree has given it to the plaintiff. She is not bound to have it in her arms or by her side continuously. She is within her rights and duty if she provides for it a suitable home and surroundings. There is no dispute that she has done this in leaving the child with its grandparents, who have had the care of it almost its entire life. The defendant, although the affidavits on his side of the case describe him as a clean, moral, and truthful gentleman, fit and proper to have the care and custody of his minor child, has not shown that he could do better than to leave it in the care of some other person. It cannot be said that the plaintiff has abandoned the child. Even if the defendant had the little one, it might become necessary to send her to some boarding school or to place her in some family where she could have the benefit of home surroundings. It seems that the plaintiff found it necessary to take employment to support herself, and it is far better for the interest of the child that it should be with its own people, who know it so well, than to be a burden upon its mother for its personal care, much to the detriment of both mother and child.

[5] The defendant, who is the moving party, has not shown that the mother is unfit to have the care of the child, or that the latter's condition would be improved over its present surroundings.

The court was right in denying the motion, and its decree is affirmed.

McBRIDE, C. J., and BENSON and HARRIS, JJ., concur.

(98 Or. 490)

NEALAN v. RING.

(Supreme Court of Oregon. Oct. 14, 1919.)

1. TIME §9(8)—COMPUTING TIME FOR NOTICE OF APPEAL BY EXCLUDING FIRST DAY.

Where judgment was entered March 13th, the 60-day period within which the notice of appeal is required to be served and filed under L. O. L. § 550, as amended by Laws 1913, p. 617, will be computed, under L. O. L. § 531, requiring first day to be excluded in computing time within which an act is to be done, by excluding both the 13th and the 14th of March.

2. COURTS §90(1)—RULE WORKING NO INJUSTICE, ACTED UPON BY PROFESSION, AFFIRMED.

Where rule announced by decisions of the Supreme Court, which have been generally received and acted upon by the profession, works no injustice, the decisions will not be overturned.

In Banc.

Appeal from Circuit Court, Linn County; Geo. G. Bingham, Judge.

Action by Theodore Nealan against Al Ring. Plaintiff appeals. On motion to dismiss appeal. Motion overruled.

Weatherford & Wyatt, of Albany, for the motion.

W. C. Winslow, of Salem, opposed.

MCBRIDE, C. J. This is a motion to dismiss an appeal. The judgment was entered March 13, 1919. The notice of appeal was filed May 13, 1919. Section 550, L. O. L., as amended by subdivision 5, c. 319, Gen. Laws 1913, provides in substance that an appeal, if not taken in open court at the time of the rendition of the judgment or decree, shall be taken by serving and filing the notice of appeal within 60 days from the entry of the judgment or decree appealed from. Section 531, L. O. L., provides, among other matters, that—

"The time within which an act is to be done, as provided in this Code, shall be computed by excluding the first day and including the last, unless the last day fall upon Sunday, Christmas, or other nonjudicial day, in which case the last day shall also be excluded."

Respondent contends that by virtue of these provisions the 13th day of March should be excluded, and the 14th included, which method of computation would cause the filing of the notice herein to fall upon the sixty-first day after the entry of judgment, or one day too late. Appellant claims that the 14th should be excluded, which method of computation would allow the whole of the 13th day of May for filing the notice, which would consequently be within 60 days.

[1, 2] Decisions of other states upon this

point are conflicting, and the question is not free from difficulty; but we are of the opinion that the cases of Pringle Falls Power Co. v. Patterson, 65 Or. 474, 128 Pac. 820, 132 Pac. 527, and Vincent v. First Nat. Bank, 78 Or. 579, 143 Pac. 1100, 149 Pac. 938, settle the contention in favor of appellant. Were the matter *res integra* a different conclusion might plausibly be contended for; but, these decisions having been generally received and acted upon by the profession, it would be injudicious to overturn them, especially as the rule therein announced works no injustice.

The motion is overruled.

(93 Or. 655)

FARMERS' & FRUIT-GROWERS' BANK v. DAVIS.

(Supreme Court of Oregon. Oct. 14, 1919.)

1. APPEAL AND ERROR §417(1)—SUFFICIENCY OF NOTICE OF APPEAL.

Under L. O. L. § 550, subd. 1, notice of appeal specifying the court in which the judgment was rendered, giving the names of the parties, and notifying defendant and his attorney that plaintiff appealed to the Supreme Court from the judgment for defendant and against plaintiff, entered in a named court on a given date, the undertaking on appeal served on defendant reciting that the appeal was to the Supreme Court, *held* sufficient.

2. APPEAL AND ERROR §624—EXTENSION OF TIME FOR FILING TRANSCRIPT NOT BEYOND NEXT TERM.

Under L. O. L. § 554, subd. 2, where the next term of the Supreme Court after an appeal perfected January 16th commenced March 4th, and ended October 7th, when the next term began, the time for filing transcript was not extended beyond the next term by orders the last of which prescribed the time as until August 5, 1918.

3. EXCEPTIONS, BILL OF §16—SUFFICIENCY OF BILL CONTAINING TRANSCRIPT OF ALL THE EVIDENCE.

Bill of exceptions portraying all proceedings of the trial, and certified to by the trial judge, to which a transcript of all the evidence was attached, *held* sufficient.

4. JUDGMENT §948(1)—NO NECESSITY TO PLEAD ESTOPPEL BY JUDGMENT NOT RELIED ON AS BAR.

The rule that an estoppel by judgment to be available must be pleaded does not apply where the judgment, instead of being relied on as a bar to the action, is sought to be introduced in evidence merely as conclusive of some particular fact previously adjudicated.

5. PLEADING §11—SUFFICIENCY OF COMPLAINT IN REPLEVIN ALLEGING OWNERSHIP AND RIGHT OF POSSESSION.

In replevin for possession of a bond, the complaint alleging that plaintiff was the owner and entitled to possession was sufficient without

amendment; plaintiff not being required to plead its evidence.

3. JUDGMENT §728—EFFECT AS ESTOPPEL IN SUBSEQUENT LITIGATION.

While the doctrine of the effect of a judgment as an estoppel in a subsequent action is limited to matters involved in the litigation, it is generally held to be equally applicable whether the point decided is the ultimate vital point, or only incidental, if necessary to decision of the ultimate point.

7. JUDGMENT §741—CONCLUSIVENESS IN SUBSEQUENT LITIGATION AS TO MATTERS NECESSARILY THOUGH NOT DIRECTLY DETERMINED.

Judgment in a prior suit is deemed final and conclusive in subsequent litigation between the parties or their privies as to a matter necessarily determined or implied in reaching the final judgment, though no specific finding may have been made thereon, and even though it was not raised as an issue by the pleadings.

8. JUDGMENT §677—CONCLUSIVENESS AS TO PERSON STANDING IN SHOES OF PARTIES DEFENDANT.

Judgment in action by payee of note against the makers held conclusive, in the payee's action to recover a bond from the person holding it in the right of the makers, as to whether bonds had been paid for by the payee, so that it acquired title to them.

9. EVIDENCE §235—ADMISSION BY MAKER OF NOTE COMPETENT AGAINST STAKEHOLDER CLAIMING BOND FOR MAKER.

Any admission or claim by makers of a note in regard to the point whether certain bonds were received by the payee bank in part payment held admissible, as against a disinterested stakeholder claiming title to a bond against the bank for the makers.

Department 2.

Appeal from Circuit Court, Jackson County; F. M. Calkins, Judge.

Action by the Farmers' & Fruit-Growers' Bank against F. Roy Davis. From judgment for defendant, plaintiff appeals. Reversed and rendered.

Porter J. Neff, of Medford, for appellant.
W. E. Crews, of Medford, for respondent.

BEAN, J. This is an action for the possession of one bond of the Medford Printing Company of the par value of \$100. There are seven other like bonds in the same condition. The complaint is in the usual form alleging ownership and right of possession. The answer denies the same. The cause was tried by the court without the intervention of a jury. Findings of fact were made and a judgment passed in favor of defendant, from which judgment plaintiff appeals.

The facts out of which the case arose are substantially as follows: On May 4, 1910, J. F. Reddy and John R. Allen gave the plaintiff their promissory note for \$3,487. Thereafter, plaintiff commenced an action on

the note and attached certain property belonging to Allen and Reddy. In order to obtain the release of the attachment and a dismissal of the suit, J. F. Reddy and Mary F. Reddy gave to plaintiff their note for \$3,662.75, being the amount of the Allen-Reddy note and interest and costs of the action. This note was held as collateral for the original Allen-Reddy note. Payments were made and credited upon it from time to time, and it was renewed at different times. In the meantime John R. Allen had made an assignment of his property to certain trustees for the benefit of his creditors. Among the property so assigned were certain bonds in the Medford Printing Company, of which those in controversy were a part. On December 12, 1911, the trustees of John R. Allen, being unable to sell these bonds advantageously, distributed the bonds among the creditors as a dividend on the basis of their value being 90 per cent. of par. Plaintiff as its dividend on the Allen-Reddy note received \$800 par value of these bonds, 90 per cent. of which is \$720, and \$26.48 in money to equalize its dividend. Plaintiff credited the cash payment on the collateral note of Reddy and wife, but held the bonds claiming the same to be collateral security without crediting the value of the bonds. In September, 1914, plaintiff commenced an action against Reddy and wife on the last renewal of their collateral note for \$3,338.66, dated April 24, 1914, with interest at 8 per cent. per annum from date, asserting no part thereof had been paid except \$24, paid July 7, 1914. Plaintiff claimed \$350 as reasonable attorney's fees in the action. There was no controversy in regard to the amount of the attorney's fees. The Reddys answered in that action setting up two defenses, the only one here material being that the original Allen-Reddy note had been paid. A trial was held upon the issues in the circuit court. A complete transcript of the proceedings of that trial is attached to the bill of exceptions. Upon the issue of the payment of the original Allen-Reddy note, the defendants Reddy and wife claimed and introduced testimony tending to show that the receipt by plaintiff in that case, and the plaintiff here, of the \$800 par value of the Medford Printing Company bonds, was a payment on the Allen-Reddy note at the agreed value of \$720. Plaintiff opposed the allowance of this credit, claiming that the bonds were held as collateral to the notes and not as payment thereon. The issue thus raised was submitted by the court to the jury in the following language:

"Now the evidence that was offered tends to show that a certain amount was received in money on the indebtedness and a certain amount in bonds of the Tribune Printing Company. I say, that there was on the indebtedness; I will withdraw that and say that the evidence tends to show that a certain amount of money was

paid and a certain amount of bonds were given as a result of this trust agreement—that is the dividend that was coming to the plaintiff on this trust agreement. The defendant contends that both the money that was paid and the value of the Tribune bonds should be indorsed on this note as payment or on this indebtedness as payment. The plaintiff, on the other hand, contends that the understanding was that the money received should be indorsed on the indebtedness, but that the Tribune bonds that were received should be held and any moneys received from them should be indorsed on the indebtedness and whenever the note was paid in full, that is, the note that is sued upon here is paid in full, that if the bonds had not been paid that they should be turned back to Dr. Reddy.

"There is a direct issue on that question, and it will be for you to decide whether or not the value of the bonds should be indorsed on the indebtedness or should be disregarded by you. If the plaintiff's contention is true that they simply hold the bonds as collateral for the notes and that the bonds had not been sold or reduced to cash, they should not be indorsed on the note. If the defendant's contention is true that the bonds were accepted as cash payment, then of course that amount should be deducted from the amount due on the note."

No other evidence was offered by the defendants Reddy tending to show any other payment ever having been made upon the notes which had not been credited. The jury returned the verdict for \$3,210.17, including interest and attorney's fees, for which judgment was entered on February 29, 1916. Upon the trial of the present case, the plaintiff offered in evidence the record in the former action on the note in the case of Farmers' & Fruit-Growers' Bank v. J. F. Reddy and Mary F. Reddy, for the purpose of showing that the verdict and the judgment established the fact as between plaintiff and the Reddys that the bonds were received by the bank as absolute payment on the Allen-Reddy note and on the collateral note of Reddy and wife, and that credit was given therefor by the verdict of the jury, and judgment rendered thereon.

After the rendition of the judgment in the action on the note and for the purpose of inducing the defendants to pay the judgment, plaintiff entered into a stipulation with the Reddys in the following language:

"It is hereby agreed between Mary F. Reddy and J. F. Reddy, parties of the first part, and Farmers' & Fruit-Growers' Bank, parties of the second part:

"That the judgment held by the Farmers' & Fruit-Growers' Bank against the Reddys shall be paid.

"(2) That the bonds of the Medford Printing Company in the amount of eight hundred dollars shall be delivered by the bank to F. Roy Davis, and that thereupon the Farmers' & Fruit-Growers' Bank shall commence an action in replevin for the said bonds against said Davis; that in said replevin action said Davis shall have the right to set up as defense any right or claim which the Reddys have to the bonds

and employ W. E. Crews to defend the case without cost to F. Roy Davis.

"It is the intention that in said replevin action the respective rights of the Farmers' & Fruit-Growers' Bank and the said Reddy shall be determined, the Farmers' & Fruit-Growers' Bank assuming the burden of the plaintiff and that the transfer of the bonds to said Davis and the payment of the judgment by said Reddy shall in no manner affect the rights of either party to said bonds.

"It is further agreed that this agreement shall in no way legally affect the replevin action on trial or the manner of its appeal."

Pursuant to this stipulation, the bonds were turned over to the defendant Davis by plaintiff. Formal demand for their return was made and refused, and this action was commenced. Some preliminary questions are submitted in a rather irregular way. They should properly have been presented before the time of the argument upon the merits.

Rule 23 of this court (173 Pac. x), of date September 2, 1918, provides, among other things, that—

"All motions must be filed within ten days after a party or his attorney obtains knowledge of an alleged failure of the adverse party or his attorney to comply with the requirements of the statute or with the rules of this court, and unless so filed all defects, except objections to the jurisdiction of the court, will be taken as waived by the moving party."

[1] In the brief of respondent, it is urged that the notice of appeal is insufficient to confer jurisdiction for the reason it does not sufficiently describe the judgment appealed from or the court appealed to. The notice of appeal specifies the court in which the judgment was rendered, gives the name of the parties to the action, notifies the defendant and his attorney that the plaintiff "appeals to the Supreme Court from the judgment in the above-entitled action in favor of defendant and against plaintiff, entered in the above-named court on November 17, 1917, and from the whole of said judgment."

Subdivision 1 of section 550, L. O. L., provides that—

"Such notice shall be sufficient if it contains the title of the cause, the names of the parties, and notifies the adverse party or his attorney that an appeal is taken to the supreme or circuit court, as the case may be, from the judgment, order, or decree, or some specified part thereof."

It was held in *Fraley v. Hoban*, 69 Or. 180, 133 Pac. 1190, 137 Pac. 751, that a notice of appeal which correctly specifies the court in which the judgment was rendered, gives the names of the parties to the action, the date of the judgment, and informs the adverse party that an appeal from the judgment has been taken, is sufficient without any other description. And in *Holton v. Holton*, 64 Or. 290, 129 Pac. 532, 46 L. R. A. (N. S.) 779, it was held that a notice of appeal which does

not specify to what court the appeal is taken, nor fully describe the decree, is sufficient when, by reference to the undertaking, the missing particulars are supplied. See, also, *MacMahon v. Hull*, 63 Or. 133, 119 Pac. 348, 124 Pac. 474, 128 Pac. 3; *Ralha v. Coos Bay Coal & Fuel Co.*, 77 Or. 275, 143 Pac. 892, 149 Pac. 940, 151 Pac. 471.

In the present case, the undertaking upon appeal, which was served upon the defendant, recites that the appeal of the above-entitled action is to the Supreme Court of the state of Oregon. The notice of appeal substantially conforms to the statute and was sufficient to inform the respondent and his counsel that an appeal was to be taken from the judgment mentioned therein. The point is not well taken.

[2] A question is also raised by respondent in his brief in regard to the extension of the time for filing the transcript. The appeal was perfected January 16, 1918. Orders were made from time to time by the trial court extending the period for filing the transcript. The last order prescribed such time as until August 5, 1918. Section 554, subd. 2 (see Laws 1913, p. 619), provides for an order enlarging the time for filing the transcript upon appeal; but such order shall not extend the time for filing the transcript beyond the term of the Supreme Court next following the appeal. The next term of this court after the appeal commenced on March 4, 1918, and ended October 7, 1918, when the next term began; hence the time for filing the transcript was not extended beyond the next term of this court. The objection is not well taken. See *Emery v. Brown*, 63 Or. 264, 127 Pac. 682. It is claimed on behalf of respondent that the time allowed for filing brief would in effect put the case over the October term, but this cannot be considered.

[3] Counsel for respondent asks that the bill of exceptions be stricken out for the reason that it contains a transcript of all the evidence and all the proceedings had at the trial. The bill of exceptions portrays all of the proceedings of the trial of the cause, and is certified to by the trial judge. A transcript of all of the evidence is attached thereto. Under the rule announced and fully discussed in *Malloy v. Marshall-Wells Hardware Co.*, 90 Or. 303, 173 Pac. 287, 175 Pac. 659, 176 Pac. 589, by Mr. Justice McCamant, and affirmed in an opinion by Mr. Justice Harris, relating to the bill of exceptions, that in the present case is sufficient. Further discussion is unnecessary and would only consume space.

Considering the case on the merits: A careful computation of the interest on the note sued upon in the former action plainly shows that the \$720, the value of the bonds in question, was credited by the jury upon the note. There was a slight discrepancy in the figures, but it is not material. Objection was made by counsel for defendant to the

introduction of the record of the former judgment as evidence for plaintiff which was sustained by the court. It was admitted temporarily, but the certificate of the trial judge states that the objection to the introduction of that record was sustained for the reason that the judgment in the former action was not pleaded by plaintiff as an estoppel or bar to the present action, to which ruling counsel for plaintiff duly saved an exception. Plaintiff asked permission to file an amended complaint setting up the estoppel which was denied by the court over the exception of counsel for plaintiff. This is the main question for determination in this case.

[4] The rule that an estoppel by judgment to be available must be pleaded does not apply where, as in the case at bar, the judgment, instead of being relied upon in bar of the action, is attempted to be introduced in evidence merely as conclusive of some particular fact formerly adjudicated. In such case, it need not be pleaded in order to make it conclusive. The rule is stated in *Swank v. St. Paul City Railway Co.*, 61 Minn. 423, 63 N. W. 1088, as follows:

"A former judgment on the same cause of action, being a complete bar to a second action, must always be pleaded by way of defense. *Bowe v. Minnesota Milk Co.*, 44 Minn. 460, 47 N. W. 151. But a former judgment is no bar to a second suit upon a different cause of action. It merely operates as conclusive evidence of the facts actually litigated in the first action, and upon the determination of which the finding or verdict therein was rendered, and need not be pleaded any more than any other evidence. In such a case it is proper for a party to plead his cause of action or defense in the ordinary form, leaving the judgment to be used in evidence to establish his general right."

In *Krekeler v. Ritter*, 62 N. Y. 372, 374, the court uses the following language:

"The record of the superior court was not offered or received in evidence in bar of the action, but merely as evidence of the fact in issue. Had it been offered as constituting a bar, or as an estoppel to the action, it would have been inadmissible, not having been pleaded as a defense. [Citations.] But as evidence of a fact in issue it was competent although not pleaded like any other evidence, whether documentary or oral. A party is never required to disclose his evidence by his pleadings. The evidence was competent to disprove a material allegation of the complaint traversed by the answer. As evidence it was conclusive as an adjudication of the same fact, in an action between the same parties."

[5] The complaint alleges that the plaintiff is the owner of the property in question and entitled to the possession thereof. We think it is sufficient without amendment. It was not required to plead its evidence. It should be noted that the present defendant is in privity with and stands in the shoes of J. F. Reddy and Mary F. Reddy, the defendants in the former action as to the ownership of

the bonds. Hence he can claim only the same right to the bonds that the Reddys have. This is plainly agreed by the stipulation set forth above. The present action is upon a different claim or demand from the former action. The general rule is stated in 15 R. C. L. § 450, p. 973, as follows:

"When the second action between the same parties is upon a different claim or demand, or cause of action, it is well settled that the judgment in the first suit operates as an estoppel only as to the point or question actually litigated and determined, and not as to other matters which might have been litigated and determined. This rule holds true whether the judgment is used in pleading as a technical estoppel, or is relied on by way of evidence as conclusive *per se*. In all cases it should appear that the first judgment determined the actual question at issue between the parties, and that the precise question was raised and determined in the former suit. On the other hand, it is equally well settled that a fact which has been directly tried and decided by a court of competent jurisdiction cannot be contested again between the same parties in the same or any other court, and that where some controlling fact or question material to the determination of both actions has been determined in a former suit, and the same fact or question is again at issue between the same parties, its adjudication in the first will, if properly presented, be conclusive of the same question in the latter suit, without regard to whether the cause of action is the same or not, or whether the second suit involves the same or a different subject-matter, or whether or not it is in the same form of proceeding."

[§, 7] The law applicable is stated in substance as follows: While the doctrine of the effect of a judgment as an estoppel in subsequent action is limited to matters involved in the litigation, it is generally held to be equally applicable whether the point decided is, of itself, the ultimate vital point, or only incidental, if still necessary to the decision of that point, and a judgment in a prior suit is deemed final and conclusive in subsequent litigation between the parties, or their privies, as to those matters necessarily determined or implied in reaching the final judgment, although no specific finding may have been made in reference thereto, and even though it was not raised as an issue by the pleadings in the former action. If the record of the former trial shows that the verdict could not have been rendered without deciding the particular matter, it will be considered as having settled that matter as to all future actions between the parties or their privies, and if a judgment necessarily presupposes certain premises, they are as conclusive as the judgment itself, for the judgment is an adjudication on all matters which are essential to support it. Although there are decisions to a different effect, it has been said that the foregoing principles are universally applied, no matter how much injustice may be done by its application to a particular case. 15 R. C. L. § 451, p. 976,

citing, among other authorities, *Short v. Taylor*, 137 Mo. 517, 38 S. W. 952, 59 Am. St. Rep. 508; *Wells v. Boston, etc., Railroad Co.*, 82 Vt. 108, 71 Atl. 1103, 137 Am. St. Rep. 987; *Bleakley v. Barclay*, 75 Kan. 462, 89 Pac. 906, 10 L. R. A. (N. S.) 230; *Washington, etc., Steam Packet Co. v. Sickles*, 5 Wall. 580, 18 L. Ed. 550; *Redden v. Metzger*, 46 Kan. 285, 26 Pac. 689, 26 Am. St. Rep. 97; *Shelby v. Creighton*, 65 Neb. 485, 91 N. W. 369, 101 Am. St. Rep. 630; *Reed v. Douglas*, 74 Iowa, 244, 37 N. W. 181, 7 Am. St. Rep. 478; *Steinbach v. Relief Fire Ins. Co.*, 77 N. Y. 498, 33 Am. Rep. 655. See, also, 23 Cyc. pp. 1524, 1431, and cases cited under note 71; *Stillwell v. Hill*, 87 Or. 112, 169 Pac. 1174, and cases there cited.

[§, 8] In effect the payment of the value of the bonds in question upon the Reddy note was embraced in the allegations of the defendant's answer and put in issue in the former action. Circumstances in relation thereto were disclosed by the testimony and the question submitted to the jury under proper instructions, and passed upon by that tribunal, and became a part of the judgment. *Freeman on Judgments* (3d Ed.) § 284. The defendant Davis ought not to be permitted, in the present action, to claim on behalf of Dr. and Mrs. Reddy that the bonds referred to were not paid for by the bank and thereby became its property, contrary to the claim of the Reddys whom he represents, and in contravention of the verdict of the jury and the judgment of the court in the former action. Whatever might be the technical holding in regard to the former judgment, there is another reason why the record of the former case should be considered. It plainly shows that the Reddys who participated in the trial of that action asserted that the bonds were received by the bank in part payment of their note. Any admission or claim by them in regard to the matter would be admissible as against the present defendant, who is an uninterested stakeholder claiming title to the bonds for the Reddys.

The record submitted in this case plainly shows that the plaintiff is the owner of and entitled to the possession of the bond described in the complaint. Therefore, pursuant to section 3, art. 7, Constitution of Oregon, as amended November 8, 1910, the judgment of the lower court will be reversed and one entered here in favor of plaintiff as prayed for in its complaint.

McBRIDE, C. J., and JOHNS, J., concur.

BENNETT, J. (specially concurring). In this case I concur with the opinion of Mr. Justice BEAN as to the admissibility of the judgment transcript of the previous trial in the action by the plaintiff against Allen and Reddy, but I think the case should be reversed and remanded for a new trial. I do

not wish to concur in the implied construction of section 3 of article 7 of the Constitution of Oregon adopted in 1910.

(93 Or. 591)

WELCH v. JOHNSON.

(Supreme Court of Oregon. Oct. 7, 1919.)

1. ATTORNEY AND CLIENT — 86—IMPLIED AUTHORITY OF ATTORNEY TO ADMIT AWAY CLIENT'S CASE.

A general attorney had no implied authority, merely from his employment, to bind his client by an admission there was no mistake in the terms and conditions of the conveyance to the client, in the absence of pending litigation in which he was appearing as attorney of record.

2. EVIDENCE — 246—ADMISSION IN BRIEF BINDING ONLY AS TO PARTIES TO LITIGATION.

An allegation in a brief could bind only the parties to the litigation, and not another party for whom one of the attorneys who prepared the brief was counsel.

3. REFORMATION OF INSTRUMENTS — 17(2)—PREPARATION OF DEED IN OFFICE OF PLAINTIFF'S ATTORNEY NO DEFENSE.

Though the deed which plaintiff sues to correct was prepared in the office of his attorney, it was not necessarily any the less a mistake to include the disputed clause.

4. REFORMATION OF INSTRUMENTS — 25 — PREPARATION OF DEED IN OFFICE OF PLAINTIFF'S ATTORNEY AS SHOWING NEGLIGENCE.

That the deed whose reformation is sought was prepared in the office of plaintiff's attorney is properly considered on the point that to be relieved from mistake it must appear the mistake was not due to party's negligence.

5. REFORMATION OF INSTRUMENTS — 25—NEGLECT PREVENTING RELIEF AGAINST MISTAKE MUST BE VIOLATION OF DUTY.

The negligence which would prevent relief from mistake in a deed by reformation of the instrument must be such as amounts to violation of a positive duty owing the other party.

Department 1.

Appeal from Circuit Court, Multnomah County; W. N. Gatens, Judge.

On petition for rehearing. Petition denied.

For former opinion, see 183 Pac. 776.

Ernest C. Smith, of Hood River, and Huntington & Wilson, of Portland, for petitioner. W. A. Robbins, of Portland, opposed.

BURNETT, J. In his petition for a rehearing the defendant, Johnson, urges upon us the consideration of three several features of the testimony here set down:

"(1) That the respondent, Welch, through his attorney, Charles A. Johns, on December 29, 1916, at a time when his attention was directed

to the clause in question and he was informed that the appellant would make the claim that he has made and does make in this suit, stated that 'there is no contention over the terms and conditions in the conveyance.'

"(2) That the same attorney, Charles A. Johns, in April, 1916, in a written statement to this court in behalf of Welch corporation, the Pacific Land Company, said that Welch assumed and agreed to pay the mortgage in and by the terms of the deed.

"(3) That the respondent, the plaintiff at the trial, produced evidence showing that the deed in question was prepared in the office of Charles A. Johns, attorney for Welch, at the time the deed was prepared."

It will be recalled that the object of this suit was to correct an alleged mistake in a deed from the defendants Vreeland to the plaintiff, Welch, by striking out of the same the clause whereby Welch assumed and agreed to pay the note and mortgage held by Johnson as a lien upon the land conveyed, on the ground that it was inserted in the conveyance by the mutual mistake of the parties thereto. The testimony involved in the first specification of the petition is substantially as follows: Having foreclosed his mortgage, the attorney for the defendant Johnson, who was plaintiff in that proceeding, addressed a letter to the present plaintiff, Welch, at Portland, Or., directing his attention to the decree of foreclosure, notifying him that under the conveyance mentioned Welch was responsible for the payment of the debt evidenced by the note and secured by the mortgage, and calling upon him to pay it in full. This letter, dated December 28, 1916, was introduced in evidence. The defendant Johnson also read in evidence here a letter from Charles A. Johns, under date of December 29, 1916, addressed to the attorney for Johnson, which reads thus:

"Mr. Welch has handed me your letter to him of December 28, in which I note you claim he assumed and agreed to pay the Johnson note and mortgage, and that you are directed by Mr. Johnson to take such steps as may be necessary to collect his claim. There is no contention over the terms and conditions in the conveyance to Mr. Welch, but for many and different reasons he disclaims any personal liability to Johnson. Among other things, as I understand the facts, the note and mortgage from Ricord to Johnson was a purchase money note and mortgage. At all events, there is no disposition on the part of Mr. Welch to pay this claim or any part of it, and I think after a careful investigation you will find he is not personally liable."

[1] In this suit Johnson contends that this letter constitutes an admission, binding upon Welch, to the effect that there is no mistake in the conveyance. If this construction is correct, it would be fatal to the plaintiff's suit. In *Fleishman v. Meyer*, 46 Or. 267, 274, 80 Pac. 209, this court had under consideration the correspondence between the defend-

ants and a firm of attorneys who seemed to be representing the plaintiffs in advance of any litigation between them, in the matter of an alleged breach by defendants of their contract to sell personal property to the plaintiffs. Want of a pending action is a condition attending the correspondence here in question. In that case the court said, speaking by Mr. Justice Moore:

"Authority to compromise the claim, as mentioned in the exception noted, will be implied only in the regular course of pending suits and actions, when an attorney has neither time nor opportunity to consult with his client, whose interest would be imperilled by delay [citing authorities]. The weight of authority in this country supports the rule that an attorney, by virtue of a mere retainer, has no implied power to bind his client by a compromise of his claim [citing still other precedents]."

If an attorney in advance of litigation cannot compromise his client's case, much less can he admit away the client's whole case. There is nothing in the evidence for the defendant relating to the extent of the authority given to Johns to bind the plaintiff, Welch, by the letter in question. On the other hand, as a witness for the plaintiff in rebuttal, Johns stated:

"That letter was written without a consultation with Mr. Welch or any knowledge of the facts concerning the execution of these deeds."

In the absence of any pending litigation in which Johns was appearing as the attorney of record for Welch, no more importance can be attached to the letter than to the declaration of any one else who assumes to speak for another. The case is not affected by the fact that the writer was a member of the bar. He might as well have been the plaintiff's grocer or laundryman. It would be necessary to show that the declarations in the letter were authorized by the plaintiff and within the scope of the authority conferred upon the writer, before the writing could bind the plaintiff. How far an attorney may bind his client in compromise or renunciation of his claim is discussed in *Pomery v. Prescott*, 106 Me. 401, 78 Atl. 898, 138 Am. St. Rep. 347, 21 Ann. Cas. 574, and note.

[2] Much is claimed, also, for a statement made in the brief of the defendant in the case of *John R. Johnson, Plaintiff, v. Pacific Land Company, Defendant* (heard in this court at the February term, 1917) 84 Or. 356, 164 Pac. 564, to the effect that the plaintiff there had sold the land here in question to Ricord, who conveyed to the Vreelands, and the latter to Welch, and that in each instance the grantees assumed and agreed to pay the mortgage. This brief was over the name of Charles A. Johns and Claude M. Johns. The action there was for the replevin of some personal property alleged to have been wrongfully removed from the mortgaged

premises by the defendant there. We note that it was an incidental statement made in the brief by way of opening the argument for the defendant in that case. It was *res inter alios acta*. It is not shown even that Welch was present at the argument of the case or knew that the statement was included in the brief. At the utmost, it could bind only the parties to that litigation.

Much the same is the case of *Patty v. Salem Flouring Mills Co.*, 53 Or. 350, 96 Pac. 1106, 98 Pac. 521, 100 Pac. 298. One question there involved was the custom of the defendant in dealing with farmers when it received wheat from them and issued receipts therefor. In the *Patty Case* the trial court admitted evidence of the testimony of a witness in the previous case of *Savaga* against the same defendant respecting such a custom. The court in an exhaustive opinion by Mr. Justice Moore held that this was error. That case is controlling upon the second specification in the defendant's petition here.

[3-5] Even if the deed in question was prepared in the office of the plaintiff's attorney, and this is questionable under the testimony, that would not necessarily make it less a mistake to include the clause in dispute. Even attorneys are not infallible, and their errors are not necessarily conclusive upon their clients. This circumstance is properly considered on the point that to be relieved from a mistake it must appear that it was not due to the party's negligence, but, as pointed out in the former opinion, on the authority of *Pomeroy*, the negligence which will prevent the relief of a party from his mistake must be such as will amount to a violation of a positive duty owed to another party. Here, at the time the alleged mistake was made Johnson had already received his note and mortgage, together with the agreement of the Vreelands as grantees subsequent to Johnson to pay this same debt. In taking the conveyance from the Vreelands, Welch owed no duty whatever to Johnson. The latter was not induced to surrender any right or to prejudice his situation by anything in the deed which Welch accepted. The negligence, therefore, whether of himself or of his attorney, who wrote the deed, if he did write it, is not such as will prevent the correction of the mistake.

Summing up the whole matter of the evidence, we have the consensus of statement of the parties to the conveyance that it was a mistake to include such a clause, and that it was not part of the agreement out of which the deed arose. All that is opposed to this positive statement are the inferences to be drawn from the correspondence alluded to and the possible fact that the deed was drawn in the office of a member of the bar. As a matter of law, the letter mentioned was not binding upon the plaintiff here, and the in-

ferences to be drawn from the circumstances under which the conveyance was written are not of sufficient weight to overcome the direct, uncontradicted, and explicit narrative of the parties.

The petition for rehearing is denied.

McBRIDE, C. J., and BENSON and HARRIS, JJ., concur.

JOHNS, J., did not participate in the consideration of the original case or of the petition for rehearing.

(93 Or. 668)

LADD & TILTON BANK v. MITCHELL et al.

(Supreme Court of Oregon. Oct. 14, 1919.)

1. MORTGAGES — 158 — WHAT CONSTITUTES "PURCHASE-MONEY MORTGAGE" ENTITLED TO PRIORITY OF LIENS.

Generally, mortgage executed by purchaser contemporaneously with acquirement of legal title, or afterwards as part of same transaction, is a "purchase-money mortgage," regardless of whether executed to vendor or third person, and entitled to preference as such over all other claims or liens arising through the mortgagor though prior in point of time.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Purchase-Money Mortgage.]

2. MORTGAGES — 559(2)—WHAT CONSTITUTES "MORTGAGE TO SECURE PAYMENT OF THE BALANCE OF THE PURCHASE PRICE."

A mortgage executed to "secure payment of the balance of the purchase price," within L. O. L. § 426, providing that upon foreclosure of such mortgage mortgagees shall not be entitled to deficiency judgment against purchaser, is a mortgage given concurrently with a conveyance of land, by purchaser to vendor, on the same land, to secure the unpaid balance of the purchase price, and a mortgage executed by purchasers to vendor's mortgagee in consideration of the latter's release of the land purchased from its mortgage is not within the statute.

In Banc.

Appeal from Circuit Court, Multnomah County; George W. Stapleton, Judge.

Suit by the Ladd & Tilton Bank against Hattie Mitchell and husband and another. Decree for plaintiff, and named defendants appeal. Affirmed.

This is a suit by Ladd & Tilton Bank against defendants McKinley Mitchell and wife and Lewis-Wiley Hydraulic Company to foreclose a first mortgage on certain real property. The complaint is in the usual form and asks that, in the event the amount received upon the sale of the real property be insufficient to satisfy the demand of plaintiff, it have judgment against defendants Hattie

Mitchell and McKinley Mitchell, and each of them, for the deficiency. The defendants Hattie Mitchell and McKinley Mitchell filed an answer admitting the allegations of the complaint and setting up certain facts which they claim exempt them from the operation of any judgment for any balance that may remain after the proceeds of the sale of the real property described in the mortgage.

The trial court rendered a decree in favor of plaintiff, and the Mitchells appeal from that portion of the judgment and decree which is as follows:

"That if, after the application of the proceeds of sale of said real property in the manner aforesaid, any deficiency remains upon the judgment herein rendered and obtained by plaintiff, that plaintiff have execution against the defendants, Hattie Mitchell and McKinley Mitchell, or either of them, and against the property of them or either of them, to satisfy in whole or in part any such deficiency."

The cause was submitted upon the following stipulation of facts:

"It is hereby stipulated by and between the parties hereto, by and through their respective attorneys of record, that the following facts are to be considered as true on the trial of the above-entitled case:

"(1) That on and prior to the 3d day of October, 1912, Lewis-Wiley Hydraulic Company, an Oregon corporation, owned and held absolute title to lots 2 and 3 in block 10, Westover Terraces, an addition to the city of Portland, Multnomah county, Or., according to the duly recorded maps and plats thereof, and that on or prior to said date, to wit, the 3d day of October, 1912, Lewis-Wiley Hydraulic Company had borrowed certain moneys from Ladd & Tilton Bank, and as security therefor had executed a blanket mortgage unto Ladd & Tilton Bank on all of the property owned by Lewis-Wiley Hydraulic Company, including in said blanket mortgage the property above described, to wit, lots 2 and 3 in block 10, Westover Terraces aforesaid. That said blanket mortgage was to secure Ladd & Tilton Bank for the repayment of moneys actually advanced by the said Ladd & Tilton Bank to said Lewis-Wiley Hydraulic Company and used by said Lewis-Wiley Hydraulic Company for its corporate purposes; the said blanket mortgage so executed by the Lewis-Wiley Hydraulic Company was not in fact a purchase-money mortgage and said property was never owned by Ladd & Tilton Bank.

"(2) That on or about the 3d day of October, 1912, Lewis-Wiley Hydraulic Company sold to Hattie Mitchell and McKinley Mitchell, the defendants above named, said lots 2 and 3 in block 10, Westover Terraces, for the total purchase price of \$8,750, paying \$750 in cash unto the Lewis-Wiley Hydraulic Company, and, at the request of Lewis-Wiley Hydraulic Company, Hattie Mitchell and McKinley Mitchell executed a first mortgage on said lots in favor of the plaintiff, Ladd & Tilton Bank, for \$3,375, the said mortgage being the mortgage which is described in the complaint filed herein;

and as a further portion of the consideration Hattie Mitchell and McKinley Mitchell executed a mortgage for \$— in favor of Lewis-Wiley Hydraulic Company to secure the payment of the balance of the consideration due Lewis-Wiley Hydraulic Company.

"(3) For the purpose of permitting the Lewis-Wiley Hydraulic Company and Hattie Mitchell and McKinley Mitchell to consummate the purchase of the real property as in paragraph 2 of this stipulation set forth. Lewis-Wiley Hydraulic Company requested Ladd & Tilton Bank to apportion to lots 2 and 3 in block 10, Westover Terraces aforesaid, such amount of the general indebtedness due unto Ladd & Tilton Bank from the Lewis-Wiley Hydraulic Company as should be proper and suitable in the premises, and, pursuant to said request, Ladd & Tilton Bank did apportion to said lots 2 and 3 in block 10, Westover Terraces aforesaid, from the general indebtedness due from Lewis-Wiley Hydraulic Company to Ladd & Tilton Bank, the sum of \$3,375. The Lewis-Wiley Hydraulic Company, as a consideration for the segregation of said indebtedness by Ladd & Tilton Bank as aforesaid, did represent to Ladd & Tilton Bank that Hattie Mitchell and McKinley Mitchell would assume and pay such proportion of said segregated indebtedness and as evidence of said obligation of Hattie Mitchell and McKinley Mitchell to pay such proportion of such segregated indebtedness due unto Ladd & Tilton Bank from the Lewis-Wiley Hydraulic Company, as a consideration mortgage in the sum of \$3,375, the same being the mortgage more particularly described and set forth in the complaint filed in this cause.

"(4) Hattie Mitchell and McKinley Mitchell were informed by the Lewis-Wiley Hydraulic Company of the fact that Ladd & Tilton Bank had a general blanket mortgage on the property known and described as Westover Terraces, and particularly lots 2 and 3 in block 10 thereof, which mortgage was to secure the repayment of moneys theretofore loaned by Ladd & Tilton Bank to Lewis-Wiley Hydraulic Company.

"(5) That the mortgage in favor of Ladd & Tilton Bank was executed by Hattie Mitchell and McKinley Mitchell in consideration of the release by Ladd & Tilton Bank of lots 2 and 3 in block 10, Westover Terraces, aforesaid, from the security of the Lewis-Wiley Hydraulic Company as hereinbefore set forth and from the blanket mortgage executed to Ladd & Tilton Bank as hereinbefore set forth, and the repayment of the security afforded Ladd & Tilton Bank by said blanket mortgage.

"(6) At the time that Hattie Mitchell and McKinley Mitchell executed the note for \$3,375 and gave a first mortgage on lots 2 and 3 in block 10, Westover Terraces aforesaid, as security for the same, the Lewis-Wiley Hydraulic Company was not released from the liability for the repayment of the moneys theretofore loaned by it unto the Lewis-Wiley Hydraulic Company, but at the time of the execution of said note and mortgage by Hattie Mitchell and McKinley Mitchell and contemporaneously therewith, and at the time of the lodging of the same with Ladd & Tilton Bank, the Lewis-Wiley Hydraulic Company did execute the following guaranty on the back of the note, in words and figures as follows, to wit:

"For value received Lewis-Wiley Hydraulic

Company hereby guarantees the payment of the within note and waives protest, demand and notice of nonpayment thereof. Lewis-Wiley Hydraulic Company, by W. C. Morse, Vice President.'

"Upon the foreclosure of a mortgage executed, 'to secure the payment of the balance of the purchase price of real property * * * the mortgagee shall not be entitled to a deficiency judgment.'"

W. T. Slater, of Portland (Manning & Slater, of Portland, on the brief), for appellants.

P. W. Cookingham, of Portland (Wood, Montague, Hunt & Cookingham, of Portland, on the brief), for respondent.

BEAN, J. (after stating the facts as above). The only issue in this case is whether the plaintiff is entitled to a judgment for any balance that may remain due after the application of the proceeds of the sale of the real property described in the mortgage. It is contended on behalf of defendants Hattie Mitchell and McKinley Mitchell, whom we will hereafter designate as defendants, as Lewis-Wiley Hydraulic Company, the other defendant, did not answer or appeal, that under the provisions of section 426, L. O. L., the plaintiff is not entitled to a judgment for such balance, or, as it is termed, "a deficiency judgment." The provisions of this section of our Code are as follows:

"When judgment or decree is given for the foreclosure of any mortgage, hereafter executed, to secure payment of the balance of the purchase price of real property, such judgment or decree shall provide for the sale of the real property, covered by such mortgage, for the satisfaction of the judgment or decree given therein, and the mortgagee shall not be entitled to a deficiency judgment on account of such mortgage or note or obligation secured by the same."

The transaction delineated by the stipulation was of the same force and effect as though Ladd & Tilton Bank had loaned to the Mitchells \$3,375, Lewis-Wiley Hydraulic Company guaranteeing payment thereof, and then the Mitchells had paid the same to the Lewis-Wiley Hydraulic Company, and that company in turn had paid the same to Ladd & Tilton Bank. Instead of taking such a circuitous route, a three-cornered transaction was made. It might be stated that in effect the Mitchells assumed and agreed to pay to Ladd & Tilton Bank a portion of the money the Lewis-Wiley Hydraulic Company had borrowed from Ladd & Tilton Bank. The Mitchells were not purchasers of the lots from Ladd & Tilton Bank; Ladd & Tilton Bank were not the sellers of the lots. The mortgage was not executed by the Mitchells "to secure the payment of the balance of the purchase price of real property" within the meaning of the statute. The original debt of the Lewis-Wiley Hydraulic Company to Ladd

& Tilton Bank was for money loaned by the bank to that company. The mortgage given by the Mitchells to Ladd & Tilton Bank was in effect given for a loan.

[1] The position of the defendants is that the mortgage was a purchase-money mortgage. We think that it may be conceded that it is a general rule, to which there is little dissent, that a mortgage on land executed by the purchaser of the land contemporaneously with the acquirement of the legal title thereto, or afterwards, but as a part of the same transaction, is a "purchase-money mortgage," and entitled to preference as such over all other claims or liens arising through the mortgagor, though they are prior in point of time; and this is true without reference to whether the mortgage was executed to the vendor or to a third person. 19 R. C. L. § 196, p. 416; *Marin v. Knox*, 117 Minn. 428, 136 N. W. 15, 40 L. R. A. (N. S.) 272 and note.

But this rule is of little assistance in determining the question in the case at bar involving a construction of section 426, L. O. L., which was adopted for a different purpose.

The decisions holding that, if a loan is secured by a mortgage given on property purchased with the money lent, then such mortgage is a purchase-price mortgage, were for the benefit of the mortgagee and not to his detriment. In other words, the courts have construed such mortgages as purchase-price mortgages in order to secure to the mortgagee the full amount of the money advanced. In several jurisdictions, however, it is held that such mortgages are not purchase-price mortgages. *Heulsler v. Nickum*, 38 Md. 270; *Eyster v. Hatheway*, 50 Ill. 521, 99 Am. Dec. 537. In *Heulsler v. Nickum*, *supra*, it was said:

"The terms 'purchase money' do not include any money that may be borrowed to complete a purchase but that which is stipulated to be paid by the purchaser to the vendor, as between them only it is purchase money; as between, the purchaser and lender, it is borrowed money."

[2] A "purchase-money mortgage" is defined in 32 Cyc. at page 1267, as follows:

"A mortgage given, concurrently with a conveyance of land, by the vendee to the vendor, on the same land, to secure the unpaid balance of the purchase price"—citing *Black's Law Dictionary*.

While this definition is not the universal one, it seems to us that in enacting section 426, L. O. L., the Legislature acted with the kind of purchase-money mortgage in view as defined above; that is, that the purpose of the law was to encourage and protect the purchaser of real estate, which perchance is made for the purpose of obtaining a home; that it was not the intent of the lawmakers to render it more difficult for such a purchaser to obtain a loan and pay the cash for a home, and receive the benefit of any lower price of the realty that might be made on account of such cash payment; that if the law should be so construed that any one obtaining a loan and giving a real estate mortgage to a third party not the vendor of the land to secure the payment thereof, when it was contemplated that the money so borrowed should be used in payment for the real property purchased at the time, would be executing a mortgage "to secure payment of the balance of the purchase price of real property," within the purview of the statute, and that the lender could only look to the property upon a foreclosure proceeding, then the person wishing to purchase a home or other real property would be hampered and his credit impaired, and it might well be said that, "The last state of that man is worse than the first." In such event, the beneficent purpose of the law would be thwarted. It must be considered that the bank was not speculating in real estate in the transaction, it was doing a banking business. It was not the purpose or the intent of the law to regulate banking business or the loaning of money. The ordinary transactions of a bank do not come within the provisions of the act.

Whatever may be the construction of the section referred to when applied to a mortgage executed by a vendee to a vendor to secure the payment of the balance of the purchase price of real property, we believe that it was not the intention of the Legislature that mortgages like the one in question in the present case should come within the provisions of section 426, L. O. L.

The decree of the lower court is therefore affirmed.

JOHNS, J., not sitting.

BURNETT, BENSON, and HARRIS, JJ., concur in the result.

(94 Or. 119)

KRUEGER v. BROOKS.

(Supreme Court of Oregon. Oct 7, 1919. On Petition to Modify Decree as to Costs, Nov. 12, 1919.)

1. ADVERSE POSSESSION §114(1)—EVIDENCE SHOWING ACQUISITION OF TITLE BY ADVERSE POSSESSION.

In suit to quiet title, a survey having disclosed that a fence dividing the lands of the respective parties was located north of what would be the dividing line in strict conformity with the description in their deeds, evidence held to show that plaintiff owned up to the fence in fee simple by force of adverse possession.

2. PLEADING §236(3)—AMENDMENT OF MIS-DESCRIPTION IN COMPLAINT TO QUIET TITLE ALLOWED.

In suit to quiet title, controversy arising out of fact that survey disclosed a fence was located north of the line between the two tracts of the parties as shown by the description of their deeds, where plaintiff intended to litigate the strip in dispute, but by mistake misdescribed the tract, it was proper for the court to permit him to file an amended complaint; defendant not being surprised.

3. QUIETING TITLE §4—EQUITY HAS JURISDICTION OF SUIT BY PARTY IN POSSESSION.

Equity had jurisdiction of a suit to quiet title, brought by a party in possession of the land in dispute, since he could not prosecute an action in ejectment, and in the suit he had a right to have title adjudicated.

4. APPEAL AND ERROR §1041(3)—REFUSAL TO PERMIT FILING OF AMENDED ANSWER HARMLESS.

Where the answer which had been filed in suit to quiet title permitted defendant to offer all evidence which would have been admissible under any issues raised by a proposed amended answer, refusal to permit defendant to file such answer was harmless to defendant.

5. ADVERSE POSSESSION §110(2)—AMENDED COMPLAINT SUFFICIENT TO SUSTAIN DECREE BASED ON ADVERSE POSSESSION.

In suit to quiet title, amended complaint held to have alleged ownership or title by adverse possession and to support decree for plaintiff.

6. ADVERSE POSSESSION §106(4)—FOR REQUISITE PERIOD VESTS TITLE.

Adverse possession for the requisite period vests title in the possessor of a tract of land by operation of law.

Department 1.

Appeal from Circuit Court, Multnomah County; C. U. Gantenbein, Judge.

Suit to quiet title by W. C. Krueger against Carl O. Brooks. From a decree for plaintiff, defendant appeals. Affirmed.

This is a suit to quiet title. A trial resulted in a decree for the plaintiff, W. C. Krueger. The defendant, Carl O. Brooks, appealed.

The litigants own and occupy adjoining tracts of land. The controversy arose out

of the fact that when a survey was made it was discovered that a fence, which for considerably more than 10 years had divided the lands as used and occupied by the litigants, was located between about 29 and 33 feet north of what would be the dividing line between the two tracts, if a line were drawn upon the ground in strict conformity with the descriptions in their respective deeds.

Frederick Schleuter homesteaded and acquired title to the following described premises: The southeast quarter of the northwest quarter and the northeast quarter of the southwest quarter of section 6 in township 1 north of range 1 west of the Willamette meridian, containing 80 acres. For convenience the land just described will be referred to as tract A. Afterwards Schleuter conveyed to Charles Krueger, and subsequently, on September 15, 1909, the latter deeded to his son, W. C. Krueger, the plaintiff.

Thomas Jeff Brooks homesteaded a tract of land of which the following described premises are a part: The south half of the northeast quarter of the northwest quarter of section 6, township 1 north, range 1 west, Willamette meridian. For the sake of brevity the land included in this description will be designated tract B. On August 27, 1915, Thomas Jeff Brooks deeded tract B to his son Carl O. Brooks, the defendant.

In 1882 Charles Krueger moved onto tract A with his family and resided there at least until the conveyance to the plaintiff. The uncontradicted evidence is that in 1882 there was a brush fence separating the premises occupied by Charles Krueger and the adjoining lands on the north; but the brush fence was subsequently destroyed by fire, and soon after the fire a new fence was built by Thomas Jeff Brooks and Charles Krueger, each building one-half of the fence. This new fence was constructed practically along the line of the brush fence, although the new fence may have varied 8 or 10 feet one way or the other from the line of the old brush fence. The exact date of the construction of this new fence is uncertain, but it is accurate to say that it was built at some time between 1888 and 1893. While the new fence was repaired from time to time, and, as we understand the record, was rebuilt a number of years ago, nevertheless a fence has been maintained without interruption along the identical line where what we here term the "new" fence was originally built at some time between 1888 and 1893.

In 1882 there was growing brush along and on the south side of the brush fence; but during the succeeding years the growing brush was slashed, and the ground was gradually cleared by Charles Krueger and the plaintiff until all the land lying south of and up to the fence which could be tilled was cultivated, with the exception of about an acre

and a half, which lies in the northeast corner in a canyon, and cannot on that account be cultivated. The land south of the fence was cultivated up to a part, and probably most, of the length of the fence, for a period of more than 20 years prior to the commencement of this suit. At any rate Charles Krueger used all the land south of the fence from the time of its original construction until 1908, when he conveyed to his son; and the latter continued to use the land for the purposes for which it was adapted.

In about 1912, Thomas Jeff Brooks caused the lands described in his homestead patent to be surveyed, and it was then discovered that the fence was located from about 29 to 33 feet north of where his south line would be, if established upon the ground in exact accordance with the description in his patent. Apparently nothing was done by Thomas Jeff Brooks or his son towards claiming this narrow strip of land until about 1915, when the defendant "put boards in there * * * for the fence, over on the line—put boards and some posts about one-fourth of the way through."

The plaintiff had a survey made of tract A and of the controverted strip, and thus ascertained the description by metes and bounds of the land lying south of the fence. The following is a description of all the lands south of the fence as it has been continuously maintained since the time it was built about thirty years ago: Commencing at a point 20 feet south 89 degrees 32 minutes west of the center of section six (6) in township one (1) north of range one (1) west of Willamette meridian, and running thence south 89 degrees 32 minutes west 1,298.25 feet; thence north no degrees 7 minutes east 1,340.53 feet; thence north 89 degrees 37 minutes east 1,307 feet; thence south no degrees 28 minutes west 1,338 feet, to the point of beginning. For convenience this description will be called tract C, and for brevity the disputed strip of land will sometimes be called tract D. It must be kept in mind that tract C embraces the north half of tract A and also the whole of tract D. The section, as will be observed from the measurements, is an irregular one.

C. M. Idleman, of Portland, for appellant.
Norman S. Richards, of Portland (Richards & Richards, of Portland, on the briefs), for respondent.

HARRIS, J. (after stating the facts as above). [1] It is not necessary to state any additional facts, or to relate any more of the evidence concerning the nature of the use which the plaintiff and his grantor made of the lands south of the fence; but it is enough to say that, although the evidence in behalf of the plaintiff was contradicted by witnesses for the defendant, nevertheless the record

clearly shows that the plaintiff and his grantor have been in actual possession of and have used tract D under claim of ownership for considerably more than 10 years. The fact that all the land south of the fence was cleared, and the fact that all the land south of the fence, which could be cultivated, was in truth cultivated up to the fence, plus the fact that the fence was maintained as the dividing line for so many years, is the strongest kind of evidence that Charles Krueger, as well as his successor, the plaintiff, claimed ownership in all the land south of the fence. In brief, the evidence shows that the plaintiff is the owner in fee simple of tract D by force of a title acquired by adverse possession. *Gist v. Doke*, 42 Or. 225, 70 Pac. 704; *Dunigan v. Wood*, 58 Or. 119, 125, 112 Pac. 531; *Stout v. Michelbook*, 58 Or. 372, 114 Pac. 929.

The principal attack made by the defendant in his printed brief is directed against the pleadings. The plaintiff filed a complaint and an amended complaint. Reducing the original complaint to the briefest terms, it may be said that the plaintiff avers that he owned in fee simple and was at the time of the filing of the complaint in the possession of the land, the description of which as given in the complaint corresponds with tract A, and that he and his predecessor in interest had been in the adverse possession of such described land for more than 30 years; that the defendant "has a tract of land of which he is the owner * * * adjacent to and extending along the north boundary line of plaintiff's said land; that the defendant, without the consent of the plaintiff, forcibly entered upon the plaintiff's said tract of land, and has dug holes and erected fences upon the said tract of land, * * * thereby cutting off from plaintiff's said premises a strip of land 33 feet wide extending along the entire north side"; and that the defendant "claims an estate or interest in said tract or parcel of land [tract D] adverse to plaintiff."

The defendant answered, and admitted that the plaintiff owned tract A, and admitted that the defendant owned the adjoining tract on the north; but the defendant denied that he had entered upon the plaintiff's land, as alleged in the complaint.

With the permission of the court the plaintiff filed an amended complaint. In paragraph II of his amended complaint the plaintiff avers that he owns in fee simple and is in possession of—

"that certain * * * parcel of land * * * described as follows: [Here appears a description which corresponds with tract A.]"

This paragraph continues thus:

"That all of the northern part or portion of the land owned by the plaintiff [tract A is here described] has been and now is used by the plaintiff and his predecessors in interest for pasture and cultivation purposes for more than 30 years last past."

Paragraph III avers that the plaintiff and his predecessors now are, and have been during all the time mentioned in the pleading—"in actual, adverse, open, notorious, continuous, uninterrupted, and peaceable possession of the following described parcel or tract of land, to wit: All of the northern part or portion of land owned by plaintiff and his predecessors in interest [a description of tract C is here given]. That all of the land so held as above set forth by the plaintiff and his predecessors in interest and his and their grantors has been and now is under fence and used by the said plaintiff and his predecessors in interest for pasturage and cultivation purposes for more than 30 years last past, and said plaintiff and his predecessors in interest have paid all taxes and assessments levied and assessed on said tract or parcel of land to date."

In paragraph IV it is alleged that the defendant owned a tract of land—

"adjacent to and extending along the north boundary line of plaintiff's said land. That the defendant without the consent of the plaintiff forcibly entered upon the plaintiff's said tract of land as hereinbefore described in paragraph III of this amended complaint, and has dug holes and erected fences upon the said tract of land extending across the entire north side of plaintiff's said tract of land, thereby cutting off from plaintiff's said described land a strip of land 33 feet in width extending along the entire north side of said land, thereby attempting to entirely exclude the plaintiff from the use of said strip of land. The said 33-foot strip belongs to the plaintiff and has been held and used in actual, adverse, open, notorious, continuous, uninterrupted, and peaceable possession by the plaintiff and his predecessors in interest for more than 30 years last past, as heretofore alleged."

Paragraph V repeats the averment that tract C has been enclosed by a fence for more than 30 years, "has been held in actual, open, adverse, notorious, continuous, uninterrupted, and peaceable possession by this plaintiff and his predecessors in interest."

The defendant filed a motion against the amended complaint; but he answered when the court denied the motion. In his answer the defendant admitted that part of paragraph II which avers that plaintiff owned tract A, but denied the allegation that plaintiff had used tract C for more than 30 years, denied paragraph III, admitted the averment in paragraph IV that the defendant owned the land adjoining plaintiff's premises on the north, and denied the remainder of the amended complaint.

The case came on for trial, and the plaintiff proceeded to examine his first witness and thereupon the defendant objected to the introduction of any evidence on the grounds that (1) a court of equity was without jurisdiction; and (2) "the complaint does not state facts sufficient to constitute a cause of suit." When this objection was overruled, the defendant immediately asked for permission to file an amended answer; but the court denied

the motion, saying in explanation of the ruling:

"It is rather late to come in and ask for an amendment during trial, unless a very clear case is made out, and I doubt whether you have done that."

The proposed amended answer contained some affirmative matter. In substance this affirmative matter states that the defendant owns tract B and that the plaintiff owns an adjacent tract on the south, which is described in the proffered pleading by metes and bounds. This description by metes and bounds of the land which the defendant alleges is owned by the plaintiff is in reality only another way of describing tract A. It is then alleged that the true boundary line between the premises owned by the plaintiff and those owned by the defendant is a line drawn between tracts A and B.

[2] The defendant filed an answer to the original or first complaint, and if the cause had been tried on those two pleadings the issue for trial would have related to a strip 33 feet wide extending across the north end of tract A, instead of a strip across the north end of tract C. The defendant knew what the plaintiff was complaining about, and he knew what the plaintiff was attempting to put in issue for trial. The defendant was not and could not have been surprised by the amendment. The plaintiff intended to litigate the 33-foot strip which was in dispute between the parties and the defendant could not have been misled as to the intention of the plaintiff. Instead of describing tract C, the plaintiff described tract A. The plaintiff stated a cause of suit, but it is manifest that a clear mistake was made by the plaintiff, and it was entirely proper in the furtherance of justice and on the authority of many analogous precedents for the court to permit the filing of an amended complaint. *Baldock v. Atwood*, 21 Or. 73, 79, 26 Pac. 1058; *Koshland v. Fire Association*, 31 Or. 362, 365, 49 Pac. 865; *Farmer's Bank v. Saling*, 33 Or. 394, 404, 54 Pac. 190; *Christenson v. Nelson*, 38 Or. 473, 476, 63 Pac. 648; *Ridings v. Marion County*, 50 Or. 30, 31 Pac. 22.

[3] The defendant argues that a court of equity is without jurisdiction. The plaintiff was in actual possession of all the land south of the fence when he began this suit. The evidence for the plaintiff was to the effect that he was and had been in possession of the disputed land. The defendant, when testifying as a witness, stated that he did not claim that he had been in possession of tract D; but, on the contrary, he expressly admitted that the plaintiff had been in possession of all the land south of the fence. It is therefore admitted that the plaintiff was in possession. The plaintiff was not obliged to wait for the defendant to commence an action in ejectment. The plaintiff could not

prosecute an action in ejectment, and consequently a suit in equity was the only remedy available to him; and, having availed himself of the remedy afforded by a suit in equity, he had a right to have the title adjudicated. *McLeod v. Lloyd*, 43 Or. 260, 276, 71 Pac. 795, 74 Pac. 491; *Comegys v. Hendricks*, 55 Or. 533, 534, 106 Pac. 1016. Indeed, a suit to quiet title would be a misnomer, and no remedy at all, if in the circumstances presented here the plaintiff could not have his title tried out and determined. As was said by Judge Deady in *Starr v. Stark*, 1 Sawy. 270, 276, Fed. Cas. No. 13,316, by a final decree—

"the title to the premises, as between the parties, is determined, and all questions or matters affecting such title are concluded thereby."

See, also, *Savage v. Savage*, 51 Or. 167, 170, 94 Pac. 182; *Moore v. Clackamas County*, 40 Or. 536, 540, 67 Pac. 662.

Most of the cases relied upon by the defendant were suits to establish boundary lines. This is not a suit to establish a boundary line; nor is it an attempt by a claimant out of possession to quiet his title as against a person in possession.

[4] The defendant complains because the court refused to permit him to file his proposed amended answer. The amended complaint was filed on November 28, 1917, and an answer to this amended complaint was filed at some time not definitely disclosed by the records. The case came on for trial on March 27, 1918, and on that day the defendant offered to file the amended answer. It is not necessary to determine whether the alleged delay of the defendant alone justified the ruling of the court, for the reason that no substantial right of the defendant was injuriously affected. The answer which had already been filed permitted the defendant to offer all the evidence which could have been admissible under any of the issues which could properly have been raised by the proposed amended answer. It must, of course, be remembered that this is a suit to quiet title, and the defendant could not convert it into a suit to establish a boundary line by the mere filing of an answer seeking the establishment of a boundary line. The defendant was permitted to tell the whole of his story about the controverted land, and the decree of the trial court was rendered after hearing and considering all the evidence offered by both parties.

The amended complaint contains much unnecessary matter. It would have been enough if the plaintiff had alleged ownership and possession and that the defendant claims an adverse interest, as taught in the following and other precedents: *Cooper v. Blair*, 50 Or. 394, 397, 92 Pac. 1074; *Savage v. Savage*, 51 Or. 167, 170, 94 Pac. 182; *Stanley v. Topping*, 71 Or. 590, 604, 143 Pac. 632; *Mascall v. Murray*, 76 Or. 637, 645, 149 Pac. 521.

The amended complaint sufficiently alleges that the plaintiff is in possession of tract C. We think, too, that it can be said that the

pleading avers that the plaintiff owns tract C. In paragraph II is the averment "that all of the northern part or portion of the land owned by the plaintiff commencing at a point," and then follows a description by metes and bounds of tract C. Again, in paragraph III we find the allegation that "all of the northern part or portion of land owned by plaintiff and his predecessors in interest, commencing at a point 20 feet," and then there is a description of tract C. The complaint avers in positive language that the plaintiff owns in fee simple and is in possession of tract A.

[5, 6] The averments of ownership are not, it is true, made with commendable directness, and yet, when taken in connection with the rest of the pleading, we think that it can be said that the plaintiff alleges that he is the owner of tract C. Moreover, the pleading also recites the source of the plaintiff's title and alleges the probative facts upon which the claim of ownership is rested. The amended complaint sufficiently alleges ownership to support the decree, and even though it be assumed that the pleader must allege the source and ingredients of his title, still it may fairly be said that the amended complaint sufficiently alleges title by adverse possession and the elements requisite for such title. 2 C. J. 259, and notes. No good purpose could possibly be served by remanding the cause for a new trial, since it is fair to presume that a new trial would disclose no additional information, and when, too, it is apparent, as it is here, that a new trial would amount to nothing more than a second hearing of the same evidence which has already been once heard, and from which it clearly appears that the plaintiff acquired a fee-simple title to tract D in virtue of adverse possession. Adverse possession for the requisite period vested title in the possessor of tract D by operation of law. *McKinney v. Hindman*, 86 Or. 545, 548, 169 Pac. 93, 1 A. L. R. 1476; *Parker v. Kelsey*, 82 Or. 334, 343, 161 Pac. 694; *Spath v. Sales*, 70 Or. 269, 273, 141 Pac. 160.

Upon the whole record we think that the decree of the trial court is correct, and that the pleadings are sufficient to support the decree. The decree is therefore affirmed.

BEAN, BURNETT, and JOHNS, JJ., concur.

On Petition to Modify Decree as to Costs.

HARRIS, J. In an opinion rendered recently, the decree from which the defendant appealed was affirmed. Nothing was said in the opinion about costs, and for that reason an affirmation of the decree would allow the respondent to recover his costs and disbursements from the appellant. The defendant has filed a petition asking that the decree be modified to the extent of disallowing costs to either party. The trial court refused costs to either party, and directed each to pay his own disbursements. We think that under all the circumstances of this case each party should pay his own disbursements in this court. It is therefore ordered that the decree appealed from be affirmed, without costs to either party in either court.

BEAN, BURNETT, and JOHNS, JJ., concur.

(67 Colo. 189)

(184 P.)

HANSHUE et al. v. CHARLES B. MARVIN
INV. CO. (No. 9201.)

(Supreme Court of Colorado. June 2, 1919.
Rehearing Denied Oct. 6, 1919.)

1. JUDGMENT \S 496—PRESUMPTION OF JURISDICTION ON COLLATERAL ATTACK.

On collateral attack on a prior decree, unless the judgment roll affirmatively shows the county court acted without jurisdiction as to one defendant, its jurisdiction to enter the decree against him will be conclusively presumed.

2. PROCESS \S 96(2)—SUFFICIENCY OF AFFIDAVIT FOR SERVICE BY PUBLICATION.

Affidavit for service by publication on 19 of 20 defendants held a sufficient compliance with Mills' Ann. Code, \S 41, as showing that defendants, beside the 10 which it stated resided out of the state, were either nonresidents, or had departed from the state without intention of returning, or had concealed themselves to avoid service, so that personal service could not be made within the state.

3. PROCESS \S 96(2)—SUFFICIENCY OF AFFIDAVIT FOR SERVICE BY PUBLICATION ON A NON-RESIDENT.

Affidavit for service by publication held sufficient as stating that the post office address of a nonresident defendant was not known to affiant, so that the court had jurisdiction to enter decree against such defendant.

Error to District Court, Yuma County;
H. P. Burke, Judge.

Action by the Charles B. Marvin Investment Company against Carmon A. Hanshue and others. To review judgment for plaintiff, defendants bring error. Reversed, and cause remanded.

The parties will be designated, as in the lower court, plaintiff and defendants. The title emanating from the United States to the S. W. $\frac{1}{4}$, 11—3—48, Yuma county, Colo., vests by certain mesne conveyances in the plaintiff, the Marvin Investment Company, defendant in error, unless divested by the title of Mary E. Hanshue, defendant below and plaintiff in error. Hanshue deraigns title from a tax deed to Muntzing and Murray, and a subsequent action by them in the county court to quiet title. In December, 1901, Muntzing and Murray obtained the tax deed to the land, and October 17, 1904, commenced action in the county court of Yuma county to quiet title against the following defendants: Pearl Hurst, W. E. Hurst, Lawrence B. Wharton, Perklomen Valley Building & Loan Association, L. E. Beach, Ernest L. Diffenderfer, George E. Bermont, *Ira J. Kirkpatrick*, Susie D. Gage, H. P. Law, Oswald Oliver, Flora L. Aldrich, Sylvanus Aldrich, Asa Reed, M. Estes, Elbert A. Higgins, Sarah M. Hayden, Wallace N. Herbert, Eliza Tibbetts, and Thomas H. Unger.

Summons was duly issued to all the de-

fendants, and return made thereon that none of them, except Estes, could be found. Thereupon August Muntzing filed his affidavit for publication based upon the following Code provision:

"Service by publication shall be allowed only after summons issued and return thereon made, that the defendant, after diligent search, cannot be found. After such return, not less than ten days after issue of summons, publication shall be made by order of the clerk of the proper court, but shall be made only in cases of attachment, foreclosure, claims and delivery, or other proceedings where specific property is to be affected, or the procedure is such as is known as a proceeding in rem. After return is made, as aforesaid the case being such as hereinbefore mentioned the plaintiff or one of the plaintiffs may file in the office of the proper clerk an affidavit stating that the defendant resides out of the state, or has departed from the state without intention of returning, or concealed himself to avoid the service of process and giving his post office address, if known, or stating his post office address is not known to affiant, whereupon the order of publication shall be made by the clerk." Mills' Ann. Code, \S 41.

The affidavit, omitting the caption, is in words and figures as follows:

"August Muntzing being first duly sworn, on his oath says: That he is one of the plaintiffs in the above-entitled action, and that the plaintiff George Murray is a nonresident of the state of Colorado; that summons has been issued to the sheriff of Yuma county in the said action and his return thereon made not less than ten days after the issue of said summons that the defendants—except the said M. Estes—and each and every of them after diligent search cannot be found; that the complaint in said action was filed with the clerk of said court on the 18th day of October, A. D. 1904; that said action is brought to remove all clouds from, and quiet in the plaintiffs, the titles to certain lands and premises situate in said county of Yuma, in the state of Colorado; that the said defendants, Lawrence B. Wharton, L. E. Beach, Ernest L. Diffenderfer, Susie D. Gage, H. P. Law, Oswald Oliver, Flora L. Aldrich, Sylvanus Aldrich, Asa Reed, and Sarah M. Hayden, reside out of the state of Colorado, and the said defendants, Perklomen Valley Building & Loan Association, George E. Bermont, *Ira J. Kirkpatrick*, Elbert A. Higgins, Wallace N. Herbert, Eliza Tibbetts, Pearl Hurst, and W. E. Hurst & Thomas H. Unger, either reside out of the state of Colorado or have departed therefrom without intention of returning, or conceal themselves to avoid the service of process; and that said defendants and each and every of them cannot, after due diligence, be found within the state of Colorado, and this affiant in support thereof states the following facts and circumstances: That affiant has made frequent and diligent search, and inquiry of F. H. Hammond, Matt Dickson, Franz Kissling, and many other resident settlers residing nearest the lands involved in this action and also inquired for their whereabouts and post office addresses of J. M. Abbott, one of the oldest inhabitants of said Yuma county, of W. H. Conover, postmaster of Yuma, Colo., the post

office nearest said lands, and of J. B. Campbell, treasurer, and W. D. McGinnis, county clerk of Yuma county, Colo., and none of them know or would or could inform affiant of their present whereabouts or post office addresses, and affiant has made and caused to be made diligent inquiry and search for officers and agents of said Perkiomen Valley Building & Loan Association upon whom process against said association could lawfully be served, and none can be found upon whom to make such service herein, and affiant has examined the files and records of said Yuma county and finds no affidavit of co-partnership or association of or for said defendant association filed or recorded therein, and personal service of the summons herein on said association cannot be made as affiant verily believes, and affiant is informed and believes that the several defendants hereinbefore named and each and every of them are not within this state, and that the post office addresses of the following named defendants are as follows: Of Oswald Oliver, Flora L. Aldrich, Sylvanus Aldrich, Asa Reed, and Sarah M. Hayden and of each of them is Hastings, Neb., and that the post office addresses of the other of the hereinbefore named defendants are unknown to affiant. That affiant has made diligent inquiry to find said defendants, but cannot, after due diligence, find them or any of them (except the said M. Estes), first above named and excepted, within this state.

"That the affiant therefore says that personal service of said summons cannot be made on said defendants or any of them, and prays for an order that service of the same may be made on them by publication thereof."

Thereupon an order was duly entered for publication of summons. January 30, 1905, præcipe was filed for default and judgment. February 1st, judgment and decree was entered against all the defendants quieting the title in Muntzing and Murray. This judgment recites that the court has jurisdiction of all the defendants, and orders and decrees that Muntzing and Murray are the owners and that none of defendants have any right, title, or interest in the land. This includes *Ira J. Kirkpatrick*, plaintiff's immediate grantor. Muntzing and Murray then conveyed the land to Carmon A. Hanshue, and he conveyed it to Mary E. Kennedy, now Mary E. Hanshue.

Plaintiff began the present action September 10, 1915, in the district court to quiet title to the land in it, which was unoccupied. Carmon A. and Mary E. Hanshue answered separately. Her first defense is a general denial. The second alleges the tax deed to Muntzing and Murray as color of title and payment of taxes in good faith for seven successive years. Her third defense alleges title in her under and by virtue of the decree in the action quieting title against plaintiff's grantors, and payment under the decree of taxes for seven successive years as color of title and in good faith. His answer alleges title in her. It was stipulated on the trial that the title emanating from the United States is in the Marvin Investment Company

unless otherwise divested by the title of Hanshue, and that whatever title vested in Muntzing and Murray vested at the beginning of this action in Hanshue. Hanshue then offered in evidence the judgment roll in the county court action to quiet title for the purpose of showing that the title claimed by plaintiff had been divested. This was objected to upon the ground the judgment roll affirmatively showed upon its face that the court was without jurisdiction to enter the decree because it was based upon a void affidavit for publication of summons; the claim being that the affidavit was stated in the alternative or disjunctive and did not state that the post office address of *Ira J. Kirkpatrick* was unknown to affiant. The objection was sustained, and the court found plaintiff was the owner of the land in fee simple, and that defendants had no right, title, or interest therein, and by decree entered December 8, 1916, quieted the title in plaintiff, and defendants bring the case here on error.

M. M. Bulkeley, of Wray, Stiner & Boslough, of Hastings, Neb., and Allen & Webster, of Denver, for plaintiffs in error.

John F. Mail, of Denver, for defendant in error.

GARRIGUES, O. J. (after stating the facts as above). [1] Unless the decree quieting title in Muntzing and Murray is void, it establishes title in Hanshue, independent of the validity of the tax deed. The point is whether the county court had jurisdiction to enter the particular decree as against *Kirkpatrick*, plaintiff's immediate grantor. In this collateral attack, unless the judgment roll affirmatively shows that the county court acted without jurisdiction, its jurisdiction to enter the decree will be conclusively presumed. *Van Wagenen v. Carpenter*, 27 Colo. 444, 61 Pac. 698; *Burris v. Craig*, 34 Colo. 383, 82 Pac. 944; *Farmers' U. D. Co. v. Rio Grande C. Co.*, 37 Colo. 512, 86 Pac. 1042; *Mortgage Trust Co. v. Redd*, 38 Colo. 458, 88 Pac. 473, 8 L. R. A. (N. S.) 215, 120 Am. St. Rep. 182; *Trowbridge v. Allen*, 48 Colo. 419, 110 Pac. 193; *Empire Ranch & Cattle Co. v. Coldren*, 51 Colo. 115, 117 Pac. 1005; *Kavanagh v. Hamilton*, 53 Colo. 157, 125 Pac. 512, Ann. Cas. 1914B, 76; *Pinnacle G. M. Co. v. Popst*, 54 Colo. 451, 131 Pac. 413.

Plaintiff contended on the trial and contends on review, that the affidavit shows affirmatively upon its face a noncompliance with the statute, and objected to the judgment roll upon this ground, and the lower court sustained the objection.

The Code (§ 41) provides, after return is made that the defendants cannot be found, plaintiff may file "an affidavit stating that the defendant resides out of the state, or has departed from the state without intention of returning, or concealed himself to avoid the

service of process and giving his post office address, if known, or stating his post office address is not known to affiant."

There were twenty defendants. One was personally served, and nineteen were attempted to be served by publication of summons. The affidavit names ten, which it specifically states reside out of the state of Colorado, and the post office address of five of these is given, and names nine others (including Kirkpatrick), which it specifically states either reside out of the state or have departed therefrom, or conceal themselves to avoid process, and that none of the above-named nineteen defendants can be found within the state, and states that affiant is informed and believes that none of them are within this state, and that the post office address of the following, Oswald Oliver, Flora L. Aldrich, Sylvanus Aldrich, Asa Reed, and Sarah M. Hayden, is Hastings, Neb., "and that the post office addresses of the other of the hereinbefore named defendants are unknown to affiant."

The first contention is that the averment in the alternative or disjunctive that defendants reside out of the state or have departed from the state, or conceal themselves, is not a statement of a prerequisite required by the Code. This identical question was before us in *Greene v. Gibson*, 53 Colo. 346, 348, 127 Pac. 239, where we said:

"Certain of the defendants in the action in the county court were served by publication. The affidavit upon which the order for this service was made stated that these parties 'either reside out of the state of Colorado, or have departed therefrom without intention of returning, or conceal themselves to avoid the service of process, and that said defendants and each and every of them cannot, after due diligence, be found within the state of Colorado.' The affiant then states facts from which it appears that he had exercised due diligence to ascertain the whereabouts and post office addresses of these parties; that he was unable to do so, and that their post office addresses were unknown to him. The objection urged to the affidavit is that as the Code (section 41, Mills) provides that service may be made by publication when it appears by proper affidavit that 'the defendant resides out of the state, or has departed from the state without intention of returning, or concealed himself to avoid the service of process,' it is insufficient, because it must appear from the affidavit either that the defendants reside out of the state, or have departed therefrom without the intention of returning, or concealed themselves to avoid the service of process, and to state that they have done one or the other in the disjunctive does not state positively that they had done either. One of the essential facts which must appear in an affidavit for publication of summons is that the statutory ground for such service exists; that is, that the defendant cannot be personally served with summons within the state, for the reason which the Code specifies. Where, then, as in the case at bar, it appears from the affidavit for publication that the affiant, after due dili-

gence, is unable to learn the whereabouts, residence, or post office address of a defendant, coupled with the further statements that he either resides out of the state, or has departed therefrom without the intention of returning, or conceals himself to avoid the service of process, it logically follows that the defendant is either a nonresident of the state, has departed from the state without the intention of returning, or conceals himself to avoid the service of process. In our opinion, the affidavit was sufficient."

[2] It must appear that those served by publication could not be personally served within the state. The affidavit states positively that none of the nineteen defendants, after diligent search, can be found within the state, and that affiant is informed and believes that none of them are within the state. It names ten, which it states positively reside out of the state, and nine, which it says either reside out of the state or have departed therefrom, or secrete themselves. It then states that the post office address of five of the ten is Hastings, Neb., and that the post office addresses of the other fourteen are unknown to affiant. We think it sufficiently appears from the affidavit that the nine defendants named therein were either nonresidents or had departed from the state without any intention of returning, or had concealed themselves to avoid service of process, and that personal service could not be made upon them within the state of Colorado, and that this showing was a sufficient compliance with the requirements of the Code to authorize the publication of summons.

It is claimed that the Court of Appeals, in *Gibson v. Wagner*, 25 Colo. App. 129, 130 Pac. 93, held otherwise. That case was reversed upon another ground which we are about to consider, and it is hard to tell from the opinion whether the court intended to hold the publication of summons void on account of the point we are now discussing. If it did, we do not agree with the opinion. It is our judgment that the opinion of this court in the case of *Greene v. Gibson*, 53 Colo. 346, 127 Pac. 239, should be followed.

[3] The specific point upon which the present case turns is whether the affidavit states that the post office address of *Ira J. Kirkpatrick* is not known to affiant. The affidavit is void unless it meets this requirement, and the court had no jurisdiction to enter the decree. Barring the lands and defendants, the affidavit in the present case and in *Greene v. Gibson*, 53 Colo. 346, 127 Pac. 239, and in *Gibson v. Wagner*, 25 Colo. App. 129, 130 Pac. 93, is said to be identical. Defendant in error urges we should affirm the case upon the doctrine announced by the Court of Appeals in the *Gibson-Wagner* Case. This announces no new rule of law. It holds that plaintiff must give the post office address of the defendant, if known, or state

that it was not known to affiant. This is the Code requirement, and we agree with the law as announced by the Court of Appeals on this point. If the affidavit is the same as in the present case, then it is with the statement of the case, and not the law, that we do not agree. If the affidavits are identical, we think the Court of Appeals opinion misstates the affidavit. The opinion states there is no averment in that affidavit that the post office address of the defendant is not known to the affiant. If that is true, the decision is right; but if it misstates the facts, the law announced by the opinion is right, but the case was incorrectly decided. The opinion in that case states that it is based upon an affidavit which reads as follows:

"Affiant is informed and believes * * * that the post office addresses of the other of the hereinbefore named defendants are unknown to affiant."

The affidavit in the present case states that the post office address of five of the defendants, naming them, is Hastings, Neb., and that the post office addresses of the other of the hereinbefore named defendants are unknown to affiant. *Ira J. Kirkpatrick* is one of the hereinbefore named defendants, so it states that his post office address is unknown to affiant. The effect produced by the use of three stars in the *Gibson-Wagner Case*, as will be seen by examining and comparing the language quoted there on page 131 of 25 Colo. App., on page 94 of 136 Pac. 93, with the affidavit here, is to cause a misstatement of the facts, if the affidavits are the same. The affidavit in the present case is in one sentence, of which "says" is the predicate. The affiant says, among other things, that he is one of the plaintiffs, and (says) "affiant is informed and believes that the several defendants hereinbefore named and each and every of them are not within this state, and (says) that the post office address of the following named defendants are as follows: Of Oswald Oliver, Flora L. Aldrich, Sylvanus Aldrich, Asa Reed, and Sarah M. Hayden and of each of them is Hastings, Neb., and (says) that the post office addresses of the other of the hereinbefore named defendants are unknown to affiants."

To place upon this affidavit the construction placed upon it in the *Gibson-Wagner Case*, that "affiant is informed and believes * * * that the post office addresses of the other of the hereinbefore named defendants are unknown to affiant," would be a perversion of the plain meaning of the language, change the whole effect of the affidavit, and make it seem ridiculous. It would make the affiant say that he was informed and believed that the post office address of the defendant was unknown to him, which would be as silly as saying that he was in-

formed and believed that he was the plaintiff in the case.

Judgment reversed and cause remanded.

BAILEY and ALLEN, JJ., concur.

NOTE.—Wherever italics occur in the statement of the case or opinion, they have been used by us for the purpose of calling attention to the particular matter in controversy.

(67 Colo. 356)

BIJOU IRR. CO. et al. v. LOWER LATHAM DITCH CO. et al. (No. 9079.)

(Supreme Court of Colorado. May 5, 1919.
Rehearing Denied Oct. 6, 1919.)

COURTS ~~§~~ 475(9)—EXCLUSIVE JURISDICTION OF DISTRICT COURT ADJUDICATING WATER RIGHTS.

District court of a county held without jurisdiction of a suit to enjoin certain water officials from distributing water in a way claimed by plaintiff ditch companies to be detrimental to their interests, which suit involved matters pertaining to a prior adjudication of water rights by the district court for another county.

En Banc.

Error to District Court, Weld County; Robert G. Strong, Judge.

Suit by the Lower Latham Ditch Company and others against the Bijou Irrigation Company and others. Judgment for plaintiffs, and defendants bring error. Reversed, with directions to dismiss the cause.

James W. McCreery and Donald C. McCreery, both of Greeley, Robert M. Work, of Monmouth, Ill., and Fred Farrar, Atty. Gen., for plaintiffs in error.

Joseph C. Ewing, of Greeley, and Goudy, Twitchell & Burkhardt, of Denver, for Lower Latham Ditch Co. and others.

Crump & Allen, of Denver, for Weldon Valley Canal Co.

Stephenson & Stephenson, of Ft. Morgan, for Ft. Morgan Reservoir & Irrigation Co. and others, interveners.

TELLER, J. Defendants in error the Lower Latham Ditch Company, the Union Ditch Company, and the Godfrey Ditch Company were plaintiffs below in a suit against the plaintiffs in error to enjoin defendant water officials from distributing water in a way claimed by the plaintiffs to be detrimental to their interests.

The complaint sets up the adjudication of water rights in 1883, in water district No. 2, by the district court for the then county of Arapahoe, and the adjudication in said proceeding of certain priorities to each of said

plaintiffs; that there were also therein adjudicated certain other priorities including No. 24 and No. 14, the points of diversion of a part of which had been changed by decree of the said district court to the headgate of said Bijou Irrigation Company, the owner thereof; that there is at all times at said headgate, in water district No. 1, sufficient water in said river to supply said priorities without requiring water thereof to pass down said river from water district No. 2; that the return waters below the Lower Latham dam are ample for the supply of the priorities so transferred from points of diversion above said dam; and that to send water past said dam to supply the senior priorities of said Bijou Irrigation Company is to deprive plaintiffs, at times, of water needed for their priorities.

The complaint contained, also, allegations to the effect that only a part of priority No. 24 had ever been required for irrigating the lands to which it was to be applied, and that, to cause 40 second feet of said priority to flow into the ditch of said Bijou Company at a low stage of water, will be to enlarge the use to that extent, to the injury of plaintiffs.

Defendants in error the Weldon Valley Canal Company and the Ft. Morgan Reservoir & Irrigation Company, on petitions setting forth substantially the same matters as are alleged in the complaint, were permitted to intervene.

To the complaint and to the petitions in intervention, the defendants demurred, setting up, among other things, that the district court of Weld county was without jurisdiction of the cause, because the matters set up in the complaint pertained to the adjudication of water rights, and could be heard only by the court in which the original adjudication decree and the decree changing the points of diversion were entered.

The demurrers having been overruled, the Bijou Irrigation Company and the Bijou irrigation district filed their answers to said complaint and to the petitions in intervention.

The water officials stood on their demurrer and took no further part in the proceedings.

Replications and various motions were filed which need not be here considered.

On a trial to the court, findings were made in favor of the plaintiffs and a decree entered, according to the prayer of the complaint, enjoining the defendants, including the water officials, from causing any water to pass the Lower Latham dam, and the headgates of the several plaintiffs to supply water to the Bijou Company on account of said priority No. 30, after July 15th in each year, or at any other time when causing said water to pass said dam would interfere with any priority of the plaintiffs of earlier date than November 14, 1877, or with other named priorities thereof, upon account of the transfer-

red portion of priority No. 24, when such act would interfere with any priority of any of said plaintiffs.

The decree directed that copies of it be certified to the defendant water officials.

The demurrer to the complaint challenged the jurisdiction of the district court of Weld county on the ground that the relief sought required for its determination a modification, or at least a construction of the original adjudication decree which was entered in the district court of Arapahoe county, now the city and county of Denver.

Under the rulings of this court, the demurrer should have been sustained.

In *Weiland v. Catlin Co.*, 61 Colo. 125, 156 Pac. 596, it appeared that in a suit in the district court of Otero county the water officials were charged with refusing to recognize a decree changing the point of diversion of a priority, entered in the district court of Bent county, where there had been an original proceeding for the adjudication of priorities. An injunction was sought to compel the water officials to obey the decree.

A demurrer on the ground of want of jurisdiction was overruled, and on that ground this court reversed the judgment.

We there said:

"If the district court of Otero county has jurisdiction for this purpose, it must, as it did, construe the decree of the Bent county district court, and do, as it did, render judgment directing the water officials to distribute the priority fixed by that decree in harmony with such construction. Whether such construction and judgment are right or wrong is immaterial. The question is: When a court vested with jurisdiction to adjudicate water rights has exercised that authority and entered a decree, can another court of co-ordinate jurisdiction entertain a case the object of which is to determine whether the water officials have complied with its terms in the distribution of water? The statutes designate the district court vested with exclusive jurisdiction to adjudicate priorities to the use of water for irrigation in a water district. When jurisdiction for that purpose has attached, and a decree is entered, the statutes on that subject necessarily inhibit any other court of co-ordinate jurisdiction from modifying, reviewing, or construing such decree. * * * Consequently, if a question arises between the owner of a priority fixed by a decree, and water officials charged with the duty of distributing water under it, with respect to its meaning or effect, it must be determined by the court entering the decree, and not by any other court of co-ordinate jurisdiction."

That case was followed in *Love v. Redden*, 61 Colo. 133, 156 Pac. 599.

The case is governed by the two cases above cited.

The judgment is accordingly reversed, with directions to dismiss the cause.

ALLEN, J., not participating.

(66 Colo. 411)

SHETLER et al. v. STROUD. (No. 9344.)

(Supreme Court of Colorado. July 7, 1919.)

VENDOR AND PURCHASER \Rightarrow 3(1)—**CONTRACT CONSTRUED AS AN OPTION AND NOT CONTRACT OF PURCHASE.**

Contract for sale of land in two parcels in which purchasers agreed to pay taxes and interest and to protect vendor from loss or forfeiture of the equity which he was acquiring in such land, which contract included placing deeds in escrow for delivery upon payment after purchasers sold the land, and by which they released vendor from a claim for broker's commission, and which placed no liability upon purchasers for failure to so sell the land, held either an option or agency contract, and not one of purchase.

Department 1.

Error to District Court, City and County of Denver; John I. Mullins, Judge.

Action by Thomas J. Stroud against D. C. Shetler and another. Judgment for plaintiff, and defendants bring error. Reversed, with directions to dismiss.

Wendell Stephens. of Denver, for plaintiffs in error.

TELLER, J. This case involves the construction of a contract between the plaintiffs in error, real estate brokers, and the defendant in error.

The material parts of the contract, in which plaintiffs in error were parties of the second part, are as follows:

"That whereas, a sale has been pending wherein the first party will acquire title to the east half of section 6 and the southwest quarter of section 5, T. 3 N., R. 18 W. in Harlan county, Neb., subject to incumbrances aggregating \$17,000;

"And whereas, the second parties are desirous of securing title to the above-described land in the event that the sale aforesaid is effected:

"It is now, therefore, in consideration of one (\$1.00) dollar to each party in hand paid, hereby mutually agreed:

"That the second parties shall, within one year from date, pay to the first party at the rate of ten (\$10) dollars per acre for the equity in the above-described 480 acres, or a total of \$4,800, which payment may be made as follows: Five (\$5.00) dollars in cash and five (\$5.00) dollars in notes due in one or two years, with interest at 6 per cent., payable annually, secured by second mortgage on such land, for each acre of land sold by second parties.

"That said land shall be sold in two parcels, to wit: (a) The northeast quarter of section 6, subject to an incumbrance of not to exceed \$6,000; (b) the southeast quarter of section 6 and the southwest quarter of section 5, subject to an incumbrance of not to exceed \$7,500; provided that, in the event of the sale of this parcel there is not sufficient cash paid to pay first party \$5 cash per acre, then first party

will accept \$2.50 cash per acre and \$7.50 in notes per acre.

"That the second parties will pay all back taxes and interest and meet future payments of taxes and interest as they may fall due in order to protect first party from the loss or forfeiture of the aforesaid equity so to be acquired by him in said land.

"That deeds of conveyance in parcels as aforesaid shall be placed in escrow with W. A. Spangler to be delivered to second parties or assigns upon payment of ten (\$10.00) dollars per acre in the manner above specified for land sold.

"That second parties waive and release T. J. Stroud and C. E. Adams, Jr., from all claims for commission or services as brokers for the sale of the Stroud and Adams ranch in Adams county, Colo.

"That this contract is contingent upon first party acquiring the equity in the above-described land subject to incumbrances not exceeding a total of \$17,000, within ten days."

Defendant in error was plaintiff below, and sought to recover \$4,800 as the purchase price of the 480 acres.

Defendants demurred, setting up that the contract on its face was an option, which they had never exercised. The demurrer was overruled. Defendants then answered, denying liability on the contract, and setting up special defenses and a counterclaim for the \$2,500 brokers' fee, mentioned in the contract, which are not necessary to be considered.

The cause having been referred, the referees found for the plaintiff, and judgment was entered accordingly.

A careful study of the contract satisfies us that it is either an option or a contract of agency, and not a contract of purchase. Its subject-matter was land, of which the plaintiff was negotiating a purchase. In case he acquired title to the land, the defendants were, within one year, to pay at the rate of \$10 per acre, one-half in cash and one-half in notes, for each acre of land sold by them.

It provided for the sale of the land in two parcels, and for the acceptance of \$2.50 cash per acre, instead of \$5 in case such a change in terms was necessary. Defendants were to pay taxes and interest as they fell due to protect the plaintiff from loss or forfeiture of the equity which he was acquiring. Deeds were placed in escrow for delivery on payment of \$10 per acre for land sold. Defendants released plaintiff from a claim against him for a brokers' commission.

Nowhere in the instrument is there any provision for a deed to defendants except for lands sold by them, nor are they required to pay anything except the sums for which it is stipulated that the land shall be sold, which payments are to be made when the land has been sold.

The person acquiring title to the land pre-

scribes the price and terms of sale, and could never be compelled to convey the land to the defendants until it had been sold, at the price and on the terms fixed by the owner. Defendants are required to pay the taxes and interest, not to protect their interest in the property, but the owner's interest.

If the land could not be sold on the prescribed terms, the defendants incurred no liability under the contract; and a judgment for the amount for which they would be liable if the 480 acres were all sold at \$10 per acre is wholly without foundation in the absence of evidence of such sale. There is no such evidence.

The judgment is accordingly reversed, with directions to dismiss the case.

GARRIGUES, C. J., and BURKE, J., concur.

(67 Colo. 217)

GREEK CATHOLIC CHURCH OF ST. MICHAELS v. ROIZDESTVENSKY et al. (No. 9147.)

(Supreme Court of Colorado. July 7, 1919. Rehearing Denied Oct. 6, 1919.)

1. RELIGIOUS SOCIETIES §25 — OWNERSHIP OF PROPERTY LOST BY LACHES OF NINE YEARS.

Where a church congregation permitted a Roman Catholic Church to come under control of the Orthodox Greek Catholic Church and so remain for about nine years, during which time the church's debts were paid and its property improved at considerable costs, laches prevent recovery of the property by congregation's grantee.

2. CANCELLATION OF INSTRUMENTS §34(1)—LACHES APPLICABLE TO VOID TRANSACTIONS.

The rule that, transactions sought to be canceled being absolutely void, the doctrine of laches does not apply, is without application where the party pleading the laches has by reason of the delay been put to disadvantage.

Department 2.

Error to District Court, Pueblo County; J. E. Rizer, Judge.

Suit by the Greek Catholic Church of St. Michaels against the Archbishop Platon Roizdestvensky and another to cancel changes of name of the church and the deed to the Archbishop and to quiet title. Judgment for defendants, and plaintiff brings error. Judgment affirmed.

M. J. Galligan, of Pueblo, for plaintiff in error.

F. R. McAlliney and W. B. Vates, both of Pueblo, for defendants in error.

DENISON, J. The plaintiff in error was plaintiff below. July 6, 1900, Greek Catholic

Church of the St. Michaels was incorporated by the filing of the affidavit in accordance with the statute for incorporating churches.

June 12, 1901, an affidavit was filed, showing that a meeting of the church was held May 20, 1901, at which a change of name was attempted to the "Greek Catholic Church of St. Michaels."

March 31, 1908, an affidavit was filed, purporting to change the name of the "Greek Catholic Church of St. Michaels," to the "Greek Orthodox Church of St. Michael."

July 8, 1908, the attempt seems to have been made to change the name again to the "Russian Orthodox Greek Catholic St. Archangels Michaels Church of Pueblo, Colo."

On the same day, by warranty deed, the Russian Orthodox Greek Catholic Archangels Michaels Church purports to convey to Archbishop Platon Roizdestvensky and his successors in office the church property, which had been conveyed in 1901 to the "Trustees of the Greek Catholic Church of the St. Michael." The grantee was an archbishop of the Greek Orthodox Church.

March 15, 1913, this suit was brought in the name of the "Greek Catholic Church of St. Michaels" against Archbishop Platon Roizdestvensky. The Russian Orthodox Greek Catholic St. Archangels Michaels Church of Pueblo, Colo., was afterwards added as a defendant.

The prayer was to cancel the last two changes of name and the deed to the archbishop, and to quiet the title in the plaintiff.

The plaintiff alleged, and its evidence tended to show, that these changes of name were, for various reasons, invalid, and also that the Greek Catholic Church was subject to the Roman Catholic Pope; that the Greek Orthodox Church was under allegiance to the Czar of Russia or the Holy Synod of Russia, not to the Pope of Rome; that the first priest in charge of the church at its organization was a Greek Catholic priest; that most of the members were Greek Catholics and the church was organized as a Greek Catholic Church; that the land in question was purchased and a church built thereon during the incumbency of the Greek Catholic priest; that after the first pastor died no Greek Catholic priest could be obtained, and a priest of the Orthodox Greek Catholic Church was obtained about 1903 or 1904; that a succession of priests of that church has remained in charge thereof from thence hitherto; and that the property had been diverted from its purpose as a Greek Catholic Church under the Pope to that of an Orthodox Greek Catholic Church, under the Czar or Holy Synod.

It was claimed, on the other hand, that the church had always been an Orthodox Greek Catholic Church, and that the changes of

name were made to express that more clearly, and the defendants' evidence tended to show this. The defendants moreover pleaded laches and showed that during the incumbency of the orthodox priests from about 1904 to 1913 some \$3,000 or \$4,000 had been expended in improving the property and paying off mortgages upon it.

The opinion of the court below, which is made a part of the record on error, shows that the learned judge who tried the case was of the opinion that the plea of laches had been sustained by the evidence, and, accordingly, he gave judgment for the defendants.

[1, 2] Argument is made here that mere lapse of time is not sufficient to constitute laches. While we think that is not always the case, yet the question does not now arise, because, during the long delay from 1904 to 1913, the parties in possession, in apparent good faith—we must assume that court below found that it was in good faith—expended the money as stated above.

It is also urged that the proceedings sought to be canceled are absolutely void, and therefore the doctrine of laches does not apply. The rule here invoked does not itself apply to a case where the party pleading the laches has, by reason of the delay, been put to disadvantage.

We can see no equity in returning to the plaintiff the property with additions made and debts removed which would not have been made or removed if the plaintiff's action had been prompt.

We think the record shows other grounds to support the judgment, but it is not necessary to notice them.

The judgment should be affirmed.

GARRIGUES, C. J., and SCOTT, J., concur.

(67 Colo. 199)

**CASON v. MUTUAL LIFE INS. CO. OF
NEW YORK. (No. 9203.)**

(Supreme Court of Colorado. May 5, 1919. Rehearing Denied Oct. 6, 1919.)

**INSURANCE — 366 — LIFE POLICY, ON DEFAULT
IN PREMIUM FOR MORE THAN MONTH, LAPSES.**

Where a yearly renewable term policy, which required the payment of premiums in advance with a period of 30 days' grace, provided that "except as hereinafter provided" the payment of a premium or installment shall not maintain the policy beyond the date when the next premium or installment is payable, and that dividends would be paid in cash, but gave insured the option to have them applied on premiums, held, that where insured defaulted in payment of an annual premium, and the default continued for more than one month, the policy lapsed, although dividends were due which if applied to

the payment of the premium would have extended the policy beyond the time of death.

Error to District Court, City and County of Denver; John A. Perry, Judge.

Action by Floy P. Cason against the Mutual Life Insurance Company of New York, a corporation. Judgment for defendant, and plaintiff brings error. Affirmed.

Archibald A. Lee, of Denver, for plaintiff in error.

Charles Waterman and William A. Jackson, both of Denver, for defendant in error.

BAILEY, J. Floy P. Cason, plaintiff, brought suit as beneficiary in an insurance policy issued by The Mutual Life Insurance Company of New York, defendant, upon the life of her husband. At the close of her testimony the company interposed a motion for a non-suit, which was allowed. She brings the cause here for review.

The policy in question was issued in April, 1912. In it the defendant covenants, in consideration of the premium paid on the date of issue, and in the further consideration of the payment of an annually increasing premium upon the first day of April of each succeeding year, during the continuance of the policy, to pay to the beneficiary a sum fixed by the policy upon the death of the insured. It also provides for payment of premiums in advance, with thirty days or one month of grace, which ever is the longer, after the expiration of the year for which the payment of the last premium kept the policy alive.

It then provides as follows:

"All premiums are payable in advance at said home office or to any agent of the Company upon delivery, on or before date due, of a receipt signed by an executive officer of the Company. * * *

"A grace of thirty days (or one month if greater) subject to an interest charge at the rate of five per centum per annum, shall be granted for the payment of every premium after first, during which time the insurance shall continue in force. If death occur within the period of grace, the overdue premium and the unpaid portion of the premium for the then current year, if any, shall be deducted from the amount payable hereunder.

"Except as herein provided the payment of a premium or installment thereof shall not maintain this policy in force beyond the date when the next premium or installment thereof is payable. If any premium or installment thereof be not paid before the end of the period of grace, then this policy shall immediately cease and become void, and all premiums previously paid shall be forfeited to the Company, except as hereinafter provided."

Dividends and the disposal thereof are stipulated for in the following language:

"This policy shall participate in the surplus of the Company and the proportion of the surplus accruing hereon shall be ascertained and

distributed annually on the anniversary of its date of issue. At the option of the insured or the owner of this policy such dividends shall be either—

"(1) Paid in cash, or (2) applied toward the payment of any premium or premiums; or (3) left to accumulate to the credit of the policy with interest at the rate of three per centum per annum, and payable at the maturity of the policy, but withdrawable on any anniversary of the policy.

"Unless the insured or the owner of this policy shall elect otherwise within three months after the mailing of a written notice requiring the election of one of the three above options, the dividends shall be paid in cash."

Under the scale of premiums agreed upon the deceased was assessed the sum of \$91.20, as premium for the year in which he died.

Terms upon which lapsed policies may be reinstated are as follows:

"Unless the original term for which this policy was issued has expired, it may be reinstated at any time within three years from date of default in payment of any premium, upon evidence of insurability satisfactory to the company, and upon payment of the arrears of premium with interest thereon at the rate of five per centum per annum."

The policy is designated as a "Yearly Renewable Term" policy, and under the caption "Notice to Policy Holder" is found the following:

"As this policy is on the yearly renewable term plan, the premiums will increase yearly, as shown by the table herein, and they will increase more rapidly as time goes on. Owing to the low rate of premium charged, the dividends on this policy will be small, and must not be confused with those on ordinary forms of policy."

The insured failed to pay the premium which fell due on April 1, 1916, and some correspondence ensued in reference thereto between him and the defendant. On May 18, 1916, the insured died not having paid or attempting to pay that premium. Some time after his death the beneficiary received from the defendant company blank forms upon which to designate the manner in which a dividend then due, under the terms of the policy, should be applied. Mrs. Cason filled out one of them in which she elected to have the dividend applied to the payment of the current premium, and on the 23d of June, 1916, tendered the same, together with the balance of the yearly premium, to the agent of the company. The tender was refused, and defendant declining to recognize the right of the beneficiary to so elect, denied any liability upon the ground that the policy had lapsed.

The sole question is whether the policy was in force at the death of the insured. It is plain that it is a renewal term contract, and that under its provisions there is a new contract of insurance each year, provided the

one condition precedent is fulfilled, to wit: the payment of the premium within the time limit. Failure to perform that condition terminates the contract.

Plaintiff contends that the policy gives an option to apply dividends to the payment of premiums. But the policy also provides that the insurance shall cease if the premium is not paid within the period of grace, and that the contract is for a term of one year, renewable only upon the payment of the annual premium in advance. Manifestly the option must be exercised while the contract is yet in force, and a full annual premium must be paid.

At the time of the death of the insured a dividend had accrued upon the policy in the sum of \$22.70. It is argued that the insurance company is bound by the terms of the policy to apply this dividend to any overdue premium and so keep the policy in force, and that there is no evidence that the company ever gave notice of this accrued dividend or that it ever required the insured to elect how it should be applied. It is also contended that the notice to elect sent the beneficiary after the death of the insured, and her response thereto and tender of the balance of the premium, was sufficient to reinstate the policy. Also, that in any event, the correspondence above mentioned between the company and the insured, following the non-payment of the premium in question, was a waiver of whatever right to declare the policy forfeited the company might have had. It is argued that this is true regardless of whether the policy is a whole life policy, or one, as stated in the contract, for a renewable term.

As noted above, the policy is designated as a "yearly renewable term" policy, which is a distinct form of insurance differing from a life policy, and other forms. It is for a specific period of time. In this case it was for a yearly period, with one month of grace, and to be kept in force, according to its terms, must have been renewed each year before it had lapsed. The payment of the yearly premiums was a condition precedent to a renewal. In *New York Life Insurance Co. v. Statham*, 93 U. S. 24, 23 L. Ed. 789, the forms of term insurance and whole life policies are contrasted and discussed on page 80 of 93 U. S. as follows:

"We agree with the court below, that the contract is not an assurance for a single year, with a privilege of renewal from year to year by paying the annual premium, but that it is an entire contract of assurance for life, subject to discontinuance and forfeiture for non-payment of any of the stipulated premiums."

In *Rosenplanter v. Provident, etc., Society*, 96 Fed. 721, 37 C. C. A. 566, 46 L. R. A. 473, a renewable term policy was under discussion, and at page 727 of 96 Fed., at page 572 of 37 C. C. A., the court said:

"The contract which the parties themselves made was one for an insurance for a single year, with the privilege of renewal for succeeding years upon condition of the payment of an additional premium upon the day named in the policy. Failure to renew it according to * * * contract put an end to the policy, without more ado."

Also in *McDougall v. Provident, etc., Society*, 135 N. Y. 551, 32 N. E. 251, where the court described and construed the policy there involved in the following language:

"Defendant further promised 'to renew and extend this insurance during each successive year from the date thereof, upon condition that the assured shall pay, on or before the twenty-third day of June in each successive year during the continuance of the contract. * * * It is plain that this policy was a contract for an insurance for the term of one year only, providing, however, by its terms, for its renewal for successive years upon compliance by the insured with the conditions named.'"

See, also, *Haas v. Mutual Life Ins. Co.*, 84 Neb. 682, 121 N. W. 996, 26 L. R. A. (N. S.) 747, 19 Ann. Cas. 58; *Hartford, etc., Co. v. Walsh*, 54 Ill. 164, 5 Am. Rep. 115; *Baldwin v. Provident, etc., Society*, 23 App. Div. 5, 48 N. Y. Supp. 463; *Roberts v. Aetna Life Ins. Co.*, 101 Ill. App. 813; *Brady v. Ins. Co.*, 11 Mich. 443; *Jenkins v. Ins. Co.*, 171 Mo. 375, 71 S. W. 688.

It is plain from the terms of the policy that the insurance was distinctively from year to year, subject to renewal only upon compliance with its provisions. The insured had allowed the policy to lapse, and the correspondence between him and the defendant shows an effort upon the part of both to renew the contract upon different terms as to the payment of the premiums. This, however, was not a waiver of any of the rights of defendant.

There was nothing in the policy which required the company to apply the dividend due to the partial payment of the annual premium. The Supreme Court of the United States, in *Slocum v. Ins. Co.*, 228 U. S. 364, at page 374, 33 Sup. Ct. 523 at page 527 (57 L. Ed. 879, Ann. Cas. 1914D, 1029) in discussing the question whether an insurance company is bound to accept partial payments of premiums said:

"The policy plainly provided for the payment of the stipulated premium annually within the month of grace following the due day, and as plainly excluded any idea that payment could be made in installments distributed through the year. Concededly, there was no payment of the whole of the premium in question, and as a partial payment was not within the contemplation of the policy, nothing was gained by handing to the agent the check * * * unless what he did in that connection operated as a waiver of full and timely payment."

In the case at bar it was not within the contemplation of the policy that partial payments would be allowed. Indeed, the cor-

respondence mentioned above was, among other things, a tentative effort to change the terms of payment under the policy to semi-annual or quarterly payments of the premium, and to reinstate the policy under those proposed new terms.

There is no provision in the policy authorizing the application of dividends to the purchase of extended insurance, or providing for the purchase of any insurance less than for a whole year, or for the payment of anything less than a full annual premium. There was nothing under this policy to be forfeited and therefore nothing which could be waived, because the failure to pay the premium had put an end to the contract. If the condition precedent is not performed the policy dies, and if it is to be revived it must be by a new agreement between the parties.

In any event, regardless of whether the policy is a term policy or an entire life policy there is nothing in the correspondence which warrants a holding that the lapse of the policy was waived. The letter chiefly relied upon by plaintiff is the one dated May 10, 1913, which appears upon its face to be a stereotype form probably sent to all policy holders who permit their contracts to lapse by failure to pay premiums.

Upon a full and careful examination of the policy it must be concluded that it is one for a fixed term of one year, with a period of grace added, and may be renewed at the end of each year by paying the full premium due under its terms; that the payment of such yearly premium within the time specified is a condition precedent to renewal; that the failure to make such payment terminates the policy; that it has no provision either authorizing or requiring the company of its own motion to apply dividends to the payment, either partially or wholly, to any premium or premiums due; and that it contains absolutely no provisions for extended insurance by a partial payment of a premium.

It conclusively appearing that the insured had not paid the current premium, and had therefore permitted the policy to lapse, it is unnecessary to discuss any of the other points raised by the plaintiff.

The terms of the policy are direct, clear and without ambiguity. They leave no room for construction. It is the function of courts to enforce contracts according to their precise terms and not to attempt to modify or change them or to make a different contract between the parties from that into which they themselves have voluntarily entered.

The judgment of the trial court in dismissing the action was right and should be affirmed.

Judgment affirmed.

On Application for Rehearing.

The main contention on rehearing is that the court in its opinion fails to give effect to

the words in the policy, "Except as hereinafter provided," and that this provision has not had consideration by the court in reaching a conclusion.

These words appear in this clause of the policy:

"If any premium or installment thereof be not paid before the end of the period of grace, then this policy shall immediately cease and become void, and all premiums previously paid shall be forfeited to the company, except as hereinafter provided."

The expression "Except as hereinafter provided" has not the slightest application to the question of the termination of the policy. It plainly refers to the forfeiture of premiums previously paid, and to that alone. This is clearly apparent, not only from grammatical construction, but in view of the other provisions of the policy which make it manifest beyond the possibility of doubt, that the only way to continue the policy in force is by the payment of the agreed premium when due, or within the period of grace allowed.

The clause under discussion simply provides that as a result of the fact that the policy has lapsed, it is expressly agreed that all premiums previously paid are forfeited, except only those which are returnable under the dividend clause. Such clearly is the sole and only purpose and effect of the limitation in question. There appears to be no room for a difference of opinion on this proposition.

Rehearing denied.

GARRIGUES, C. J., and ALLEN, J., concur.

(87 Colo. 207)

STRAUSS et al. v. AUSTGEN. (No. 9582.)

(Supreme Court of Colorado. June 2, 1919.
On Petition for Rehearing, Oct. 6, 1919.)

1. APPEAL AND ERROR §1001(1) — VERDICT SUPPORTED BY EVIDENCE CONCLUSIVE.

A finding of the jury supported by evidence is conclusive.

2. CHATTEL MORTGAGES §229(1) — EFFECT OF CONSTRUCTIVE NOTICE OF PRIOR MORTGAGE.

In replevin to recover a motion picture camera which had been mortgaged to plaintiff and later transferred to defendants by the mortgagor to secure a note, an instruction that, if defendants had no knowledge of the mortgage except the constructive notice from recordation, the jury should determine whether the description was sufficient to enable defendants, aided by inquiry, to identify camera as one of the articles described, and to find for the mortgagee if a reasonable person would have discovered that the camera was included, *held* correct.

3. APPEAL AND ERROR §1149—INADVERTENT ERROR IN JUDGMENT CORRECTED WITHOUT REVERSAL.

Where a judgment in replevin was for money only and contained no provision for return of the property, such omission, being due to inadvertence, may be corrected on appeal without reversal of judgment; it appearing no objection to the form of the judgment was made.

Department 1.

Error to County Court, City and County of Denver; George W. Dunn, Judge.

Replevin by Jacob Austgen against Leo Strauss and another. Judgment for plaintiff, and defendants bring error and apply for a supersedeas. Application for supersedeas denied, and judgment modified and affirmed.

Hindry, Friedman & Brewster, of Denver, for plaintiffs in error.

R. H. Gilmore, of Denver, for defendant in error.

TELLER, J. The defendant in error had judgment in a replevin action brought by him to recover from the plaintiffs in error one movie camera and a tripod upon which he had a chattel mortgage. Plaintiffs in error insist that the judgment is erroneous because the property is not sufficiently described in the mortgage, and that its locus is not given, and hence there is nothing to aid the description.

The property in question was a part of the photographic outfit mortgaged by one Griebel to defendant in error on the 8th day of March, 1918. The parties to the mortgage are described as "of the city and county of Denver," and, after the description of the individual articles mortgaged, there is added: "And all miscellaneous equipment pertaining to the above photographic equipment." The mortgage contains the usual covenant that the property mentioned was, at the date of the instrument, lawfully possessed by the mortgagor as his own property. It contains a further covenant that the mortgagor until default "may keep, retain and use the said property," etc. The mortgage was given to secure a note of \$700.

On May 17th Griebel delivered the camera and tripod to the plaintiffs in error to secure a note of \$150.

Plaintiffs in error claim that the description in the first mortgage is insufficient as against a third party without actual notice.

The property mortgaged was in a photographic studio on Lawrence street in this city when the Strauss loan was made. The camera in controversy was identified as the one in the studio at the time the mortgage was made and invoice taken. It appears that Griebel had only the one movie camera.

[1, 2] The court instructed the jury, among other things, as follows:

"If you find that the defendants had no knowledge or information concerning the said mortgage except the constructive notice imputed to them by the record of the said mortgage, then you will inquire and determine from the evidence whether the description of the said mortgage, aided by inquiries which the mortgage itself indicates, was sufficient to enable the defendants to identify the said movie camera as one of the articles described in said chattel mortgage; and, if you find that on such inquiry a reasonably intelligent person would have discovered that said movie camera was included in said description, then you will find for the plaintiff."

Under this instruction the jury found for the plaintiff.

In *Sigel-Campion Co. v. Holly*, 44 Colo. 580, 101 Pac. 68, in a suit involving a chattel mortgage on cattle, it was held that it was for the jury to determine whether the cattle in controversy were the cattle described in the mortgage, "and whether, under the facts elicited at the trial, the description in the mortgage is, in fact, sufficient to enable third persons dealing with the owner of the cattle to identify them."

The foregoing instruction is in substantially the language of the said decision, and the finding of the jury, being supported by the evidence, is conclusive upon the question of identity of the property mortgaged and that pledged.

The mortgagor having but one movie camera, the case does not fall within the rule laid down in the cases cited in behalf of plaintiff in error where only a part of the mortgagor's live stock was included in the mortgage.

[3] Another objection to the judgment is that it is for money only, with no provision for a return of the property, as the Code prescribes. No objection to the form of the judgment was made, and it appears that the omission of the alternative provision was due to inadvertence. Its correction does not require a reversal of the judgment.

There being no substantial error in the record, the supersedeas is denied and the cause remanded to the county court, with directions to correct the judgment as above indicated, which judgment, when so amended, shall stand affirmed.

GARRIGUES, C. J., and BURKE, J., concur.

On Petition for Rehearing.

TELLER, J. The opinion in this case does not, as counsel assume, hold that it is within the province of a jury to construe a chattel mortgage. The objection now made that the mortgage was not admissible in evidence

because the movie camera was not sufficiently described was not made in the trial court.

That court, without objection by the defendant, instructed the jury as to the law which should govern in determining the issue tried. We held that the instruction was correct, and that the verdict under it was sustained by the evidence.

Rehearing denied.

(67 Colo. 214)

BROWN v. BARTH. (No. 9225.)

(Supreme Court of Colorado. June 2, 1919.
Rehearing Denied Oct. 6, 1919.)

1. EVIDENCE \Leftrightarrow 385—ON ADMISSION OF EXECUTION OF WRITTEN CONTRACT PARTY EXECUTING CANNOT IMPEACH IT BY PAROL.

Having admitted the execution of a written instrument, the party executing it cannot impeach it by parol, or prove that something was intended different from its plain terms.

2. ASSIGNMENTS \Leftrightarrow 106—ASSIGNEE NOT LIABLE TO ASSIGNOR FOR INTEREST ON CLAIM ASSIGNED.

An assignment of a claim against the estate of a decedent to the sole heir for the face of the claim, which was paid to assignor at the time, held a substitute for a prior agreement for settlement by which the heir agreed to pay claimant and other creditors in full, with legal interest, and hence claimant could not recover from the heir interest accruing on the claim.

Department 1.

Error to District Court, City and County of Denver; Charles C. Butler, Judge.

Action by James H. Brown against Charlotte A. Barth. There was a judgment for defendant, and plaintiff brings error. Affirmed.

W. R. Ramsey and James H. Brown, both of Denver, for plaintiff in error.

Bartels & Blood, of Denver, for defendant in error.

BURKE, J. Plaintiff in error brought this action against defendant in error to recover a balance of \$908.76 alleged to be due him under a written contract. From a judgment on the pleadings in favor of defendant this writ is brought. The question for our determination is a simple one and requires no citation of authority.

[1, 2] William Barth died December 17, 1914, leaving defendant as his sole heir. Various complications arose in the settlement of the estate, and a number of claims were filed. In order to adjust these expeditiously a plan of procedure was agreed upon between defendant and other persons interested, including the plaintiff, in furtherance of which, on November 10, 1915, plaintiff (represent-

ing himself and other claimants) and defendant entered into a written contract (hereinafter designated Exhibit 1) whereby it was provided that, if a plan of settlement should be accepted by "the present executors of the estate," all of the claimants should execute assignments of their rights to defendant. Defendant agreed therein to pay in full all of these claims allowed by the county court, "with legal interest thereon, in the event of said plan of settlement being accepted in all particulars." The "plan of settlement" contemplated the resignation of the executors above mentioned and the appointment of others. The payment of these claims was to be made by the defendant "within 30 days after the due appointment of said successors of the said executors." The face of plaintiff's claim was \$20,250. The balance of \$908.76 for which this action was brought was interest thereon. This contract further provided:

"Each and all of said payments to be made by her in her capacity as sole heir and next of kin of the said William Barth, deceased, to the end that she may be finally reimbursed out of and from the said estate in the final settlement thereof.

"It is understood that the promises to pay money, as aforesaid, to said Brown and other creditors, is conditioned upon said plan of settlement being hereafter duly accepted by said executors and all of said legatees, together with the due appointment of said executors, and to be void if the said events do not occur."

The successors of the executors were appointed January 10, 1916. Prior to that date, however, and on December 15, 1915, another and different written contract (hereinafter designated Exhibit A) was entered into by plaintiff and defendant covering plaintiff's claim only. By the terms of Exhibit A plaintiff assigned his said claim to the defendant for the face thereof, \$20,250. He covenanted therein that he was the sole owner of the claim, that no part of it had been paid to or assigned by him, and that no portion of it had been released or satisfied; he constituted defendant his attorney in fact for her sole use and benefit to prosecute and recover the claim, and to release, discharge, and acknowledge satisfaction thereof; he covenanted that the interest thereon was still due and unpaid, that he would not collect or receive, release or discharge, the same or any part thereof, but would save defendant harmless from all costs and charges in the premises, and that the assignment included all other claims and demands he might have against the estate of William Barth. Exhibit A was acknowledged December 17, 1915, and the \$20,250 paid in full at that time.

The complaint set up Exhibit 1 and the answer Exhibit A. The replication admitted

the execution of Exhibit A, but alleged that it was a mere assignment made in compliance with the terms of Exhibit 1, and that the money paid thereon had been accordingly credited by plaintiff on the indebtedness under Exhibit 1.

On December 17, 1915, when Exhibit A was acknowledged, nothing was due the plaintiff under Exhibit 1. The language, tenor, and effect of Exhibit A are a direct denial of plaintiff's contention that it was a mere assignment for the purpose of carrying out the terms of Exhibit 1. Exhibit A shows upon its face that, so far as the claim of plaintiff was concerned, it was an entirely different contract than Exhibit 1 and expressly intended to be a substitute therefor. Having admitted its execution, plaintiff could not impeach it by parol, nor be permitted to prove that it was something other and different than, by its plain terms, it purported to be.

Considering the admissions of the replication, and admitting the truth of all matters well pleaded therein, and in the complaint, plaintiff had no cause of action, and no pleadings which could be so amended as to state one.

The judgment of the trial court is accordingly affirmed.

GARRIGUES, C. J., and TELLER, J., concur.

(97 Colo. 220)

MORRISON v. TOWN OF LAFAYETTE.
(No. 9110.)

(Supreme Court of Colorado. July 7, 1919.
Rehearing Denied Oct. 6, 1919.)

1. MUNICIPAL CORPORATIONS \S 30—DETACHMENT OF TERRITORY WILL NOT BE DENIED BECAUSE OF FIRE HYDRANT THEREON.

While Laws 1913, p. 154, providing for disconnecting outlying territory from towns and cities, provides in section 3 that, when a town or city has maintained lights and other utilities for a period of three years through or adjoining to lands sought to be disconnected, the owner shall not be entitled to the provisions of the act, a petition for disconnection of outlying territory cannot be denied because a fire hydrant was located about 225 feet from petitioner's dwelling, which was the only building in the outlying land which had never been platted.

2. MUNICIPAL CORPORATIONS \S 647—COUNTY HIGHWAY INCLUDED IN CITY REMAINS COUNTY HIGHWAY.

When a previously maintained county highway is brought within the limits of a municipality as extended, the highway does not lose its character as a county highway, but merely becomes subject to the supervision and control of the municipality.

3. MUNICIPAL CORPORATIONS ⇨80—DETACHMENT OF TERRITORY WILL NOT BE DENIED BECAUSE COUNTY HIGHWAY RAN THROUGH IT.

The fact that a former county highway ran through outlying lands sought to be disconnected from a city is no bar to a proceeding for disconnection, notwithstanding Laws 1913, c. 52, § 3, provides that whenever a city or town has maintained streets, lights, and other public utilities through or adjoining to the tracts in question, they shall not be disconnected.

Department 3.

Error to Boulder County Court; E. J. Ingram, Judge.

Proceeding by Louella R. Morrison against the Town of Lafayette for the disconnection of territory from the municipality. There was a judgment denying the relief sought, and petitioner brings error. Reversed.

Frederick T. Henry and Carlisle Ferguson, both of Denver, for plaintiff in error.

J. Taylor Smith, of Boulder (George Pomero, of Boulder, of counsel), for defendant in error.

ALLEN, J. This is a proceeding for the disconnection of certain territory from the town of Lafayette, and was instituted under the provisions of chapter 52, p. 154 of the Session Laws of 1913, entitled "An act to provide for the disconnection of outlying territory from cities and towns." A petition, conforming to the requirements of the statute, was filed February 25, 1914, by Louella R. Morrison in the county court of Boulder county. Upon the hearing, which was had on May 12, 1914, the trial court made certain findings in favor of the respondent, the town of Lafayette, and refused to enter a decree disconnecting the petitioner's land from the town. The petitioner brings the cause here for review.

The judgment in favor of the respondent town was rendered upon the theory that it established a defense, in that, as it is claimed by the town, for more than three years prior to the commencement of the action it had maintained a street running through petitioner's land and a water pipe line and fire hydrant adjoining the premises sought to be disconnected. In other words, the respondent contends, and the trial court found, that the case falls within the following provision found in section 3 of the act:

"That whenever a city or town has maintained streets, lights and other public utilities for the period of three years through or adjoining to said tract or tracts of land the owners shall not be entitled to the provisions of this act."

It is clear from the record, if not conceded, that in all other essential respects the evidence is in favor of the petitioner. The main question, therefore, which is presented for our determination, is whether or not the evidence, as to the matters referred to in the

statutory provision above quoted, is such as to warrant a judgment in favor of the town and against the petitioner.

[1] The land sought to be disconnected from the town consists of three tracts, contiguous to each other, and referred to in the record as tracts "A," "B," and "C," respectively. Tract C contains 12.9 acres, tract B 26.4 acres, and tract A 35.6 acres. The land covers an area of approximately 75 acres. It lies within the corporate limits of the town and in the eastern portion thereof. No part of this 75 acres had ever been platted. The only improvement upon the land is the petitioner's dwelling house, located near the westerly line thereof. Petitioner's Exhibit B, found in the record, is a map from which it appears that the tracks and the right of way of certain railroads form a natural division line between the plaintiff's land and the improved and platted part of the town of Lafayette.

The pipe line for water and the fire hydrant, referred to in the evidence, does not lie upon any part of the petitioner's tracts of land. The fire hydrant is located about 225 feet from petitioner's dwelling. There is no direct testimony that the hydrant could be of any benefit to the house in question. If it could be of any advantage to the plaintiff's premises at all, it could no more than serve a very small fraction of the area of such premises. It does not seem, therefore, that the town can, or ought to be permitted to, avail itself of the statutory provision relied on, simply by showing the existence of the hydrant and water pipe line above mentioned. The public utility, to come within the statute, must be so located and constructed as to be capable of being used for the benefit of a substantial portion of the land sought to be disconnected from the town, or be of some substantial advantage to the owners of such premises. Otherwise the mere existence of a hydrant could prevent the detachment of territory which is not needed for municipal purposes and which is not benefited by being within the corporate limits of a city or town. The purpose of the statute is to permit persons owning real estate lying upon the borders to disconnect it from the town, if no part of such property has been duly platted into lots and blocks. To hold that a water pipe line running up to, or even into, such property without conferring any substantial service or advantage thereto, is such a maintenance of a public utility as to prevent detachment of the land, would be to defeat the main purpose of the statute in many proceedings of this kind. The statute should not be so construed, if it can be avoided, so as to produce absurd or unreasonable results. Similar considerations governed this court in *Anaconda Mining Co. v. Town of Anaconda*, 33 Colo. 70, 76, 80 Pac. 144, 146, where the court held a certain 20-acre tract of land not

(184 P.)

to be "upon or contiguous to the border" of the town, within the meaning of the statute, because only about 150 feet of the tract touched the border. The court, among other things, said:

"If 20 acres or more of land can be disconnected from a town where but a small portion lies upon the border, it follows that a tract can be disconnected by the simple expedient of connecting the territory with the border by a narrow strip. This the Legislature did not intend should be done."

[2, 3] The remaining point to be considered is whether or not the respondent town had maintained, as it claims, a street through the premises of the petitioner. The evidence relevant to this matter shows that the street thus referred to is a public highway that was in existence as a county highway at and before the time the town was incorporated. Since that time, the road continued to be used by the public as a county highway. It is known as the Base Line Road and also as County Road No. 83. It runs east and west through the town, and some distance east of the platted portion of the town it touches a point from which runs a highway toward the north, known as County Road No. 158. When a strip of the Base Line Road became, by the incorporation of the town, located within the town of Lafayette, it did not lose its character of, or identify as, a county highway. It merely became subject to the supervision and control of the town, and the county thereafter had no authority to maintain and keep in repair such road, or so much of the Base Line Road as became located within the limits of the town. *Nelson v. Garfield County*, 6 Colo. App. 279, 40 Pac. 474. As said in *Helple v. City of Portland*, 13 Or. 97, 105, 8 Pac. 907, 910:

"Merely taking from the county and giving to the city the power to work on the highways therein would not of itself affect the character of the highways as such."

There is no evidence that anything was ever done by the town which would change the Base Line Road or County Road No. 83 from a county highway into a street or public utility maintained by the town. On the other hand, the evidence shows that the highway remained a county highway. It continued to be regarded and used as such. Neither the use nor the work done by the town was inconsistent with the proper and ordinary purposes of a county highway. Whatever work was done by the town upon any part of the Base Line Road where the same lies through or adjoining the lands of the petitioner was work of such a nature as might be expected to be done by the county upon other sections of the road. It was merely keeping that part of the road in repair, by filling, grading, or dragging. No improvements were placed upon or along the road at

any point near the petitioner's land or at any place where the road runs through or adjoining such land, and nothing was done to make the road become anything else than a county highway. The petitioner obtained no additional advantage from the road from the fact that it passed through the corporate limits of the town. The road as it passes through the petitioner's land would remain as a county highway in case such land is disconnected from the town.

Under the evidence in the instant case, and in view of the foregoing considerations, the Base Line Road or County Road No. 83, so far as the same runs through or adjoining the tracts of land of the petitioner, is not a street or a public utility maintained by the town, within the meaning of the statute. If that part of the road was maintained and kept in repair by the town of Lafayette, that fact would not constitute such a maintenance of a street or other public utility as to preclude the right of the petitioner to have her land disconnected from the town. The streets or public utilities contemplated by the statute in question are those established by the city or town, or maintained primarily for its own municipal purposes, and the existence of which streets or public utilities depends on the continued existence of the municipal corporation itself. The highway in question is not within this class.

The judgment is reversed, with directions to enter a decree in favor of the petitioner.

Reversed.

GARRIGUES, C. J., and BAILEY, J., concur.

(87 Colo. 210)

CULLEN v. PARK CLUB LAND CO.
(No. 9449.)

(Supreme Court of Colorado. July 7, 1919.
Rehearing Denied Oct. 6, 1919.)

VENDOR AND PURCHASER §3(4)—CONTRACT
ONE OF SALE AND NOT OPTION.

A written instrument denominated a contract of sale, reciting that plaintiff received from defendant the sum of \$50 as part payment on the purchase price of lots, which provided for payment in installments, and that default should at the election of plaintiff work an absolute forfeiture, is a contract of sale, and not an option contract, and hence, where defendant defaulted in payment, plaintiff might sue on the contract and recover payments due and unpaid.

Error to District Court, City and County of Denver; John H. Denison, Judge.

Action by the Park Club Land Company against Gertrude Cullen. There was a judgment for plaintiff, and defendant brings error. Affirmed.

H. A. Hicks, of Denver, for plaintiff in error.

W. H. Malone and W. H. Malone, Jr., both of Denver (B. M. Malone, of Denver, of counsel), for defendant in error.

BURKE, J. This was a suit by defendant in error against plaintiff in error (hereinafter designated as in the court below) upon a written instrument, the only portion of which necessary to an understanding of the case is as follows:

"Contract of Sale.

"Denver, Colo., April 25, 1916.

"Received of Gertrude Cullen, of the city and county of Denver and state of Colorado the sum of fifty dollars as part payment on purchase price of lots number 12, 13, N. $\frac{1}{4}$ 14, in block number 9, in Park Club Place, an addition to the city and county of Denver, Colorado. Full purchase price of said property being eighteen hundred seventy-five dollars, payable as follows: Cash as above, fifty dollars; twenty-five dollars (\$25.00) on the first day of each month, commencing May 1, 1916, for 12 months; fifty dollars (\$50.00) per month thereafter commencing May 1, 1917, until May 1, 1919, on which date the balance of the purchase price is to be paid. All payments to be made at the office of the company in the city of Denver. All deferred payments to bear interest at 6 per cent. per annum, payable January 1st and July 1st in each year. * * * Abstract of title will be furnished purchaser within 10 days.

"Time is the essence of this contract, and the failure to make each and all of the several payments at the place and times herein specified shall, at the election of the said Park Club Land Company, work an absolute forfeiture of all rights of the said purchaser under this contract, and in that case all payments on the purchase price aforesaid shall be forfeited to the Park Club Land Company, not as a penalty, but as liquidated damages; the same being hereby agreed to be the reasonable compensation to be made on account of the failure to complete the purchase and take the property under this contract as above specified.

"The purchaser agrees to pay all general taxes and all special assessments levied and assessed on this property for the year 1916 and thereafter. Gertrude Cullen. [Seal.]

"The Park Club Land Company,

"By R. H. Malone."

This instrument was set up in the complaint, and it was further alleged that the cash payment of \$50 and monthly payments until October 1, 1916, were made; that thereafter defendant failed and refused to make further payments, or to pay interest on deferred payments, or to pay taxes. The answer admitted the execution of the instru-

ment, admitted the payments and the failure to pay. The denials of this answer were confined to mere conclusions. Plaintiff filed a motion to strike out the answer, and for judgment on the pleadings; whereupon the answer was amended, and thereafter judgment on the pleadings entered in favor of the plaintiff, and defendant brings error.

It is the contention of the plaintiff that this instrument is a contract for the sale of real estate; of defendant, that it is only an option to purchase. This is the sole question in the case. If this is a contract for the sale of real estate, the motion for judgment on the pleadings was properly sustained. If it is an option, the ruling of the court below was error.

In the case of *Ide v. Leiser*, 10 Mont. 5, 11, 24 Pac. 695, 24 Am. St. Rep. 17, is given a very excellent definition of an option, and the distinction between this and an agreement to sell land is pointed out. An examination of the instrument in question, in the light of this authority, will disclose that it wholly lacks the distinguishing characteristics of an option. If it could in any respect be said to be an option to the plaintiff to purchase the land in question, the cash payment of \$50 was the consideration therefor, and the plaintiff exercised that option and converted it into a contract of purchase and sale when she made the first of the monthly payments under it. But the fact is that by its positive language—i. e., "part payment of the purchase price"; "full purchase price of said property"; "balance of purchase price to be paid"; "purchaser under this contract"; "payments on the purchase price"—it is a contract of sale. The only option it contains is an option to the vendor, in case of failure to make the payments called for, to declare it forfeited and retain the payments made. This option to the vendor to so elect he was in no way bound to exercise. Failing to so elect, it stood as a contract of sale, and vendor was entitled to bring suit for the unpaid purchase price, even had the instrument itself provided that upon failure to make the payments the contract should be held "void." *Wilcoxson v. Stitt*, 65 Cal. 596, 4 Pac. 629, 52 Am. Rep. 810; *Smith v. Mohn*, 87 Cal. 489, 25 Pac. 696; *Westervelt v. Huiskamp*, 101 Iowa, 196, 70 N. W. 125.

The instrument is a contract for the sale of land. The motion for judgment on the pleadings was properly sustained, and the judgment is affirmed.

GARRIGUES, C. J., and ALLEN, J., concur.

(43 Nev. 114.)

In re MCKAY'S ESTATE. (No. 2375.)

(Supreme Court of Nevada. July 31, 1919.
Rehearing Denied Oct. 21, 1919.)**1. APPEAL AND ERROR** \S 801(4)—**DETERMINATION OF RIGHT TO APPEAL BEFORE HEARING ON MERITS.**

Ordinarily questions not pertaining to the regularity and efficacy of an appeal, but affecting its merit, should not be determined on motion to dismiss; but a party's right to be heard on the merits is statutory, depending entirely on whether he or she is within the general class designated by the statute, and the question should be determined in advance of hearing on the merits.

2. DESCENT AND DISTRIBUTION \S 33—**GRANDNIECE EXCLUDED FROM INHERITANCE BY NEPHEWS AND NIECES.**

Laws 1897, c. 106, regulating descent, as amended by Laws 1915, c. 130, § 259, providing as to nephews and nieces in the third degree of kinship, excludes a grandniece from any inheritance, so that such grandniece was not an "heir" of testatrix, and section 272, defining the right of representation, does not bear on the former section, except as a statutory rule of interpretation.

3. CONSTITUTIONAL LAW \S 70(3)—**POLICY OF LAW MATTER FOR LEGISLATURE.**

The policy or expediency of a law is within the exclusive domain of legislative action, and is a forbidden sphere for the judiciary.

Appeal from District Court, Washoe County; Geo. A. Bartlett, Judge.

In the matter of the estate of Stewart McKay. Petition for distribution by James A. Fraser and others, executors, was opposed by Bertha Laughton, and from an adverse judgment she appeals. Appeal dismissed.

H. V. Morehouse and Percy & Smith, all of Reno, for appellant.

Fred C. Peterson, of Grass Valley, Cal., and C. F. McGlashan, of Truckee, Cal., for respondent.

DUCKER, J. The appellant, Bertha Laughton, is a grandniece of the deceased, Stewart McKay, and claims that he died intestate as to certain lands located in Washoe county, Nev.

Stewart McKay died in the state of California on the 3d day of February, 1917, and left no wife, or issue, or father, or mother, or brother, or sister surviving him. His nearest of kin are James A. Fraser, Addie Fraser Gunnarson, Tillie Fraser, and Jessie Fraser, surviving children of a deceased sister. Appellant's mother, Hughena Sapp, was a sister of said children, and died prior to the death of Stewart McKay.

The deceased, Stewart McKay, was possessed of certain property in California and lands situated in Nevada at the time of his

death. He left a will in which said James A. Fraser, Addie Fraser Gunnarson, and Tillie Fraser were named executor and executrices of said estate.

The administration of said estate in the Second district court of Washoe county, Nev., is ancillary to the probate of said will in the state of California. The said executor and executrices filed a petition for distribution in the Second judicial district court, to which appellant filed her objections, and a petition praying that it be adjudged and decreed by the court that the said Stewart McKay died intestate as to said real property, and that she be decreed to be an heir of said decedent by representation through her deceased mother, Hughena Sapp, and entitled to an undivided one-fifth interest in said real estate. A demurrer to her petition was filed by the executor and executrices, which was sustained by the court, and her petition denied. It was further ordered and adjudged that the said Stewart McKay, deceased, died testate as to the real property involved herein, situate in the county of Washoe, state of Nevada. Hence this appeal.

The respondent heirs, the nephew and nieces of Stewart McKay, deceased, moved to dismiss the appeal, on the ground that appellant is not an heir at law and is therefore not a person entitled to appeal, under section 5327 of the Revised Laws of Nevada. This section provides that "any party aggrieved may appeal in the cases prescribed in this title." If appellant is not an heir at law of the deceased, Stewart McKay, she is not a party aggrieved by the ruling of the court below, and not authorized to appeal.

[1] Ordinarily questions which do not pertain to the regularity and efficacy of an appeal, but affect its merit, ought not to be determined on a motion to dismiss the appeal. But a party's right to be heard upon the merits of an appeal is a statutory right, which depends entirely upon whether such party is within the general class designated by the statute. It is obviously a preliminary question, which should be determined in advance of a hearing on the merits and at the earliest opportunity.

In *Amory v. Amory*, 28 Wis. 157, under a statute providing that "any person aggrieved by any order, sentence, judgment or denial of a judge of the county court, may appeal therefrom to the circuit court for the same county," the court said:

"The question whether the party appealing in any case is a person thus designated by the statute, and to whom the right of appeal is given, is essentially a preliminary one. The objection being raised that the appellant is not such person, but a stranger to the order or sentence appealed from, it is clearly in the nature of matter in abatement, which, like any other, should be brought forward before further steps are taken, though not waived, perhaps, if

not so brought forward. If sustained, it goes to show that the party appealing, or attempting to do so, cannot prosecute that appeal, nor any other, and that the merits of the order or sentence appealed from should never be tried at his instance or suggestion. It follows, therefore, that his appeal should be dismissed, and that, too, at the earliest possible moment when the fact can be judicially ascertained. The reason and propriety of this rule or mode of proceeding are too obvious to require comment or explanation."

The appellant in the case, *supra*, claimed to be the widow of the testator, James Amory, and had attempted to contest the probate of the will.

So in *Hadfield v. Cushing*, 35 R. I. 306, 86 Atl. 897, it was held, on a motion to dismiss an appeal, that an expectant heir of a grandfather then living was not aggrieved by a decree of the probate court appointing a guardian for such grandparent, so as to entitle her to appeal therefrom. The motion to dismiss the appeal in the preceding case was made under a statute of the state of Rhode Island which provides:

"Any person aggrieved by an order or decree of a court of probate may, unless provision be made to the contrary, appeal therefrom to the superior court for the county in which such probate court is established," etc.

Appellant herein expresses a willingness that the question of her heirship be determined on the motion, if it can be done, but questions the right of this court to decide it in this manner, for the reason that her heirship was the very point passed upon by the court below, and thus becomes a material question for this court to decide upon appeal. Her counsel cite *In re Mendenhall's Will*, 43 Or. 542, 72 Pac. 318, 73 Pac. 1033, *Barnhart v. Fulkert*, 92 Cal. 155, 28 Pac. 221, *Oregon Timber & Cruising Co. v. Seton et al.*, 59 Or. 64, 111 Pac. 376, 115 Pac. 1121, and *Hayne*, New Trial & App. (Rev. Ed.) § 272 and 2 Plead. and Prac. 346, in support of her contention. These authorities sustain the general rule that on a motion to dismiss an appeal the court will not consider the merits of the controversy. In none of these, and in no other cases, so far as we have been able to ascertain, was the question decided, under a statute similar to ours, that where the point on appeal involved the right of appeal it could not be determined on a motion to dismiss.

[2] On the motion before us we are confronted with the query: Was the appeal properly taken? If in solving this question it appears that the appellant is not a party aggrieved, the appeal must be dismissed.

Assuming, for the purpose of this decision, that *Stewart McKay* died intestate as to the real estate in question, the estate is cast into the fourth subdivision of section 259 of the act to regulate the settlement of estates of deceased persons (St. 1897, c. 106),

as amended in 1915 (St. 1915, c. 130), for the intestate left no issue, nor wife, nor father, nor mother, and no brother or sister living at his death. But, as our decision must rest upon a construction of the entire section, we will set it forth. The section reads:

"Sec. 259. When any person having title to any estate, not otherwise limited by marriage contract, shall die intestate as to such estate, it shall descend and be distributed, subject to the payment of his or her debts, in the following manner:

"First—If there be a surviving husband or wife, and only one child, or the lawful issue of one child, one-half to the surviving husband or wife, and one-half to such child or issue of such child. If there be a surviving husband or wife and more than one child living, or one child living and the lawful issue of one or more deceased children, one-third to the surviving husband or wife, and the remainder in equal shares to his or her children, and to the lawful issue of any deceased child by right of representation. If there be no child of the intestate living at his or her death, the remainder shall go to all of his or her lineal descendants, and if all of the said descendants are in the same degree of kindred to the intestate, they shall share equally, otherwise they shall take according to the right of representation.

"Second—If he or she shall leave no issue, the estate shall go, one-half to the surviving husband or wife, one-fourth to the intestate's father and one-fourth to the intestate's mother, if both are living; if not, one-half to either the father or mother then living. If he or she shall have no issue, nor father, nor mother, the whole community property of the intestate shall go to the surviving husband or wife, and one-half of the separate property of the intestate shall go [to] the surviving husband or wife, and the other half thereof shall go in equal shares to the brothers and sisters of the intestate, and to the children of any deceased brother or sister by right of representation. If he or she shall leave no issue, or husband, or wife, the estate shall go, one-half to the intestate's father and one-half to the intestate's mother, if both are living, if not, the whole estate shall go to either the father or mother then living. If he or she shall leave no issue, father, mother, brother, or sister, or children of any issue, brother or sister, all of the property * * * shall go to the surviving husband or wife.

"Third—If there be no issue, nor husband, or wife, nor father, nor mother, then in equal shares to the brothers and sisters of the intestate, and to the children of any deceased brother or sister by right of representation.

"Fourth—If the intestate shall leave no issue, nor husband, nor wife, nor father, nor mother, and no brother or sister living at his or her death, the estate shall go to the next of kin in equal degree, excepting that when there are two or more collateral kindred in equal degree, but claiming through different ancestors, those who claim through the nearest ancestors shall be preferred to those who claim through ancestors more remote; provided, however, if any person shall die leaving several children, or leaving one child and issue of one or more children, and any such surviving child shall die under age and not having been married, all of

the estate that came to such deceased parent shall descend in equal shares to the other children of the same parent, and to the issue of any such other children who may have died, by right of representation.

"Fifth—If at the death of such child, who shall die under age and not having been married, all the other children of this said parent being also dead, and any of them shall have left issue, the estate that came to such child by inheritance from his or her said parent shall descend to all the issue of the other children of the same parent, and if all the said issue are in the same degree of kindred to said child they shall share the said estate equally; otherwise they shall take according to the right of representation.

"Sixth—If there be no surviving husband, or wife, or kindred, except a child or children, the estate shall, if there be only one child, all go to that child; and if there be more than one child, the estate shall descend and be distributed to all the intestate's children, share and share alike.

"Seventh—If there be no surviving husband, or wife, or kindred, except a child or children and the lawful issue of a child or children, the estate shall descend and be distributed to such child or children and lawful issue of such child or children by right of representation, as follows: To such child or children each a child's part, and to the lawful issue of each deceased child, by right of representation, the same part and proportion that its parent would have received in case such parent had been living at the time of the intestate's death; that is, the lawful issue of any deceased child shall receive the part and proportion that its parent would have received had such parent been living at the time of the intestate's death.

"Eighth—If there be no surviving husband, or wife, or kindred, except the lawful issue of a child or children, all of the estate shall descend and be distributed to the lawful issue of such child or children by right of representation, and this rule shall apply to the lawful issue of all such children and to their lawful issue ad infinitum.

"Ninth—If the intestate shall leave no husband, nor wife, nor kindred, the estate shall escheat to the state for the support of the common schools."

Computing their degrees of kinship to the intestate according to the rules of the civil law, the nephew and nieces, James A. Fraser, Addie Fraser Gunnarson, Tillie Fraser, and Jessie Fraser are in the third degree, and the grandniece, Bertha Laughton, in the fourth degree. It is thus seen that the nephew and nieces are in the class designated by the first part of the fourth subdivision of the section, as "next of kin in equal degree," and must inherit to the exclusion of the grandniece, unless the proviso in this subdivision providing for representation shows a contrary legislative intent in this kind of a case. It is purely a question of statutory construction.

The first inquiry is as to the scope of the proviso. Does it limit the fourth subdivision of the section alone, or has it a wider application?

"The natural and appropriate office of the proviso being to restrain or qualify some preceding matter, it should be confined to what precedes it unless it clearly appears to have been intended for some other matter. It is to be construed in connection with the section of which it forms a part, and is substantially an exception. If it be a proviso to a particular section, it does not apply to others unless plainly intended. It should be construed with reference to the immediately preceding parts of the clause to which it is attached." Sutherland on Statutory Construction, 296.

The preceding quotation states the general rule and its exception. We think the proviso in this case falls within the exception to the general rule stated. It will be observed that the proviso is confined to an estate of inheritance descending from a deceased parent to a child who subsequently dies under age and not having been married.

It deals exclusively with this single source of title, while the other subdivisions provide for the descent of the property of the intestate, however the title may have been acquired. The words in the proviso, "all the estate that came to such deceased parent," plainly mean an inheritance which, under the conditions named, descends to the deceased minor's brothers and sisters, or their issue as the case may be.

It is thus seen that the proviso announces an exception to the general scheme of descent embraced in the section; and so construing it in this light it clearly appears that it was not intended to qualify or limit the preceding parts of the clause or section only, but to operate, under the given circumstances, independently, and to each subdivision of the section.

"The proviso may qualify the whole or any part of the act, or it may stand as an independent proposition or rule, if such is clearly seen to be the meaning of the Legislature as disclosed by an examination of the entire enactment." Black on Interpretation of Laws, 273.

In *United States v. Babbitt*, 1 Black. 55, 17 L. Ed. 94, the question was as to the fees a register of a land office was entitled to receive, and turned on the scope of the proviso. The court said:

"We are of opinion that the proviso referred to is not limited in its effect to the section where it is found, but that it was affirmed by Congress as an independent proposition, and applies alike to all officers of this class."

These latter authorities illustrate the exception to the general rule governing the construction and effect of a proviso. We are of the opinion that the term "next of kin in equal degree," in the fourth subdivision, excludes from the inheritance all kindred not in that degree of kinship to the intestate. This is the established law in all jurisdictions where the statute of descent is the same or substantially the same as the statute un-

der consideration. *Douglas et al. v. Cameron et al.*, 47 Neb. 358, 66 N. W. 430; *Conant v. Kent*, 130 Mass. 178; *Van Cleve v. Van Fossen*, 73 Mich. 342, 41 N. W. 258; *Estate of Nigro*, 172 Cal. 474, 156 Pac. 1019; *Schenck v. Vail*, 24 N. J. Eq. 538.

The reasons for the rule are stated in *Douglas v. Cameron*, *supra*. The subdivision of the statute construed is identical with the fourth subdivision of our statute, and the matter corresponding to the proviso is more distinctly set forth in a separate subdivision of the Nebraska statute. One of the questions decided was that the grandchildren of a deceased sister did not inherit, when there were living nieces and nephews of the intestate. The question is the same here. The court said:

"It seems to be the policy of all the statutes at some point more or less remote to cut off representation entirely among collaterals, and where, because of unequal degrees of kinship, representation would otherwise be necessary, to defeat it by making a per capita distribution among those nearest in degree and excluding the more remote. Our law seems to reach that period where, at any point among collaterals beyond the children of brothers and sisters, the surviving kindred fall into unequal degrees. This is the construction given elsewhere to statutes resembling ours [citing cases]. Cases holding a different rule, so far as we have found any, have been under statutes which by their clear language required a different construction."

In *Schenck v. Vail*, *supra*, the New Jersey statute provided:

"When any person shall die seized of any lands," etc., "and without lawful issue, and without leaving a brother or sister of the whole or half blood, or the issue of any such brother or sister, and without leaving a father or mother capable of inheriting by this act the said lands," etc., "and shall leave several persons, all of equal degree of consanguinity to the person so seized, the said lands shall then descend and go to the said several persons of equal degree of consanguinity to the person so seized, as tenants in common, in equal parts, however remote from the person so seized the common degree of consanguinity may be."

In construing the language the court said:

"The legislative endeavor in this passage is plain. It is to designate the class of persons who are to take the land on the contingency specified. The terms used, considered intrinsically, are explicit and perfectly intelligible. Accepting them in their ordinary and natural meaning, the expression, 'several persons, all of equal degree of consanguinity' to a deceased person, admits of but a single interpretation; the words, *ex vi terminorum*, exclude all those who do not stand in the same degree of blood, and in their usual import they utterly refuse to comprehend, in the same category, both first and second cousins."

And again is reference made to this policy of exclusion of collaterals not in equal degree:

"Such exclusion of the rule in this connection tends, I think, very decidedly in the direction of a sound policy. It harmonizes with the rule of law which circumscribes, within reasonable bounds, the right of representation in the distribution of personalty. It prevents titles to realty from becoming uncertain and intricate, by reason of the vast multiplication of owners."

The Michigan statute construed in *Van Cleve et al. v. Van Fossen et al.*, *supra*, is similar to the statute under consideration here. The fifth subdivision of the Michigan statute and the fourth subdivision of the Nevada statute are alike, and the sixth subdivision of the statute of the former state is substantially the same as the proviso of the Nevada statute, and is connected to said fifth subdivision by the words "Provided, however." In *Van Cleve v. Van Fossen* the question decided was that grandnieces did not inherit with the nieces of the intestate.

"It is plain, therefore," said the court, "that these [grandnieces] do not stand in an equal degree as next of kin to the deceased. The term 'next of kin' in the statute signifies those who stand in the nearest relationship to the intestate, according to the rules of the civil law for computing degrees of kinship. In this subdivision of the statute there are no words suggesting that any one is to take by the right of representation. But the idea is excluded by the words that the estate shall descend to his 'next of kin in equal degree.' We must so construe this statute as to give each word and sentence force and effect, and the words 'in equal degree' exclude all others than those who stand in the same degree of kinship to the intestate."

In *Conant v. Kent* and *Estate of Nigro*, *supra*, grandnieces and grandnephews were held to be excluded from a share of the inheritance by reason of the term in the respective statutes, "next of kin in equal degree."

There is, in fact, little room for construction. The plain language of the fourth subdivision designates a particular class of collateral kindred that shall inherit under certain conditions, and the body of the section reveals nothing to indicate that the rule in this subdivision was not intended as a rule of exclusion. Appellant is not in an equal degree of kinship with the nephew and nieces of the intestate, and by the express prohibition of the statute cannot inherit.

An estate descending to a deceased minor, who had never been married, is not involved here, and it is therefore apparent that the proviso, upon which her counsel so much rely, cannot help appellant. She is not within the special case necessary to invoke its application.

Counsel for appellant insist that succession by right of representation is carried into the fourth subdivision by reason of section 272, which is a section of the same statute. Section 272 reads:

"Inheritance or succession 'by right of representation' takes place when the descendants of any deceased heir take the same share or right in the estate of another person that their parents would have taken if living. * * *

This section is what it purports to be, a definition of the term "by right of representation," and is not intended as a rule of distribution. It has no bearing on section 259, except as a statutory rule of interpretation of the term wherever employed therein. This construction is apparent from the face of section 272, and the care observed by the Legislature to provide for representation in the first, second, third, fifth, seventh, and eighth subdivisions of section 259, and in the special instance in the fourth subdivision, tends strongly to negative the idea of an intention to provide for it throughout the section by a separate and general provision.

[3] Much has been said by counsel for appellant of the injustice of a rule that will deprive appellant of her inheritance. Even so, we cannot amend the statute. The policy, wisdom, or expediency of a law is within the exclusive theater of legislative action. It is a forbidden sphere for the judiciary, which courts cannot invade, even under pressure of constant importunity.

As appellant is not an heir at law of the intestate, and therefore not a party aggrieved by the ruling of the lower court, the appeal is dismissed.

COLEMAN, C. J., and SANDERS, J., concur.

(43 Nev. 1)

GILL v. GOLDFIELD CONSOL. MINES CO.
(No. 2328.)

(Supreme Court of Nevada. Oct. 17, 1919.)

APPEAL AND ERROR ⇐454—JURISDICTION ACQUIRED BY APPEAL ON JUDGMENT ROLL.

Though an appeal was taken on the judgment roll alone, and the appellate court did not acquire jurisdiction to review errors other than those appearing on the face of the judgment roll, the appellate court acquired jurisdiction of the appeal.

On petition for rehearing. Former judgment affirmed.

For former opinion, see 176 Pac. 784.

John F. Kunz, of Goldfield, for appellant.
Hoyt, Gibbons, French & Henley, of Reno, for respondent.

SANDERS, J. We granted a rehearing in this cause (176 Pac. 784) for the purpose of giving further consideration to the point raised in opposition to the conclusion reached.

Appellant insists that as the appeal was taken upon the judgment roll alone, and the

errors sought to be reviewed being made a part of the record on appeal from the judgment, as required by section 11 of the Acts of 1915, p. 164, it became and was the duty of the court to review all errors that appear on the face of the judgment roll. Upon further consideration, we are entirely satisfied that the opinion furnishes a full and complete answer to this proposition. By adhering to the express mandate of the statute (section 5328, Rev. Laws), we complied with the law. Certainly no more substantial reason could be given for our action. Williams v. Rice, 13 Nev. 235. The appeal was taken upon the judgment roll alone. The court, therefore, certainly acquired jurisdiction of the appeal. It probably would have been more regular to have affirmed the judgment than to have dismissed the appeal; but, in the view we take of the judgment roll, the order of dismissal amounts to an affirmance of the judgment.

The only errors appearing on the face of the judgment roll, other than those enumerated in section 5328, Rev. Laws, are directed to the court's sustaining the challenge of the defendant to certain prospective jurors, Hotchkiss and Perow, upon the ground of implied bias. After reading the exhaustive voir dire examination of these gentlemen, we are in no position to say that the court erred in permitting them to remain in the jury box.

The judgment must be affirmed. It is so ordered.

COLEMAN, C. J., and DUCKER, J., concur.

(108 Wash. 461)

WINTLER ABSTRACT & LOAN CO. v.
SEARS et al. (No. 15220½.)

(Supreme Court of Washington. Oct. 15, 1919.)

1. CHATTEL MORTGAGES ⇐129 — INCLUDING CHATTELS CREATES LIEN ONLY.

In the state of Washington, a mortgage which includes chattels such as abstract books does not serve to convey title, but creates a lien only.

2. CHATTEL MORTGAGES ⇐168 — MORTGAGOR OF ABSTRACT BOOK IN POSSESSION CANNOT MAKE PHOTOGRAPHIC REPRODUCTION.

In view of Rem. Code 1915, §§ 1111 and 3669, giving a mortgagee an immediate right to maintain an immediate action for foreclosure where he has reasonable cause to believe that the mortgaged property will be destroyed, and making it a misdemeanor to remove or destroy mortgaged property, a mortgagor of abstract books who remains in possession has no right to take photographs of the books and dispose of them, for such act would make the information in the books and records less valuable, and thus destroy the security.

3. CHATTEL MORTGAGES —286—ON FORECLOSURE SALE OF ABSTRACT BOOKS, PURCHASER CANNOT RECOVER PHOTOGRAPHIC REPRODUCTIONS.

Where a mortgagee of abstract books on foreclosure purchased the same, and the decree of foreclosure, which gave particular description of the property ordered sold, specified only the books themselves, *held*, that the mortgagee's grantee could not recover photographic reproductions of the mortgaged abstract books and records, even though the mortgagor might have been enjoined from making such photographic reproductions.

Department 2.

Appeal from Superior Court, Clarke County; W. A. Reynolds, Judge.

Action by the Wintler Abstract & Loan Company against Charles B. Sears and others. From a judgment dismissing the action after nonsuiting plaintiff, plaintiff appeals. Affirmed.

Crass & Hardin, of Vancouver, for appellant.

McMaster, Hall & Drowley, of Vancouver, for respondents.

BRIDGES, J. This action was brought to recover the photographic reproductions of certain mortgaged abstract books and records and to recover damages. The trial court nonsuited the plaintiff, and this appeal is from the judgment dismissing the action.

The facts are substantially as follows: In the year 1912, the Clarke County Abstract & Loan Company was the owner and in possession of certain real estate and certain records, books, plats, maps, instruments, machines, furniture, and fixtures, constituting a complete plant used in the conduct of its business as a maker and seller of abstracts of title to real property. On August 10, 1912, the abstract and loan company, in order to secure a note of \$24,000, executed and delivered to Jessie M. Wintler, as trustee, a mortgage upon its real estate and upon the above-mentioned personal property. One clause of the mortgage is as follows:

"And the said mortgagor mortgages also to the mortgagee as additional security for the said note, all of its plant, used in the conduct of its business as engaged in the compilation and sale of abstracts of title to real property and in making loans and other like business, and consisting of all its records, books, plats, maps, instruments, machines, furniture and fixtures, and all other of its equipment as the same now exists and is located at No. 607 Eleventh street, Vancouver, Washington, or as the same may hereafter be renewed, added to, or enlarged."

After giving the mortgage, the abstract and loan company continued in possession of the mortgaged property and continued the abstract business. It failed to make the payments required by the terms of the note and

mortgage, and on October 26, 1915, the trustee commenced an action to foreclose the mortgage. While this action was pending, the abstract and loan company made photographic copies of all of the books and records of the abstract plant and sold them to Charles B. Sears and C. W. Knowles to be used in the same county. Afterwards the mortgage was duly foreclosed, and on April 22, 1916, the property was sold by the sheriff, and the mortgagee became the purchaser at the sale. Thereafter the mortgagee and the persons for whom she was acting as trustee, together with one or two others, organized the appellant corporation, and the property obtained by purchase at the sheriff's sale was conveyed to it. After the photographic reproductions were sold to Sears and Knowles, they formed the Sears Abstract & Loan Company, which continued to use the photographic copies and to make therefrom abstracts of title to real estate, up to the time of the beginning of this action. On December 26, 1918, the Sears Abstract & Loan Company executed and delivered to the Vancouver National Bank a chattel mortgage covering the photographic copies, together with other personal property. This mortgage was given to secure a bona fide indebtedness owing to the bank. It appears that all of the respondents had actual knowledge of the existence of the mortgage to Jessie M. Wintler and the taking and sale of the photographic copies.

[1] The chief legal question involved is: May a mortgagor of a set of abstract books and records lawfully, and without violating any of the rights of the mortgagee, make photographic copies of such books and records for the purpose of using the same after the mortgage is foreclosed, in the business of making abstracts of title to property, or selling the same to be used for a like purpose. In discussing this question it must always be kept in mind that in this state a mortgage does not serve to convey the title, but creates a lien only, leaving the title in the mortgagor. *Silsby v. Aldridge*, 1 Wash. 117, 23 Pac. 836; *Binnian v. Baker*, 6 Wash. 50, 32 Pac. 1008; *Richter v. Buchanan*, 48 Wash. 32, 92 Pac. 782; *Nettleton v. Evans*, 67 Wash. 227, 121 Pac. 54.

[2] Apparently, the question involved here is one of first impression; for no cases in point are cited in the briefs, and the somewhat extended search which we have made fails to reveal any. There is a line of cases cited by appellant which holds that an author, at common law, has a property in his manuscript, and may obtain redress against one who deprives him of it, or, by improperly obtaining a copy, endeavors to realize a profit by its publication. The case of *Press Publishing Co. v. Monroe*, 73 Fed. 196, 19 C. C. 429, 51 L. R. A. 353, is illustrative of

this principle; but those cases cannot help us here, because there the owner was the complaining party, while here the one who complains holds only a mortgage lien. Nor—and for nearly the same reason—can we get any light from that line of cases where a photographer, employed to take certain photographs of the employer, uses his negatives or plates to take additional pictures, to be sold to others or to be put to some other use. *Klug v. Sheriffs*, 129 Wis. 468, 109 N. W. 656, 7 L. R. A. (N. S.) 362, 116 Am. St. Rep. 967; *Levy v. Clements*, 175 Mass. 376, 56 N. E. 735, 50 L. R. A. 397; *Douglas v. Stokes*, 149 Ky. 506, 149 S. W. 849, 42 L. R. A. (N. S.) 386, Ann. Cas. 1914B, 374; *Corliss v. Walker Co.* (C. C.) 64 Fed. 280, 31 L. R. A. 283.

The respondents contend that the mortgagor, being the owner of the property, had a right to take these photographs and dispose of them, provided he did thereby no unnecessary damage to the mortgaged property; that the mortgage did not cover the photographs, and therefore could not be foreclosed as to them. The lower court seems to have also taken this view of the case. We cannot believe that the only right which a mortgagee has is to foreclose his mortgage. The mortgagor's ownership is not unqualified; he may not do with the property as he sees fit; he may use it in the usual and customary way, doing no unnecessary damage; but he may not, over the objections of the mortgagee, use the property in any unusual, unc customary, or unexpected way; and particularly so if such use greatly injures the property or depreciates its value. The mortgagee has, and in the very nature of the relation must have, the right at all times to protect the property, which gives him security against any unusual or unnecessary damage. These principles are laid down by Jones on Chattel Mortgages. At section 451 (5th Ed.) he says:

"A mortgagee, in case of apprehended danger of loss of the mortgaged property, may have a receiver appointed, even before his right to foreclose has accrued. It is sufficient to authorize the appointment of a receiver that the mortgagor is insolvent, that the property is not sufficient in value to secure the debt, and that there is still danger of its removal beyond the jurisdiction of the court. The power of a court of equity to preserve the mortgaged property from destruction, so that it may answer the purpose of the mortgage, is undoubted. A bill for an injunction and the appointment of a receiver may be sustained, where it is shown that these remedies are proper for the mortgagee's protection, although the time of payment set in the mortgage has not arrived."

And at section 490:

"A purchaser of property upon which there is a valid mortgage who consumes or sells the property or any part of it is liable to the mortgagee for the damages so occasioned him; and it makes no difference that the purchaser took the property in hostility to the mortgage, and denying that it was an existing lien."

The same general principle has been recognized by our Legislature and enacted as a part of the laws of this state. Section 1111, Rem. Code, provides that where a debt secured by mortgage is not due and the mortgagee has reasonable cause to believe that the mortgaged property will be destroyed, lost, or removed, he may maintain an immediate action for foreclosure of his mortgage. Section 3669 of the same volume provides that any mortgagor of personal property who, with intent to hinder, delay, or defraud the mortgagee, shall injure or destroy such property or any part thereof, or shall conceal the same or remove it from the county without the consent in writing of the mortgagee, or who shall sell or dispose of the same or any interest therein, shall be guilty of a misdemeanor.

In the instant case the chief value of the security was not in the abstract books themselves, but in the information contained in them. Any act which would make either the books and records, or the information contained in them, less valuable, would to that extent lessen the value of the security. The mortgage not only covered the books themselves, but the information contained in them; and the making public of that secret information must be considered an unlawful destruction of the security. If one set of photographs may be lawfully taken and sold for use, so may a dozen sets of photographs be taken and sold; and thus what was ample security has become almost valueless. It would be small comfort to the mortgagee to tell him that he must be satisfied if the books themselves have not been injured and if they still contain the original information. That doctrine would take the kernel and leave the shell. If one mortgage a house, used only as a dwelling, he would not subsequently be permitted to convert that mortgaged property into a stable; or if one mortgaged a high-priced pleasure automobile he would not thereafter be permitted to use it as a common truck, although he might not make any physical changes in the conveyance. We have no doubt that if this mortgagee had undertaken to enjoin the taking and selling of these photographs, or had sought to have a receiver appointed to take charge of the property because of such taking and sale, or had commenced suit to foreclose her mortgage because of the depreciation of the security resulting from such taking and sale, she must have prevailed. Any other rule of law would deprive abstract books of nearly all their commercial value; for who would, hereafter, lend money upon abstract books as security, knowing that one or more sets of photographic copies may afterwards be lawfully taken and sold, to be used in opposition to the mortgaged property? The same rule of law, which would permit a mortgagee to enjoin any act which would wholly or partially destroy the mortgaged property, should

also permit him to enjoin any act which would wholly or partially destroy the value of that property. We therefore hold that in this case the mortgagor did not have the right, over the objections of the mortgagee, to take and sell these photographic copies. But it does not necessarily follow that the appellant can maintain this suit.

[3] This action is maintained upon the principle that the mortgage covered the photographic copies, and that it was foreclosed as to those copies, and that when the original mortgagee became the purchaser at the sheriff's sale she purchased these copies along with the rest of the personal property, and that she thereafter conveyed the same to the appellant. If it be conceded that under any circumstances the purchaser at the sale might maintain a possessory action such as this, yet we are forced to the conclusion that the appellant is not in position to maintain this action. The decree of foreclosure gives a particular description of the personal property which was ordered sold. These photographic copies are not included in this description. The sheriff's bill of sale to the purchaser gives an itemized statement of the property sold, and these photographic copies are not included. It follows that the appellant cannot be the owner or entitled to the possession of these photographic copies and cannot therefore maintain this suit.

While we decide that a mortgagor of abstract books and records has no right, as against the mortgagee, to take and sell photographic copies thereof, and that the mortgagee would have his action to enjoin such taking and sale, yet, where the reproductions have been taken and sold, we expressly do not decide whether such copies would be included within the mortgage, nor do we decide whether the mortgagee's action would be a possessory one such as the one we are dealing with, or one to enjoin the use of such copies, or for their destruction, or a straight action for money damages. Having decided that the appellant is not in position to maintain this action, it is not necessary to determine the form of the proper action or the exact nature of the remedy.

Judgment affirmed.

HOLCOMB, C. J., and PARKER, FULLERTON, and MOUNT, JJ., concur.

(108 Wash. 407)

ALLEN v. CITY OF SPOKANE.
(No. 15278.)

(Supreme Court of Washington. Oct. 10, 1919.)

1. MUNICIPAL CORPORATIONS §410(2)—OWNER ASSESSED FOR IMPROVEMENT MAY SHOW PROPERTY IMPROVED WAS NOT STREET.

In view of Const. art. 1, § 16, a property owner whose property has been assessed for a

purported street improvement in action to set aside the assessment may show the property improved was not a public street.

2. MUNICIPAL CORPORATIONS §488, 489(3)—ESTOPPEL TO QUESTION VALIDITY OF ASSESSMENT FOR STREET IMPROVEMENT.

Plaintiff, suing to cancel an assessment for a street improvement levied on property subsequently bought by her and her deceased husband, held not estopped, by the acts of her predecessor in interest in petitioning for the improvement, to question the validity of the assessment.

Holcomb, C. J., dissenting.

Department 2.

Appeal from Superior Court, Spokane County; Wm. A. Huneke, Judge.

Action by Mary F. Allen, as executrix of the estate of Joseph S. Allen, deceased, and personally, against the City of Spokane. From judgment for plaintiff, defendant appeals. Affirmed.

J. M. Geraghty and Alex M. Winston, both of Spokane, for appellant.

Stephens & Jack, of Spokane, for respondent.

FULLERTON, J. This action was instituted by the respondent, suing in her own right and in her capacity as executrix of her husband's estate, to cancel an assessment levied by the appellant, the city of Spokane, upon real property of which the respondent and her husband, subsequent to the time the assessment was levied, became the purchasers. The trial court entered a judgment canceling the assessment, and the city appeals.

The facts are disclosed by the pleadings. On December 6, 1906, certain owners of real property in the city of Spokane petitioned the board of public works of that city to cause that part of Spokane street lying between Sprague avenue and Third avenue to be improved at the expense of the owners of the property benefited, by grading the same to the established grade for the full width thereof and by building sidewalks upon each side thereof. The land now owned and represented by the respondent abutted upon the proposed improvement; it was then owned by one W. F. Mitchem, who joined in the petition for the proposed improvement. There seems to have been at that time some doubt in the minds of the city officials whether the way petitioned to be improved had been dedicated as a street, or was in fact a part of Spokane street; and, to remove this doubt, Mitchem, with other abutting and adjacent property owners, filed affidavits with the board of public works, averring:

That the way had been "generally, habitually and universally traveled by the citizens and

§ For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

residents of the city of Spokane, and by the public at large adversely, continuously, and uninterruptedly for a period of more than eleven (11) years prior to the date of the affidavit; and that the same has been during all of said time, and is now, used by said citizens of Spokane and the public at large as and for a public street."

The city, in response to the petition, caused the way to be improved and caused the assessment now in question to be levied to pay the cost thereof. The proceedings leading up to the assessment, in so far as the record before us discloses, were regular; the notices required by the form of procedure then in force were duly given, and opportunity to protest against the improvement, the manner in which it was made, and the amount of the levies, were duly given the landowners whose property was assessed. No protest of any kind was made by the then owners of the property now owned by the respondents. The assessment was made payable in ten annual installments, the first installment falling due on May 15, 1909. Of these installments, Mitchem paid three, namely, the installments falling due in 1909, 1910, and 1911, when he sold the property to the respondent and her husband. The new owners paid the installments falling due during the next four years, namely, the years 1912, 1913, 1914, and 1915. After the last payment, an action was instituted against the city by the person claiming the property improved as a street, wherein it was adjudged that the property was not and never had been a public street, but was the private property of the claimant. The present owners then demanded of the city a cancellation of the remaining installments of the assessment. The city refused to comply with the demand, and the present action was begun, with the result first stated.

For reversal the city makes two principal contentions: First, that the question whether the property improved as a street was actually a street cannot be litigated in this form of action; and, second, that the respondent is estopped, by the acts of her predecessor in interest in the property, to question the validity of the assessment.

[1] While the authorities upon the first proposition are not in accord, we think the better rule is that a property owner, whose property has been assessed for a purported street improvement, may, in an action to set aside the assessment, show that the property improved was not a public street. The cases which announce the contrary doctrine seem to proceed on the theory that the city can acquire the property, and thus make the improvement available to the public and of benefit to the property of the complaining owners. But, whatever may be the rule in the states announcing that doctrine, in this state a municipality cannot acquire such

property as it wills for a public street, even though it provide for compensation to the owner for the property taken. By section 16 of article 1 of the state Constitution, the question whether the use for which real property is taken is a public use is made a judicial question to be determined as such, without regard to any legislative assertion that the use is public, and, while we have held that the determination of the proper municipal officers that the use is public is ordinarily conclusive upon the courts (*Tacoma v. Titlow*, 53 Wash. 217, 101 Pac. 827; *Tacoma v. Brown*, 69 Wash. 538, 125 Pac. 940; *Spokane v. Merriam*, 80 Wash. 222, 141 Pac. 358), the cases announcing the rule recognize possible exceptions. The power to decide clearly implies that the courts may decide contrary to the declaration of the municipal officers, and until the question is judicially determined, or the right to such determination waived, it cannot with certainty be said that the property assessed will have the benefit of the improvement. There is, moreover, another reason for denying the principle for which the city contends. The city may not be able to exercise the power even if it so wills. In this state the power of taxation is limited. The city may find that the sum it can lawfully assess upon abutting property will be insufficient to meet the cost of acquiring the property, and may find that it cannot make up the difference from its general fund because of this limitation on its power of taxation. For the foregoing reasons it is possible that the city may never acquire the property on which the improvement is made, in which case the abutting property will not receive the benefit of the improvement, and clearly as long as this possibility exists there is no just principle upon which the assessment can rest.

[2] In support of the second contention, the appellant relies upon the cases of *Barlow v. Tacoma*, 12 Wash. 32, 40 Pac. 382, and *Wingate v. Tacoma*, 13 Wash. 603, 43 Pac. 874. But these cases differ widely in their facts from the case at bar, and, we think, warrant the application of different principles of law. In them there was no question as to the city's title to the street on which the improvement was made, and in consequence no question that the property of the complaining owners received the benefit of the improvement. The defect was in the preliminary proceedings had by the city officers in the initiation of the improvement, and, while the court in the opinions cited spoke of the defects as jurisdictional, all that was meant was that the preliminary proceedings were so far irregular as to justify a stoppage of the work by the property owners, had they acted in the proper manner and at the proper time. There was therefore no injustice in holding them es-

(108 Wash. 474)

topped from questioning the assessments levied on their property, and the court could well hold that they were estopped from questioning the regularity of the proceedings by their act of petitioning for the improvement and by their failure to call attention to the defects in the procedure prior to the making of the improvement. Here the facts are different. The property improved as a street was at the time of the improvement, and still is, in private ownership. The property of the complainant has not received the benefit of the improvement. If he is compelled to pay for the improvement, he parts with property for which he receives no return. He had a right to rely on the city's assumption of ownership of the property it improved as a street, and clearly ought not to be held estopped from questioning the assessment, unless he was guilty of some fraud or concealment when he petitioned for and acquiesced in the improvement. As we said in *Edmonds Land Co. v. Edmonds*, 66 Wash. 201, 119 Pac. 192, the petition could be nothing more than a request to the city that it proceed within the powers conferred on it by law in making an improvement; it could not act as authority to the city to proceed beyond and outside of any legal authority. It is true in this instance the owner did something more than petition and stand by without protest. He made affidavit as to facts tending to show that the property was a public street, but this we cannot think alters the situation. It is not asserted that he did not state the facts truthfully, and all that he stated in the affidavit that was fairly within his knowledge could be true and still the property not be a public street. The affidavits were but evidence tending to establish the fact of title. The ultimate question was one which the city was required to determine, and it was the only body which had the power to have it effectively determined. Since the title to the property was in doubt, it was the city's duty, before proceeding to improve it as a street, to remove the doubt. Having neglected this duty, it cannot be permitted to visit the loss upon another, who was innocent of wrong, and who had the right to assume that no duty required of the city had been neglected. Contrary to the contention of the city, therefore, we cannot conclude that the property owner was equally guilty with the city in causing the loss which must necessarily follow, or that he must bear it as the person who, by his acts, made the loss possible.

The judgment is affirmed.

MOUNT, PARKER, and BRIDGES, JJ., concur.

HOLCOMB, C. J., dissents.

GARRING v. STEPHENS et al. (No. 15329.)
(Supreme Court of Washington. Oct. 15, 1919.)

EVIDENCE §431 — ADMISSIBILITY OF EVIDENCE TO SHOW NONDELIVERY OF DEED.

In an action in ejectment and to quiet title, involving the validity of a deed, evidence that grantor had sold the land to another, that she had supposed a deed which was to be returned to her on her request had been destroyed, and that it was never her intention to have it delivered, *held* admissible.

Department 1.

Appeal from Superior Court, Lewis County; P. H. Back, Judge.

Action by Louisa E. Garring against J. A. Stephens and wife and another. Judgment for defendants, and plaintiff appeals. Affirmed.

A. E. Rice, of Chehalis, and L. J. Birdseye, of Spokane, for appellant.

C. D. Cunningham and W. H. Cameron, both of Centralia, for respondents.

MITCHELL, J. This action was commenced in July, 1917. It is the statutory action of ejectment and to quiet title. It was tried without a jury and resulted in a judgment for defendants, from which judgment plaintiff has appealed.

Stephens and wife, as such, and the Eastern Railway & Lumber Company, a corporation, appeared separately, and in addition to general denials each interposed several affirmative defenses, concerning all of which evidence was introduced. There is involved the validity of an instrument purporting to be a deed, and upon the threshold of the inquiry appellant admits she is not entitled to prevail if it shall be determined that deed was invalid. Having reached the conclusion the instrument did not operate as a conveyance of title, it will therefore be useless to consider any other feature of the controversy.

The instrument just referred to was made by Jane E. Bryan on October 19, 1905, and purported to convey to William W. Miller a tract of land which included the lesser tracts involved in this action. At that time, and for many years prior thereto, she owned and lived on the land described in the deed and continued to reside thereon until her death, April 27, 1907. During those years there lived with her in the same home her nephew, Allen Miller, and his wife and their son William W. Miller; the latter being the grantee named in the deed referred to. Allen Miller and wife and their son continued to live on the place a number of years after the death of Jane E. Bryan. Jane E. Bryan and Allen Miller were considerably in debt on October 19, 1905. Her deed to William W.

(184 P.)

Miller, who at that time was 12 years of age, was prepared by her lawyer (J. B. Landrum) and acknowledged before him as a justice of the peace. Only one person who was present at the execution of the deed, Mrs. Maloney, testified in the trial of this case. She testified that after executing the deed Jane E. Bryan handed it to her lawyer and asked him to put it on record that day, and that he said he would. In considering her testimony we bear in mind she owns a mortgage in the sum of \$1,000 made and delivered by William W. Miller to her on November 16, 1915, covering another portion of the land described in the deed to him of October 19, 1905. William W. Miller was not present on October 19, 1905, at the execution of the deed; nor is the evidence clear as to when he first learned of it. The deed was not recorded until after the death of both Jane E. Bryan and her lawyer, when, on July 15, 1907, it was filed for record by Allen Miller, acting at that time as administrator of the estate of Jane E. Bryan. The testimony is silent as to when and how the deed got back into the possession of Jane E. Bryan, and thence into the possession of her administrator. On October 22, 1906, Jane E. Bryan conveyed to the Oregon-Washington Railroad & Navigation Company, for right of way purposes, a portion of the land described in her deed to William W. Miller. On January 15, 1907, Jane E. Bryan, by a warranty deed acknowledged before her same lawyer, acting at that time as a notary public, conveyed to Allen Miller certain property which included the property in controversy here. That deed was filed and recorded two days later, and the property described in it is a portion of the land described in the deed from her to William W. Miller. Allen Miller and wife several times mortgaged the property they finally sold to the respondent. The Eastern Railway & Lumber Company operated a mill near by, and shortly after Allen Miller acquired the property from Jane E. Bryan, continuous complaint and threatened litigation on his part against the lumber company on account of sawdust and other débris from the mill resulted in the purchase, on September 25, 1911, by the lumber company from Allen Miller and wife, of the 7¼ acres ever since owned, occupied, and greatly improved by the lumber company. The consideration for this transfer was \$4,000, and the property was a part of that described in the deed of October 19, 1905, by Jane E. Bryan to William W. Miller, and also in the deed of January 15, 1907, by Jane E. Bryan to Allen Miller. In the years 1912 and 1913 Allen Miller and wife gave mortgages upon the property now owned and occupied by the respondents Stephens and wife, who through foreclosure proceedings in the year 1916 became the purchasers at the sheriff's foreclosure sale. This property now owned by them was a part of that described in the

deed of Jane E. Bryan to William W. Miller and also in the later deed of Jane E. Bryan to Allen Miller. There is abundant testimony in the record to show that from the time Allen Miller received his deed from Jane E. Bryan in January, 1907, until he disposed of the properties involved in this action, he occupied, used, let, paid taxes on, and in good faith claimed it as his own without the knowledge and without any protest from William W. Miller, both before and after he became 21 years of age, other than the making and delivery by him of a quitclaim deed to appellant about April 27, 1916.

Shortly after the conveyance to Allen Miller, an attorney for the respondent lumber company engaged in settling the complaints of Allen Miller, called at his home and discussed the matter with Jane E. Bryan, who formerly had been handling the property as her own. Concerning that conversation the attorney testified at the trial in this case as follows:

"I went right over to see Jane Bryan to see what could be done. It was in the latter part of February, 1907. I asked Mrs. Bryan who owned that property. She told me Allen Miller owned it; that she had deeded it to him, I think, about the month of January, 1907. It was then I called her attention to this deed I had seen in Landrum's office to Willie Miller. She told me that Landrum and Miller (meaning Allen Miller) had come to her when threat was made to bring suit on obligations they owed on different notes; that Landrum had suggested that this deed be made and put with him and that she had made the deed with the instruction that it be returned to her when she called for it; that she had asked Landrum for it and was told that it had been mislaid. She seemed surprised that the deed was still in existence."

This testimony was admitted over the objection of appellant and constitutes the principal assignment of error on the appeal. We think the testimony was admissible. It is perfectly clear the controversy here hinges upon the question of the delivery of the deed—the final act, without which all other formalities are ineffectual to the transfer by deed of the title to land. True, the delivery of a deed need not be directly or immediately to the grantee; but it must pass beyond the control of the grantor, which of itself is a question of intention to be determined as a fact by a consideration of all the surrounding circumstances. The rule suggested by appellant and found in Devlin on Deeds, vol. 1 (3d Ed.) § 281a, "The grantor's acts and declarations made or done in his own interest several months subsequently to his delivery of the deed are not admissible in evidence as showing his intent in delivering the deed," is not applicable here, because, at the time the grantor made the declarations referred to in the testimony complained of, she had already sold and delivered possession of the land to another, and hence had no self-interest to subvert by those declara-

tions. Again, it is contended that declarations of the grantor made after parting with his title and in disparagement of it are inadmissible when made in the absence of the grantee. But the rule assumes the very thing in dispute here, namely, delivery of the deed which is essential to the transfer of the title. Both reason and authority are to the effect that, if the intention of the grantor in delivering a deed is doubtful or equivocal, evidence of subsequent acts of the grantor is competent as tending to show what the grantor's intention was at the time of the delivery of the deed to a third person. *O'Brien v. O'Brien*, 19 N. D. 713, 125 N. W. 307; *Williams v. Kidd*, 170 Cal. 631, 151 Pac. 1, Ann. Cas. 1916E, 703.

The consideration of this assignment of error disposes of all other assignments made by appellant as to the admissibility of other evidence and leaves the case, restricted as it has been, to the consideration only of the validity of the deed to William W. Miller, to be determined upon the sufficiency of the evidence to justify the judgment. Practically all, or at least all of the controlling parts, of the evidence have been set out so as to obviate the necessity of any repetition or analysis to fortify the conclusion, already mentioned, that the judgment is correct; and it is hereby affirmed.

MACKINTOSH, FULLERTON, MAIN, and
TOLMAN, JJ., concur.

(108 Wash. 335)

E. I. DU PONT DE NEMOURS POWDER
CO. v. PEDERSON et al. (No. 15301.)

(Supreme Court of Washington. Sept. 18,
1919.)

1. FRAUDULENT CONVEYANCES ¶271(3)—PRESUMPTION AS TO HONESTY OF TRANSACTION.

It will be presumed that a transaction has been honestly made and carried out.

2. FRAUDULENT CONVEYANCES ¶295(1) — PROOF OF FRAUD MUST BE CLEAR.

Evidence of fraud must be clear and satisfactory.

3. MORTGAGES ¶37(2)—PAROL EVIDENCE TO SHOW DEED IS MORTGAGE ADMISSIBLE.

Oral testimony is admissible to show that an instrument in form a deed is a mortgage.

4. FRAUDULENT CONVEYANCES ¶312(3)—IN SUIT TO SET ASIDE, RELIEF DOES NOT EXTEND TO DETERMINING PRIORITY OF LIENS.

In suit to set aside conveyances as fraudulent, the only judgment the court could make would be either to find fraud and set aside the deeds or find there was no fraud and dismiss the action; hence it was proper to deny plaintiff's request to decree that the alleged fraudulent grantee held her title subject to the prior

lien of plaintiff's judgment, and to refuse to make any finding or conclusion on such question.

Department 2.

Appeal from Superior Court, King County; Boyd J. Tallman, Judge.

Suit by the E. I. Du Pont de Nemours Powder Company against Hans Pederson and others. From an adverse judgment, plaintiff appeals. Affirmed.

Trefethen & Findley, of Seattle, for appellant.

Roberts & Skeel, of Seattle, for respondents.

BRIDGES, J. On the 18th day of May, 1917, Hans Pederson and wife were the owners of lot 15, block 41, Denny & Hoyt's addition to the city of Seattle (which will be hereafter referred to as the "Fourth street property") and lot 3, block 10, Kinneer's Supplemental addition to Seattle, and lot 3, block L, W. N. Bell's Fifth addition to Seattle, all in King county, Wash. On that date they made a quitclaim deed of all the property mentioned to Geo. L. Haley, of Seattle. Thereafter, and on the 16th day of January, 1918, Haley and wife deeded to Millie Madison all of the property except the Fourth street lot. On December 15, 1917, the appellant in another action obtained a judgment in excess of \$17,000 against the respondents Pederson and wife. It issued execution, which was returned nulla bona, and, being unable to find property of Pederson and wife out of which to satisfy its judgment, or any part of it, it brought this suit to set aside the transfers above mentioned. The complaint alleged that these transfers were without valid consideration and were fraudulently made, for the purpose of defeating the creditors of the respondents Pederson and wife, and particularly the appellant. The several respondents answered separately, admitting the execution and delivery of the deeds mentioned, but denying all other allegations of the complaint. From judgment dismissing the action, and quieting title in Millie Madison, this appeal is taken.

The testimony is very lengthy, and we cannot here pretend to set it forth in detail. We will, however, undertake to give a general summary of it. The appellant relied almost exclusively upon the testimony of two witnesses. One testified that Mr. Haley had told him that the properties which had been deeded were really owned by Mr. Pederson, though he held the "paper" title to a part thereof, and Millie Madison held the "paper" title to the remainder. Another of appellant's witnesses testified that Mr. Haley had told him that he (Haley) held the property in trust for Pederson, and that the property was deeded to him because Pederson anticipated the appellant would obtain a judgment against him.

and he did not want to have the property in his name if such judgment were obtained. It further appeared from appellant's testimony that at about the time the deed from Haley to Madison was given Pederson constructed an apartment house on lot 3, block L, Bell's Fifth addition to Seattle, being a part of the property involved in this action; that, while the title to the lot was in the name of Millie Madison, respondent Pederson did practically everything pertaining to the construction of the apartment. He looked after obtaining a loan of \$24,000 for the purpose of building the apartment house. Much of the materials going into the building were obtained on his credit. He made arrangements for the renting of the apartments, took the rents, and deposited the money so collected in the bank in his own name. The respondent's testimony showed that Pederson and Haley were, and for a long time had been, intimate friends and business associates; that Pederson was a contractor and builder, and that he had gotten into financial straits, and had called upon his friend Haley to assist him; that in this way, at the time of the delivery of the deed from Pederson to Haley, the former had become indebted to the latter in the sum of about \$6,000 for services performed and money advanced to or for Pederson; that in addition thereto Haley had signed bonds and other obligations for the use and benefit of Pederson; that the deed from Pederson to Haley was given to secure Haley for the indebtedness which was owing from Pederson to Haley; and that, as a matter of fact, the deed was, and was intended to be, a mortgage, and that at the time of the trial in the lower court Pederson was still indebted to Haley in certain sums of money. The evidence does not show the exact amount of such indebtedness, but that the amount was considerable there can be no doubt.

About January, 1918, Haley wanted some of the money which Pederson owed him, and the latter, in order to get the money, had Millie Madison make sale of a \$2,500 note and mortgage held by her, the proceeds of which were turned over to Pederson. In addition to this indebtedness of \$2,500, Pederson also owed Miss Madison and her two brothers, who were at the war, certain additional, but undetermined, sums of money. Upon paying this \$2,500 to Mr. Haley, Mr. Pederson requested him to deed directly to Miss Madison all of the property above mentioned, except the Fourth street property, which it was agreed Haley should continue to hold as security. Haley complied with this request and made the deed to Miss Madison. It further appears conclusively that Pederson was the uncle of Miss Madison and her brothers, and had been administrator of their father's estate, and had been guardian of one or more of them, and that he (Pederson) had for a long time looked after their business affairs.

We have not only read carefully the abstracts of the testimony as presented by the parties hereto, but we have been at pains to read the statement of facts itself, and our conclusion is that the deed to the Fourth street property now held by Haley is a mortgage, and that, while Haley is the owner of the record title, Pederson and wife are the equitable owners; that the title to the property deeded to Millie Madison now rests absolutely in her, and that a valid consideration was paid; and that there was no fraud in the giving or receiving of any of the deeds complained of. The conclusions to which we have come are strictly in accordance with the conclusions which the trial court reached.

[1, 2] While there are certain circumstances surrounding these transactions which are of a suspicious nature and present many badges of fraud, yet the court will always presume that a transaction has been honestly made and carried out, and the evidence of fraud must be clear and satisfactory. *Rohrer v. Snyder*, 29 Wash. 190, 69 Pac. 748; *Roberts v. Washington National Bank*, 11 Wash. 550, 40 Pac. 225; *Smith v. Doty*, 91 Wash. 315, 157 Pac. 881; *National Surety Co. v. Udd*, 65 Wash. 471, 118 Pac. 347. The testimony fails to convince us of any fraud.

[3] The appellant assigns a number of errors based on the permission given the respondents to testify as to what was the oral agreement between the respondents herein concerning the deeds in question. It has always been the rule in this court that oral testimony may be received to show that an instrument which upon its face is a deed is in fact a mortgage. *Samuel v. Kittenger*, 6 Wash. 261, 33 Pac. 509; *Ross v. Howard*, 31 Wash. 393, 72 Pac. 74; *Borrow v. Borrow*, 34 Wash. 684, 78 Pac. 305. The appellant, however, seems to contend that Haley held the title to this property in trust for Pederson. We do not think there is any trust relationship or question involved in this case, and consequently the cases cited by appellant concerning receiving oral testimony to prove or disprove a trust are inapplicable.

[4] The appellant insisted before the trial court that the evidence showed that the lien of its judgment preceded the conveyance of the property to Miss Madison, and asked that court to decree that Miss Madison holds her title subject to the prior lien of the judgment. The trial court refused to make any finding or conclusion on this question. This ruling was right. This was a suit to set aside certain deeds to real estate because of alleged fraud. The only judgment the court could make would be either to find that there was fraud and set aside the deeds, or find that there was not fraud and dismiss the action. The question as to whether or not the plaintiff's judgment is a lien upon any of the property is not involved in this case. If Millie Madison holds the title subject to lien of ap-

pellant's judgment, that lien may be enforced without recourse to such an action as this.

Finding no error, the judgment is affirmed.

HOLCOMB, C. J., and MOUNT, PARKER, and FULLERTON, JJ., concur.

(108 Wash. 332)

JOHNSON et al. v. CLEMENTS. (No. 15387.)

(Supreme Court of Washington. Sept. 17, 1919.)

SALES ~~6~~479(7)—DEFAULT IN PAYMENT OF INSTALLMENT BY CONDITIONAL VENDEE.

In an action by conditional vendors to cancel contract and forfeit the buyer's rights for default in payment of the first installment, evidence held to sustain the trial court's finding that the buyer had defaulted.

Department 2.

Appeal from Superior Court, Snohomish County.

Action by John Johnson and others against D. A. Clements. From judgment for plaintiffs, defendant appeals. Affirmed.

Kerr & McCord, of Seattle, for appellant.

R. J. Faussett and E. C. Dalley, both of Everett, for respondents.

MOUNT, J. On the 20th day of December, 1917, John Johnson and W. S. Keller, copartners, sold to D. A. Clements, under a conditional sale contract, a certain sawmill, and the machinery and equipment belonging thereto, for the agreed price of \$4,300. One thousand five hundred dollars was paid at the time of the purchase, and the balance was to be paid in two equal installments of \$1,400. One of these installments was due on the 20th day of June, 1918, and the other on the 20th day of December, 1918. The conditional sale contract provided:

"In case default be made by the vendee in paying for said property according to the terms hereof then the vendors shall be entitled to retain all money paid by the vendee on account of the purchase price as liquidated damages and not as a penalty and all the rights of the vendee to the use of said property shall cease and the parties of the first part the vendors may change their option, take the property in payment of the balance, due and owing them under the terms hereof."

Mr. Clements took possession of the property under this conditional sale contract, and in the latter part of August, 1918, Johnson and Keller, copartners, brought this action for the purpose of canceling the contract and forfeiting all the rights of Mr. Clements thereunder, alleging that the purchaser was in default of the payment of the first installment due on June 20, 1918. Mr. Clements

filed an answer, denying default in payment, and alleged that, prior to the time when the first installment came due, an extension of time was granted; that he had made certain payments relying upon that extension; that thereafter the plaintiffs had taken possession of the property, which was of the value of \$6,000; and, by way of cross-complaint, he alleged that he had been damaged in the sum of \$4,000 thereby. Plaintiffs, for reply, denied the affirmative allegations of the answer. Upon these issues the case was tried to the court without a jury. At the close of the trial the court made the following finding:

"That D. A. Clements, the vendee, and defendant herein, has wholly failed and neglected to pay the payment due thereon within six months after the 20th day of December, 1917, except the sum of \$457.58, and that payment has been demanded before this action was brought, and defendant had failed to make said payment to comply with said conditional sale contract as provided therein, and is therefore in default."

On this finding the trial court entered a judgment in favor of plaintiffs, canceling the conditional sale contract and leaving the possession of the property in plaintiffs. Defendant has appealed from that judgment.

Several assignments of error are made, but it is necessary to notice but one. Appellant contends that the evidence is contrary to the finding above quoted. He testified, in substance, that before the \$1,400 payment became due in June, 1918, he requested an extension of time until he could sell certain cedar lumber then in the yard; that the respondents extended the time as requested. The respondents, on the other hand, testified that they made no such agreement. They testified that, after the \$1,400 payment due in June was in default, Mr. Clements came to them and said, in substance, that, if they would not crowd him for a couple of weeks, he would ship out five or six carloads of cedar lumber and pay the balance due upon the \$1,400 payment; and that they thereupon said to him:

"Mr. Clements, if you can pay us \$1,500 in two weeks that will be all right."

They also testified that the cedar lumber, or a greater part thereof, was shipped from the yard, and no payments were made to them; and that afterwards they demanded payment and payment was not made, whereupon they brought this action.

A reading of the testimony in the record convinces us that the weight of the evidence is in favor of the finding made by the trial court, from which it is plain that the appellant was in default at the time this action was brought, and under the plain terms of the contract respondents were entitled to

rescind the conditional sale and take back their property; which they did.

The judgment appealed from is therefore affirmed.

HOLCOMB, C. J., and FULLERTON, PARKER, and BRIDGES, JJ., concur.

(108 Wash. 468)

CONNOR & GROGER, Inc., v. FOREST MILLS OF BRITISH COLUMBIA, Limited. (No. 15327.)

(Supreme Court of Washington. Oct. 15, 1919.)

SALES §—442(4)—MEASURE OF DAMAGES ON BREACH OF WARRANTY DETERMINABLE BY VALUE AT TIME AND PLACE OF DELIVERY.

The measure of damages for breach of warranty in sale is the difference between the property's actual value at the time and place of sale and delivery, and what it would then and there have been worth had it been as warranted; and this though it was bought on a bill of lading, it by buyer's directions and according to the invoice he received being shipped for delivery at a certain place, and there being no evidence that seller had notice or intimation that it was to be diverted to any other market.

Department 1.

Appeal from Superior Court, King County; King Dykeman, Judge.

Action by Connor & Groger, Incorporated, against the Forest Mills of British Columbia, Limited. From judgment on findings that plaintiff was entitled to damages in a certain sum, and defendant to an offset, defendant appeals, and plaintiff brings cross-appeal. Reversed on defendant's appeal and remanded, with directions.

Baxter & Jones, of Seattle, for appellant.
Bronson, Robinson & Jones, of Seattle, for respondent.

MITCHELL, J. This cause was tried without a jury upon the third amended complaint of Connor & Groger, Incorporated. After alleging that each party to the suit was a corporation, the complaint alleged, in substance: That in August, 1914, P. C. Leonard, doing business as the Alliance Lumber Company of Seattle, Wash., in consideration of \$1,200.17, purchased from defendant, Forest Mills of British Columbia, Limited, of Revelstoke, B. C., without opportunity of examination, a carload of lumber shipped from Comaplix, B. C., for delivery at Duluth, Minn., warranted to be "No. 1 and No. 2, clear red cedar siding, according to grades as established by the British Columbia Mountain Lumber Manufacturers' Association"; that defendant knew P. C. Leonard, doing business as the Alliance Lumber Company, bought the lumber for resale, while the lum-

ber was in transit; that P. C. Leonard sold it to Proctor & Groger, Incorporated [name since changed to Connor & Groger, Incorporated] under a warranty the same as originally sold by defendant; that Proctor & Groger, Incorporated, diverted the lumber and sent it to Wilkes-Barre, Pa., where it resold the lumber to a dealer under the same kind of a warranty as to quality and grade. That, upon the arrival of the lumber at Wilkes-Barre, it was discovered to be not up to grade or quality as warranted, that the dealer or customer at that place refused to accept it, and that the expenses and charges incurred in disposing of it and the difference in its value as it was and as it would have been had it been of the quality as warranted caused plaintiff damages in the sum of \$1,000. Paragraph 7 of the complaint is as follows:

"That plaintiff called upon the said P. C. Leonard for payment for said damages so suffered, and said Leonard satisfied plaintiff's claim against him by assigning to plaintiff his right of action against the defendant which plaintiff now holds."

A general demurrer to the complaint was filed, and upon its being overruled defendant filed an answer denying the allegations of the complaint, except it admitted it sold to Leonard the car of lumber and that the complaint contained a copy of the invoice. Further the answer alleged affirmative matter which with plaintiff's reply thereto require no discussion here. At the commencement of the trial, counsel for defendant, in effect reiterating its general demurrer, objected to the introduction of any evidence in support of the complaint.

The objection being overruled, the trial proceeded upon the theory that, upon showing the lumber to be of a quality inferior to the original warranty of defendant, the plaintiff's measure of damages would be the difference between the offer made by the dealer at Wilkes-Barre, Pa., and the amount received there for the lumber, less necessary expenses and charges. The evidence to establish the amount of damages, which was received over specific objections made from time to time as well as the general objection by the defendant, showed, in substance, that the customer at Wilkes-Barre, Pa., had agreed to pay plaintiff \$1,827.02 for the lumber, which amount less freight of \$355.52 would leave \$1,471.50 plaintiff would have received for the lumber, whereas, after expenses, testified to have been necessary, in the sum of \$308.94, the lumber was sold, a portion at Wilkes-Barre, Pa., and the rest at Sidney in the state of New York, for \$705.68, leaving net the sum of \$324.74, which, taken from \$1,471.50 which plaintiff would have received had the lumber been as originally warranted, leaves the sum of \$1,146.76 loss.

The testimony shows Leonard was paid "\$1,200 and better" for the lumber, by plaintiff. Leonard, in writing, without stating the consideration therefor, assigned to plaintiff all his rights against defendant for shipping inferior stock. There was evidence tending to show much of the lumber was not up to the grade mentioned in the original sale by defendant, the effect of which is strongly challenged by defendant—an immaterial controversy as we view the whole case. The pleadings and proof are silent as to any specific damages or loss suffered by Leonard; nor is there any testimony to show the market conditions as to price for the grade of lumber claimed by plaintiff to have been actually sold by defendant to Leonard, at Duluth, Minn., or elsewhere than at Wilkes-Barre, Pa., and Sidney, N. Y.

At the conclusion of plaintiff's proof, defendant moved for a nonsuit on the ground that no cause of action had been proven against it. The motion was denied, whereupon defendant introduced evidence in support of its affirmative answer. The court made findings of fact that plaintiff was entitled to damages in the sum of \$1,146 and interest, and that defendant was entitled to an offset with interest, and entered judgment accordingly. Each party took proper exceptions to adverse findings and has appealed from that portion of the judgment adverse to it.

For the purposes of the case it may be assumed, as contended for by plaintiff, that the proof shows defendant sold the lumber to Leonard knowing he intended to resell it, and that under such circumstances it is the law Leonard was justified in selling it under the same warranty or representations as to quality that he had purchased it, and that his customer could have recourse on him for damages if the quality of the lumber was inferior, which would be the measure of Leonard's loss as against defendant although Leonard had not actually reimbursed his vendee. However, such assumption is upon the understanding that all the transactions occurred in the same place or market, and about the same time. For the purposes of the case it may be further assumed, as contended for by plaintiff, that when one sells lumber representing it to be of a certain grade, knowing his vendee intends to resell it, and the vendee does resell it with the same warranty or representation as to quality, and the subvendee sustains a loss by reason of the inferior quality of the lumber, the subven-

dee may, in the absence of a judgment against his vendor or any reimbursement other than an assignment of his vendor's right of action against the original vendor, sue and recover damages on the assignment against the original vendor, provided the proof and damages are within the scope of the liability involved in the sale by the original vendor. The qualifications just mentioned suggest the weakness of plaintiff's case. This is not an action to rescind the purchase and recover the purchase price, nor one for fraud and deceit, but one for breach of warranty or representations as to the quality of personal property. In the case of *Abrahamson v. Cummings*, 65 Wash. 35, 117 Pac. 709, this court, citing many cases, said:

"This was not an action to rescind the purchase and recover the purchase price, but to recover damages for breach of warranty. The measure of damages in such a case, according to the universal trend of authority, is the difference between the actual value of the property at the time and place of sale, and its actual value at the same time and place had it been what it was warranted to be."

If reliance be had upon the allegation and proof that Leonard purchased the lumber upon a bill of lading and sight draft, without any opportunity to examine the lumber, the answer is that by his directions, and according to the invoice he received, the lumber was shipped for delivery to him at Duluth, Minn., and there is no proof, either direct or by the slightest inference, that defendant ever had any notice or intimation the lumber was to be diverted to any other market, and it is plain the record contains no proof of the market value of such lumber as plaintiff claims it received, except at Wilkes-Barre, Pa., and Sidney, N. Y.

Not having responded to the rule as to the measure of damages for the breach of such a contract, concerning time and place of the original sale and delivery, plaintiff was not entitled to recover. We understand defendant, waiving all claims on account of an offset allowed it in the judgment, insists upon its rights to a judgment of nonsuit. Our conclusion on defendant's appeal disposes of the cross-appeal without the necessity of any further comment thereon.

The judgment is reversed on defendant's appeal, and the cause is remanded, with directions to the lower court to enter judgment of nonsuit in favor of defendant.

HOLCOMB, C. J., and MACKINTOSH, TOLMAN, and MAIN, JJ., concur.

(108 Wash. 455)

**WEIFFENBACH v. PUGET SOUND
BRIDGE & DREDGING CO.**
et al. (No. 14893.)

(Supreme Court of Washington. Oct. 15, 1913.)

**1. EVIDENCE \Leftrightarrow 474(18)—OF SUPERINTENDENT
OF CONSTRUCTION OF COUNTY COMPETENT AS
TO VALUE OF EXTRAS IN CONTRACT.**

In an action by subcontractor for amount claimed to be due on the contract as well as an amount claimed for extras, the general contract being with the county for the construction of a courthouse, *held*, that the superintendent of construction for the county was a competent witness as to the amount and reasonable value of the extras, even though his determination might not be conclusive.

**2. COSTS \Leftrightarrow 60—APPORTIONMENT IN EQUITY
CASES IN DISCRETION OF COURT.**

Unlike an action at law, where plaintiff is entitled to costs under Rem. Code 1915, § 476, the apportionment of costs in an equitable suit rests, under section 493, in the discretion of the court.

**3. COSTS \Leftrightarrow 60—WHAT CONSTITUTES EQUITABLE
SUITS.**

A suit by subcontractor on a county building to recover an amount claimed due from the principal contractor, where an order restraining county from making further payments to the principal contractor was sought as well as relief against sureties on his bond, is equitable in its nature, and costs should be apportioned under equitable rules.

**4. COSTS \Leftrightarrow 32(3) — ASSESSMENT AGAINST
PLAINTIFF WARRANTED THOUGH HE HAD
JUDGMENT WHERE CLAIM WAS EXCESSIVE.**

Where a suit by subcontractor on county building against the principal contractor was equitable in its nature, and though he recovered a substantial judgment his claim was grossly excessive and fraudulent, *held*, that the assessment of costs against the subcontractor was warranted, particularly where there was no dispute as to the amount recovered.

Department 2.

Appeal from Superior Court, King County;
John S. Jurey, Judge.

Action by August Weiffenbach against the Puget Sound Bridge & Dredging Company and others. From the judgment for part only of the amount claimed, plaintiff appeals. *Affirmed.*

See, also, 103 Wash. 240, 174 Pac. 10.

E. H. Flick and Preston & Thorgrimson, all of Seattle, for appellant.

Roberts, Wilson & Skeel, Fred C. Brown, A. H. Lundin, Howard Hanson, and S. M. Brackett, all of Seattle, for respondents.

MOUNT, J. This action was brought to recover \$14,510.69, a balance alleged to be due the plaintiff upon a subcontract for certain construction upon the King county court-

house, and also for \$79,200.33 for alleged extras furnished upon that building. The complaint prays for a judgment against the Puget Sound Bridge & Dredging Company for \$95,696.82, with interest; for an attorney's fee of \$7,500; for such judgment against King county as may protect the plaintiff in case judgment may not be enforced against the other defendants; and for an order restraining King county from making further payments to the Puget Sound Bridge & Dredging Company. The bonding companies were made parties because of being sureties upon the main contractor's bond for the faithful performance of the original contract. Several defenses were interposed by the Puget Sound Bridge & Dredging Company and the county. The defendants admitted the balance alleged to be due upon the contract, but denied the amount claimed as extras, and by cross-complaint allege damages for imperfect work and materials and delay in the performance of the work. Upon these issues the case was tried to the court without a jury. The trial occupied six weeks' time of the trial court. The record is voluminous. The trial involved an accounting between the county, the original contractor, and the subcontractor, and the reasonable value of the work and materials claimed as extras. At the conclusion of the trial the court found that the county was indebted to the principal contractor, the Puget Sound Bridge & Dredging Company, in the sum of \$33,616.67; that the Puget Sound Bridge & Dredging Company was indebted to the plaintiff in the sum of \$33,276.93; and ordered that the amount found due from the county to the Puget Sound Bridge & Dredging Company be deposited with the clerk of the superior court, that the amount due the plaintiff be paid from that fund, and that after certain amounts found due the interveners had been paid the balance be paid to the plaintiff. The court also ordered that the defendants were entitled to their costs. The plaintiff has appealed from that decree.

The principal facts may be briefly stated as follows: In July, 1914, King county entered into a contract with the Puget Sound Bridge & Dredging Company by which that company agreed to construct a courthouse for an agreed sum. This contract was for a building consisting of a basement and two stories, according to plans and specifications, but provided that additional stories might be added within a given time. Thereafter, on August 18, 1914, the appellant entered into a subcontract with the Puget Sound Bridge & Dredging Company by which contract the appellant agreed to furnish and install in the building all doors and trim, plate glass, hardware, outside windows, skylights, galvanized-iron cornices, etc., for an agreed sum. Thereafter, at the option of

the county three additional stories were added to the building; the work to be done at an agreed price according to plans and specifications furnished and made a part of the contract. The subcontract between appellant and the Puget Sound Bridge & Dredging Company provided as follows:

"Whereas, the party of the first part (appellant) has examined said plans and specifications and the contract of second party with King county, Washington, and is familiar therewith, now therefore, it has been and is hereby now agreed by and between the parties hereto:

"First. That first party will do all of the work and furnish all of the material necessary and required to be done by and under the plans and specifications hereinabove referred to, in the construction and installation of all the doors and trim, all plate glass, all hardware, all outside windows and hardware and plate glass, all roofing, all skylights, all metal windows and glass and all galvanized iron cornices, including everything incidental to and in connection with all of the above-named items, construction and installation, all to be done in strict accordance with the contract of second party with King county, Washington, and the plans and specifications of King county as furnished to second party, and the first party does expressly agree to and in all things conform to all the requirements of King county, its architect and its superintendent of buildings, and to install all of said above work and material under the said contract and specifications to the entire satisfaction of King county, its architect and superintendent of buildings."

After the building was completed, an itemized claim for extras was made by appellant to the Puget Sound Bridge & Dredging Company and in turn by that company to the county. This claim was referred to Mr. Aldrich, superintendent of construction for the county, who, after examining the same, certified that the county was liable to the Puget Sound Bridge & Dredging Company for the sum of \$33,616, from which should be deducted \$5,100 for defective work. Appellant claimed a larger sum and afterwards filed notice of a claim against the county and the sureties upon the contractor's bond, in accordance with the statutes relating to bonds of contractors upon public works; and brought this suit. No money judgment was demanded against the county. The relief demanded against the county was that appellant have "such judgment against said county of King as may be necessary to protect said plaintiff in the event of the failure of the judgments against any of the remaining defendants, to the extent that such judgment may be proper by reason of permitting the withdrawal of funds by the general contractor [the bridge company] in the face of the claims of plaintiff herein," and that the county be restrained from making further payment of reserved percentage to the Puget Sound Bridge & Dredging Company.

[1] We find it unnecessary to mention all the points raised by the appellant. One of the points is that the trial court erred in following the allowance made by Mr. Aldrich. The respondents claimed upon the trial that the findings of the superintendent were conclusive of the amount and reasonable value of extras. The trial court was inclined to this view, but refused to so rule and went into the merit of each claimed item and the reasonable value of each article and the time necessary to install the work; and finally concluded upon conflicting evidence that the allowance made by the superintendent was correct upon all the items in dispute. We are of the opinion that the trial court properly so found. We shall therefore not follow the argument of counsel, or the evidence, upon many items in dispute; nor upon the question of the qualifications of the superintendent to pass upon the items, except as a witness as to values. As to these matters his evidence was clearly competent.

One of the principal items in dispute was whether the outside window casings were to be of bronze or galvanized iron. It is claimed by the appellant that the contract provided for iron, but that he was required to substitute bronze, for which he claimed an extra amounting to \$6,600. It is plain from the original contract that these window casings were to be of bronze, and a reference to the paragraph of the subcontract above quoted makes it plain that appellant was to do his work "in strict accordance with the contract of second party with King county." So the trial court properly found that this item was not an extra.

[2-4] Appellant finally contends that the court erred in assessing costs against the appellant. It is argued that the action is a law action, and that since appellant obtained judgment he was entitled to his costs, under section 476, Rem. Code. We have held that the apportionment of costs in an equitable suit rests in the discretion of the court. *Seward v. Spurgeon*, 9 Wash. 74, 37 Pac. 803; *Churchill v. Stephenson*, 14 Wash. 620, 45 Pac. 28; *Brown v. Anacortes*, 79 Wash. 33, 139 Pac. 652; section 493, Rem. Code. There can be no doubt that this was an equitable action, because the complaint prays for a restraining order against the county and for equitable relief. The trial of the case involved a long accounting between the parties, and the complaint upon its face is in the nature of a lien foreclosure seeking to hold the sureties upon the statutory bonds of the original contractor. The decree entered was a decree in equity. If there can be a case where the plaintiff is liable for costs, though he succeed in part, this is such a case; for here the appellant filed an outrageously excessive and fraudulent claim for extras and testified that it was correct, when it was

afterwards clearly proved to have been made fraudulently. The amount allowed to the appellant by the court was never disputed by any of the respondents. For all these reasons, we are satisfied that the trial court properly awarded costs in favor of the respondents.

We find no error, and the judgment appealed from is therefore affirmed.

HOLCOMB, C. J., and PARKER, BRIDGES, and FULLERTON, JJ., concur.

(108 Wash. 319)

LEHMAN v. MARYOTT & SPENCER LOGGING CO. (No. 15339.)

(Supreme Court of Washington. Sept. 3, 1919.)

1. NEGLIGENCE ¶21 — CARE ESSENTIAL TO PREVENT SPREADING OF FIRE.

One starting a fire on his own land is required to exercise reasonable care to prevent it from spreading to a neighbor's land; otherwise, he is liable for his negligence.

2. NEGLIGENCE ¶134(1)—EVIDENCE INSUFFICIENT TO SHOW NEGLIGENCE IN PERMITTING SPREAD OF FIRE.

Evidence held insufficient to show that defendant logging company was negligent in permitting the spread of fire to plaintiff's property.

3. NEGLIGENCE ¶62(1) — PERMITTING SPREAD OF FIRE TOO REMOTE WHEN NEW EFFICIENT CAUSE INTERVENES.

If one is negligent in permitting the spread of fire, but a new cause intervenes which of itself is sufficient to stand as the cause of the damage, the original negligence is too remote to sustain recovery.

4. NEGLIGENCE ¶62(1) — WIND INTERVENING RELIEVES PARTY FROM RESPONSIBILITY FOR SPREADING FIRE.

A strong wind, which arises while a fire is in progress and carries it from the land where set to where it would not otherwise have spread, is an intervening cause relieving the party responsible for the original setting from liability for damages.

Department 1.

Appeal from Superior Court, King County; J. T. Ronald, Judge.

Action by Samuel S. Lehman against the Maryott & Spencer Logging Company. From judgment for plaintiff, defendant appeals. Reversed, and cause remanded, with direction to dismiss.

Geo. H. Walker and Robt. B. Walkinshaw, both of Seattle, for appellant.

Elias A. Wright and Sam A. Wright, both of Seattle, for respondent.

MAIN, J. The purpose of this action was to recover damages for loss of property destroyed by fire. The cause was tried to the court and a jury and resulted in a verdict in favor of the plaintiff. The defendant interposed a motion for judgment notwithstanding the verdict and in the alternative for a new trial, both of which were overruled. Judgment was entered upon the verdict, and the defendant appeals.

The respondent is the owner of a small ranch on the north bank of the Dosewallips river about six miles west of Brinnon in Jefferson county. On this ranch there were some small buildings and other articles of property. The Maryott & Spencer Logging Company, the appellant, was engaged in logging operations on the south side of the Dosewallips river and near the respondent's ranch. The appellant desiring to change the location of its logging camp, some time prior to the 28th day of May, 1918, felled and bucked the timber on a tract of land on the south side of the river for a distance of about 700 feet running along the river and extending back about 350 feet. This tract of land was across the river from the respondent's property and a little to the west. The river at this place is approximately 100 feet wide. The tract of land referred to was in the Olympic National Forest Reserve. On the 28th day of May, 1918, the timber upon the camp site, having been previously cut and prepared, was burned under the direction and supervision of a federal forest ranger, who was acting in the line of his duty.

Prior to the firing, a fire trail had been made around the tract to be burned. As is common in such cases, the fire continued to burn in various places over the tract until on the 4th day of June, when it escaped to the adjoining property, and, after burning over six or seven acres, was put under control and spread no farther. On the 7th day of June, there was no fire either on the original tract fired or that to which it had escaped on the 4th of June, except one smoldering root in about the center of the proposed camp site. This was burning underground and was so situated that it could not be extinguished. The fire was beneath the surface, and a little smoke was coming therefrom. All the debris over the tract had previously been consumed by the fire. On this date some dirt was thrown over the smoldering root. Conditions remained the same until Sunday afternoon, June 9th, when a fire occurred which destroyed the respondent's property, for which he seeks recovery. The fire also destroyed a large amount of property owned by the appellant.

During the forenoon of the 9th, the wind arose and increased in velocity until about 2 or 3 o'clock in the afternoon, when it was blowing what is referred to as a "gale." At

about the time the fire started the wind was not blowing consistently in one direction, but was whirling to some extent. On Sunday the watchman was on duty, a man of many years' experience in the woods. He visited the camp site between 9 and 10 o'clock in the morning, and at that time there was smoke only from the one smouldering root above referred to. He visited the site every hour thereafter, and when he was returning to it between 2 and 3 o'clock in the afternoon he observed a couple of "little fires on the hill above the camp site." He started for the logging camp to get help; but, owing to the wind prevailing at that time, the fire spread rapidly and did a great amount of damage. The facts above stated are supported by evidence not in conflict.

[1] The first question is whether the appellant was negligent in looking after the fire after it had been started, and particularly on the 9th of June. The rule in such cases is that one starting a fire on his own land is required to exercise reasonable care to prevent it from spreading to a neighbor's land. If in this regard he acts as a reasonably prudent person would have acted under like or similar circumstances, he is not guilty of negligence. On the other hand, if he fails to so act, he has not exercised that degree of care which the law requires of him and would be chargeable with negligence. Liability must be predicated upon negligence. *Kuehn v. Dix*, 42 Wash. 532, 85 Pac. 43; *Sandberg v. Cavanaugh Timber Co.*, 95 Wash. 556, 164 Pac. 200.

[2] Applying the rule stated to the present case, we think there is no evidence to justify a finding of negligence on the part of the appellant. For two or three days prior to the 9th of June, there had been no fire except the smouldering root. This was near the center of the camp site, and the debris thereon had been previously burned. A watchman had been left in charge, who visited the property hourly on Sunday prior to the fire and discovered it soon after it broke out. At this time the condition of the wind was such that the fire spread with great rapidity. Under the circumstances, the appellant exercised ordinary care to prevent the spreading of the fire. It was as vitally interested in seeing that the fire did not escape, as was any other person, if not more so. It was not reasonably to be anticipated that the wind would cause the fire from the smouldering root to escape and do damage, assuming that it came from this source. There is no evidence of any other fire upon the tract at that time or for some days previous.

[3] Assuming, however, that the appellant did not exercise the required degree of care, it does not follow that the respondent can prevail. If the appellant were negligent and a new cause intervenes, which of itself is

sufficient to stand as the cause of the misfortune, the first act is considered too remote to sustain a recovery. In *Stephens v. Mutual Lumber Co.*, 103 Wash. 1, 173 Pac. 1031, upon this question it was said:

"One who loses property by fire is governed by the established rules of law, and recurring to first principles, if subsequent to the act of the party charged, whether it be rightful in its inception, or wrongful in the sense that it is negligent, a new cause intervenes which of itself is sufficient to stand as the cause of the misfortune, the first act is considered as too remote to sustain a recovery. In logging operations and in the clearing of new lands, it is necessary to build fires and to destroy waste. This cannot be done without a certain hazard to other property; but the law does not, for that reason, deny the right to maintain fires in the prosecution of legitimate business, nor will it charge one with negligence who fails to put out a fire which is not threatening, when such fire, by reason of some new cause, lodges on the property of another or goes beyond the control of the person who set it out."

[4] In this case it is apparent that no fire would have occurred, and no loss would have resulted from the fire, had it not been for the unusual condition of the wind. A strong wind, which arises while a fire is in progress and carries it where it would not otherwise have spread, is an intervening cause which will relieve the party responsible for the original fire from liability from loss. In *Thompson's Commentaries on the Law of Negligence*, vol. 1, § 126, the rule is so stated:

"A strong wind which arises while a fire is in progress and carries it where it could not otherwise have spread, and there destroys property, is an intervening cause which will relieve the party responsible for the original fire from liability for the loss of such property, under principles already explained."

Considerable discussion is found in the briefs under the question of when the wind, being considered as the "act of God," will relieve from liability, and when it will not. The rule on this question is well stated in *Thompson's Commentaries on the Law of Negligence*, vol. 1, § 72, as follows:

"The rule under this head can well be said to be that, 'when the act of God is the cause of a loss, it is not enough to show that the defendant has been guilty of negligence; the case must go further and show that such negligence was an active agent in bringing about the loss, without which agency the loss would not have occurred.'"

The evidence in the present case fails to show that, even though the appellant was negligent in looking after the fire, such negligence was the active agent in bringing about the loss and without which agency the loss would not have occurred.

The unconflicting evidence in this case can lead to but one conclusion, which is that the active agent in producing the loss for which

this action is brought was the violence of the wind, without which it would not have occurred. This, as stated in *Stephens v. Mutual Lumber Co.*, supra, was an intervening new cause "which of itself" was sufficient to stand as the cause of the misfortune.

The case of *Jordan v. Welch*, 61 Wash. 569, 112 Pac. 656, is different in its facts, and therefore distinguishable. In that case railroad contractors in construction work permitted sparks or live coals from an engine operating a steam shovel to fall upon the right of way, and allowed the fire to spread to an adjoining meadow, during the dry season, and took no precautions against the communication of the fire to the adjoining lands. In other words, permitted the sparks and live coals to fall upon dry grass in the right of way, without exercising any care to prevent it from spreading to adjoining lands.

The case of *New Brunswick S. & C. T. Co. v. Tiers*, 24 N. J. Law, 697, 64 Am. Dec. 394, and the case of *Merritt v. Earle*, 29 N. Y. 115, 86 Am. Dec. 292, are both cases where property was lost or destroyed while in the possession of a carrier. The rule of liability of a carrier in such cases being that of an insurer and not that of ordinary care, those cases are inapplicable here.

The judgment will be reversed, and the cause remanded, with a direction to the superior court to dismiss the action.

HOLCOMB, C. J., and MACKINTOSH and MITCHELL, JJ., concur.

(108 Wash. 360)

BRANDON v. GLOBE INV. CO.
(No. 15377.)

(Supreme Court of Washington. Sept. 24, 1919.)

1. MASTER AND SERVANT §217(3), 234(1)—
WHERE DEFECT OBVIOUS, RECOVERY BARRED
BY CONTRIBUTORY NEGLIGENCE OR ASSUMPTION
OF RISK.

Where the danger or defect is open to the knowledge of the servant as much as of the master, the servant cannot recover for injury, having been guilty of contributory negligence or assumed the risk.

2. MASTER AND SERVANT §217(5), 234(3) —
CONTRIBUTORY NEGLIGENCE OR ASSUMPTION
OF RISK, BAR TO RECOVERY.

Where a window washer, accustomed to the building and having had opportunity for inspection, was precipitated to the ground and killed because the window sash to which he held pulled out, his widow cannot recover for his death on account of his contributory negligence or assumption of risk.

Department 2.

Appeal from Superior Court, King County; Mitchell Gilliam, Judge.

Action by May Brandon, administratrix, against the Globe Investment Company. From a judgment for plaintiff, defendant appeals. Reversed, and remanded for dismissal.

Roberts & Skeel, of Seattle, for appellant.
Karr & Gregory and H. G. Sutton, all of Seattle, for respondent.

BRIDGES, J. On April 27, 1918, and for many years prior thereto, the appellant was the owner of the Globe Block in Seattle, Wash. For six or eight years prior to that date Neil A. Brandon had been employed as the window washer for such block. He used his own methods and tools in the performance of this work. It had been his habit to wash the windows several times each year. The windows were all of the common upper and lower sash kind. On the date above mentioned Brandon was washing one of the windows on the second floor of the building. While no person saw the accident, yet we believe it can fairly be stated that, after washing the inside of this particular window, the deceased raised the lower sash and climbed out onto the window sill, then lowered both sashes, and, while holding onto the window with one hand, used the other to wash the outside of the window. Manifestly the window was not sufficient to bear such weight as he put on it, for he fell to the paved alley below, and shortly thereafter died as a result of the fall. The window had pulled through and between the stops, and was hanging out over the side of the building, by means of the window ropes. Those who afterwards found the window in this condition replaced it between the stops without the removal of the latter. The respondent is the duly appointed administratrix of the deceased's estate. The negligence charged against the appellant is that it kept the window in an improper and unsafe condition, and so that the casing did not properly fit, and that the window was loose and could with ease be pulled through the strips or stops intended to hold it in place. There was a verdict in a substantial sum for the respondent. This appeal is from the judgment entered thereon. The appellant during the trial made timely motions for nonsuit, an instructed verdict, and for a new trial, all of which, however, the trial court refused.

[1] It is too well settled to need citation of authority that it is the duty of the master to furnish his servant a reasonably safe place in which to work; but another rule, which qualifies and runs with the one announced, and which is equally well settled, is that, where the danger or defect is as much open to the view and knowledge of the servant as of the master, then the servant cannot re-

cover for an injury, because he, having knowledge of and appreciating the danger or defect, either is guilty of contributory negligence or has assumed the risk. It is upon this principle that this case must be decided. In the case of *Griffin v. Ohio & Mississippi Railway Co.*, 124 Ind. 326, 24 N. E. 888, it was said:

"Where the danger is alike open to the observation of all, both the master and servant are upon an equality, and the master is not liable for an injury resulting from the dangers of the business."

At section 346, *Beach on Contributory Negligence* (3d Ed.), it is stated:

"Knowledge on the part of the employer and ignorance on the part of the employé are of the essence of the action, or, in other words, the master must be at fault and know of it, and the servant must be free from fault, and ignorant of his master's fault, if the action is to lie. The authorities all state the rule with these qualifications."

The rule above announced has become the settled law of this state. In the case of *Jennings v. Tacoma Ry. & Motor Co.*, 7 Wash. 275, 34 Pac. 937, Judge Dunbar announced the rule in the following language:

"It is claimed by the respondent that the rule that, where a servant enters upon employment, 'he assumes the usual risk and perils of the service,' as applied to the facts of this case, still gave the respondent the right to assume that the master had furnished him a safe and convenient place in which to perform the services required of him. That proposition is no doubt correct, but the assumption cannot be relied upon after actual knowledge to the contrary is brought home to the mind of the servant. The assumption will control only where the danger is not apparent. No sane man is expected to act on an assumption which he knows to be false. It is a man's duty to exercise common sense when in the employment of a master, as well as any other time."

In the case of *Miller v. Moran Bros. Co.*, 39 Wash. 631, 81 Pac. 1089, 1 L. R. A. (N. S.) 283, 109 Am. St. Rep. 917, this court said:

"That the master is under obligations to give the servant a reasonably safe place to work, is of course, a well-established principle of law. But where the servant is in as good a position as the master to ascertain and understand the situation, and does equally well know and appreciate the existing conditions, he cannot be heard to complain from injuries sustained by working therein."

In the case of *Cole v. Spokane Gas & Fuel Co.*, 66 Wash. 393, 119 Pac. 831, the rule was announced in the following language:

"The master could have no more knowledge of such a defect than the servant possessed, for the instrumentality was so simple that it was the duty of the servant to know its condition, and either call the attention of the master to it or protect himself against the possibility of injury.

The rule seems well established that an implement of simple structure, presenting no complicated question of power, motion, or construction, and intelligible in all of its parts to the duller intellect, does not come within the rule of safe instrumentalities, for there is no reason known to the law why a person handling such instrument and brought in daily contact with it should not be chargeable equally with the master with a knowledge of its defects."

To the same effect see the following cases: *Wilson v. Northern Pacific Ry. Co.*, 31 Wash. 67, 71 Pac. 713; *Tham v. Steeb Shipping Co.*, 39 Wash. 271, 81 Pac. 711; *Lynch v. Ninemire Packing Co.*, 63 Wash. 423, 115 Pac. 838, L. R. A. 1917E, 178; *Dahl v. Puget Sound Iron & Steel Works*, 77 Wash. 126, 137 Pac. 815; *Johnston v. Nichols*, 83 Wash. 394, 145 Pac. 417; *Dixon v. Western Union Tel. Co. (C. C.)* 68 Fed. 630; *Larsson v. McClure*, 95 Wis. 533, 70 N. W. 662; *Day v. Cleveland, Columbus, Cincinnati & St. Louis Railway Co.*, 137 Ind. 206, 36 N. E. 854; 18 R. C. L. § 172 et seq., p. 683 et seq.

[2] The testimony in this case plainly shows that the master did not have any actual knowledge of the defect in the window in question; indeed, it shows that the janitor whose duty it was to look after and repair the windows in the building did not know of the defect. The deceased, however, was an experienced window washer. He was allowed to do the work by his own methods and with his own instruments. He had washed the windows of this building, including the one in question here, probably once a month for a number of years. No one could have been so well acquainted with the defects in this window as he, for it is admitted that such defect as there was must have existed for a number of years. The window was not made to serve the purpose to which the deceased was putting it; and if he desired to use it in that way it was his absolute duty to make investigation and learn for himself whether or not it was of sufficient strength to permit him to safely make such use of it. The slightest investigation by him would have shown him whether he could safely do his work in the way he desired to do it. He could not blindly rely on the duty of the master to furnish him a reasonably safe window for the uses which he desired to make of it. He had a duty to himself; a duty to make investigation to see if the window was strong enough to serve his purpose. The law would not permit him to close his eyes to all defects, and then, if he be injured as a result of some defect which it was the duty of the master to remedy, recover damages of the master for such injury. Any such rule would allow the man injured to take advantage of his own wrong, and would encourage carelessness. If the window casing in the first place had been built too small, or if it was shrunk so

that it would push out between the stops, this condition must have been manifest to the deceased, had he made the smallest amount of investigation. It is very clear to us from the facts that the deceased was either guilty of contributory negligence or assumed such risk as existed in doing the work in the way he did it.

Most, if not all, the cases relied upon by respondent, were based and decided upon principles of law not involved here. In most of them the defect was latent, and the instrument or place was being put to a common use. The case of *Monahan v. National Realty Co.*, 4 Ga. App. 680, 62 S. E. 127, was one where the plaintiff sued to recover damages for an injury to her hand, caused by the breaking of the chains supporting a window sash. She was in the act of raising the window when the chain broke. Here the defect was latent, and the ordinary use was being made of the window. In the case of *McIntyre v. Detroit Safe Co.*, 129 Mich. 385, 89 N. W. 39, the facts were that the plaintiff had driven a wagon on certain scales for the purpose of weighing the load. The sills below broke because of defects. Again we have a plain case where the defect was latent, and a casual examination would not have shown it, and the scales were being put to the use for which they were built. In the case of *Alamo Oil & Refining Co. v. Richards* (Tex. Civ. App.) 172 S. W. 159, the court expressly held that the plaintiff was not required to examine for latent defects. In the case of *White v. Beverly Building Association*, 221 Mass. 15, 108 N. E. 921, the plaintiff was using a common stair with a railing. The railing broke and resulted in injury to the plaintiff. Plainly this case does not involve the same principles which must control the one before us. The other cases relied upon by respondent are of the same general kind as those which we have noticed. They are all vastly different in their facts from the case at bar.

The case of *Fanjoy v. Seales*, 29 Cal. 244, very closely resembles the case at bar. The facts were that appellant was painting a brick building which had but recently been completed by contractors employed by appellee. In order to do the painting, appellant had suspended a staging to the cornice of the building, and while he was standing on the cornice, in the performance of his work, a portion of the wall, together with the cornice, fell, throwing him to the ground and injuring him. The testimony showed that appellant was doing his work in the usual and customary way, and that appellant was ignorant of any defect. The court said:

"Cornices are intended and constructed for ornamental purposes, and not for the use to which the one in question was put by the paint-

ers. We are not satisfied that the general custom of painters to use cornices for supporting the stagings and platforms necessary for the prosecution of their work of painting houses imposes on the owners thereof the duty of constructing such cornices sufficiently strong to sustain burdens for which they were not designed."

We see no escape from the conclusion that the judgment must be reversed, and the case remanded for dismissal. It is so ordered.

HOLCOMB, C. J., and PARKER, FULLERTON, and MOUNT, JJ.

(108 Wash. 373)

ANDERSONIAN INV. CO. v. WADE.
(No. 15394.)

(Supreme Court of Washington. Oct. 1, 1919.)

1. LANDLORD AND TENANT §291(11)—POSSESSION OF TENANT PRESUMED LAWFUL.

The possession of a tenant originally lawful is so presumed until the contrary appears.

2. LANDLORD AND TENANT §290(2)—WRONGFUL BREACH OF CONDITIONS NECESSARY IN UNLAWFUL DETAINER.

A tenant should not be ousted in an unlawful detainer proceeding except for the wrongful breach of the conditions of the letting.

3. LANDLORD AND TENANT §290(3)—TENANT ENTERING LAWFULLY MAY SET UP LEGAL OR EQUITABLE DEFENSES.

Where a tenant acquires possession lawfully and it is sought to oust him because of his subsequent acts, he may defend by setting up any defense which will justify his acts, whether legal or equitable; but if a person gains possession wrongfully, or gains it under circumstances where to permit him to hold possession would violate the express provisions of the statute, he may not defend by showing right of possession either legal or equitable.

4. EVIDENCE §384—PAROL EVIDENCE RULE AS A RULE OF SUBSTANTIVE LAW.

While the rule known as the parol evidence rule is usually referred to as a rule of evidence, it is more properly a rule of substantive law, since it is a rule of substantive law and not any rule relating to the admissibility of evidence that gives the rule effect.

5. EVIDENCE §442(1) — CONTEMPORANEOUS MODIFICATION OF WRITTEN AGREEMENT MAY BE SHOWN BY PAROL.

When the acts and conduct of the parties to a written agreement occurring subsequent thereto show an addition to or modification thereof, or the acts of one party acquiesced in by the other show such modification, no rule of evidence precludes a showing of the entire transaction, even if a part thereof is a parol contemporaneous agreement adding to, varying, or modifying the written agreement.

6. EVIDENCE §439—RULE AS TO PAROL EVIDENCE INTENDED TO PREVENT FRAUD.

The parol evidence rule is intended to prevent, not to promote, frauds, and it would be

a fraud to allow a party to a written agreement to enforce it as written when he has agreed not to do so, where the other on the faith of the agreement has acted thereon to his detriment.

7. LANDLORD AND TENANT ¶290(3)—**LANDLORD ESTOPPED TO DENY TENANT'S RIGHT TO ALTER PREMISES.**

Where, at the time of the execution of a written lease, a landlord agrees that a restriction in the lease as to the use of the premises will never be enforced, and oral permission is given to make certain alterations, and the tenant relying thereon expends a large sum of money in making the alterations, the landlord is estopped from denying that the tenant had authority to make such alterations, and cannot oust him in unlawful detainer proceeding for a breach of the restriction in the written lease.

8. LANDLORD AND TENANT ¶152(9)—**PRINCIPAL AND AGENT** ¶177(4)—**LANDLORD ESTOPPED BY ACTS OF AGENT.**

Where an agent negotiating a lease for a landlord agreed with tenant that the latter should make alterations on the premises contrary to a restriction contained in the lease, and the tenant relied thereon and expended a large sum of money in making the alterations, the knowledge of the agent was the knowledge of the landlord, and the landlord is estopped to deny that the tenant had authority to make such alterations.

Department 2.

Appeal from Superior Court, King County; J. T. Ronald, Judge.

Action by the Andersonian Investment Company against T. W. Wade. Judgment for defendant, and plaintiff appeals. Affirmed.

Piles & Halverstadt, of Seattle (F. C. Reagan, of Seattle, of counsel), for appellant.

Dudley G. Wooten, of Seattle, for respondent.

FULLERTON, J. In February, 1917, the appellant, Andersonian Investment Company, being the lessee of a certain building in the city of Seattle, sublet a storeroom therein at a stated monthly rental, to the respondent, Wade, for a term of one year. The lease to Wade was in writing and contained a stipulation that the storeroom was to be used "for the purpose of conducting therein the sale of automobile accessories and for no other purpose," and the further stipulation that—

"The lessee was not to make any alterations, additions or improvements in said premises, without the consent of the lessor in writing first had and obtained."

The lease contained the usual stipulations for forfeiture in the case of nonpayment of rent, and left it optional with the lessor to declare the lease forfeited and the term ended for a breach of the other conditions, reciting that it was mutually covenanted and agreed between the parties that a waiver by

the lessee of any covenant, agreement, stipulation, or condition of the lease should not be construed as a waiver of any succeeding breach of the same covenant.

As originally constructed, the room had a balcony midway between the floor and ceiling, extended from the front of the room towards the back, for about three-fourths of the distance, and for the full width of the room save about nine feet, reached by a stairway leading upwards from the floor. While there is a dispute in the evidence concerning the fact, it was overwhelmingly proven that, at the time the negotiations were in progress which led up to the lease, the respondent stated, to the agent of the appellant who negotiated on its behalf, that he desired to use the space above the balcony as a living apartment for himself and his family, and desired some additions made thereto to make the place more suitable for that purpose. The agent agreed that these additions might be made, agreeing further to pay the bills for the materials necessary to make the additions. When the written lease was presented for signature, it was noticed by the respondent that it limited the use of the room to the sale of automobile accessories and contained no provision for the addition requested. Payment of a check theretofore given for the first month's rent was countermanded and the matter taken up with the agent. He refused to make any change in the lease as written, but assured him that the limitation in the lease with regard to the purposes for which the room might be used was mere "matter of form," and that he would not be molested if he used the balcony for living purposes, and at the same time gave the respondent a writing consenting to the additions to the balcony floor and agreeing in the writing to furnish the materials necessary for that purpose. The respondent executed the lease and later took possession of the room, moving his stock of merchandise to the lower floor and his household goods to the balcony, and continued to use the balcony as a living room during the remainder of the time the lease was in force.

The terms of the lease just mentioned ran from March 1, 1917, to March 1, 1918, at a rental, payable monthly in advance, of \$30 per month. On February 1, 1918, the respondent sent for the agent of the appellant, with whom he had negotiated the lease, and made known to him his desire to continue in the occupation of the room for an additional term. He also made known to the agent his desire for further additions to the balcony floor in order to make it more suitable for living purposes; he desired to extend it so as to include and cover the entire space, cut a door in the wall to a stairway which led up from the outside of the building to certain apartments on the floor above, re-

move the stairway entirely which led from the storeroom floor to the balcony floor and to remove a lavatory, which was constructed in a corner of the storeroom, to the balcony floor, and install in connection therewith a bathtub. The discussion concerning these changes was had with the agent while on the balcony floor which the respondent was then using for living apartments. It was also stated to the agent that the respondent could not afford to go to the expense necessary to make the changes unless he could have a lease of the room for two years from the expiration of his present lease. The agent consented to the changes, and on the next day caused his principal, the appellant, to execute a new lease to the respondent for a term extending from March 1, 1918, to March 1, 1920, at a monthly rental of \$35 per month for the first year of the term, and \$42.50 per month for the second year. This lease, like the former one, contained the recital that the lessee should use the premises for the sale of automobile accessories, and for no other purpose, and contained the same provisions for a forfeiture in case of a breach of any of its covenants, as was contained in the original lease.

The lease was executed by both parties in triplicate, a copy being delivered to the respondent, who signed an indorsement on one of the copies retained by the appellant, which recited that the respondent had received and accepted a duplicate of the lease, and had no understanding, verbal or otherwise, differing from it. At the time of the delivery of the lease, a letter was delivered therewith, granting the respondent leave to cut the door mentioned, subject to the approval of the owner of the building, and on condition that the wall should be replaced, if requested, at the cost of the respondent, on the termination of the tenancy. Nothing was said in the letter concerning the additions to the balcony floor, the removal of the lavatory, the addition of a bathtub, or the use of the space above the balcony floor for living apartments. After the execution of the lease, the respondent obtained the consent of the owner of the building to cut the door mentioned. He was obligated also to obtain the consent of the city authorities of the city of Seattle to make this change, as well as to make the additions to the balcony floor, the same not being in the original permit to construct the building, which he did, at the expenditure of considerable time and money. After these preliminaries were settled, the respondent made the changes as contemplated, at an expense to himself, as the court found, "in the neighborhood of \$400."

On July 29, 1918, the appellant, claiming to have discovered for the first time that changes had been made in the leased storeroom in addition to those authorized by the letters delivered with the leases, and that

the premises were being used in part for living rooms, wrote a letter to the respondent, calling attention to these changes and declaring a forfeiture of the lease. The letter stated further, however, that the appellant did not wish to be arbitrary, and that if the respondent so desired a new lease could be entered into in keeping with the changed conditions. The respondent disregarded the notice contained in the letter, and later the present action was begun under the statutes of forcible entry and detainer to oust him from the premises. At the trial, on the foregoing facts appearing, the court held the appellant estopped to declare a forfeiture of the lease, and entered judgment to the effect that the appellant take nothing by its action. This appeal is from the judgment so entered.

[1-3] It is the appellant's first contention that the defense interposed, and that which the trial court found controlling, is an equitable defense and is not available to a defendant in this form of action. Cases from this court are cited where the rule is stated in language as broad as the contention implies, and it is on these cases that the appellant relies to maintain its position. But while the rule as thus announced was applicable to the facts of the particular cases then under consideration, we think it too broad as a rule of uniform application. The statutes relating to forcible entry and detainer define many acts against which the summary remedy therein provided for is applicable—acts which differ widely in their nature and effect. To illustrate: It declares a person guilty of forcible detainer who in the nighttime, or during the absence of the occupant of real property, enters therein, and who, after demand of the occupant, refuses to depart therefrom, and it declares a tenant guilty of unlawful detainer who continues in possession of leased property after a breach of the covenants of his lease, and who refuses, on demand of the landlord, to comply with the covenants within a stated time. Manifestly, there is in these acts a widely different degree of moral turpitude. In the first it is but just to say that the guilty party, however well founded his right of entry or his claim of right of possession may be, shall let go his hold before he is permitted to try out his claim of right. He is not thereby deprived of his right to such a trial and can usually lose nothing more than the rental value of the property while his rights are in process of litigation. But it is not so in the other case. The possession of the tenant is originally lawful and is so presumed until the contrary appears. If wrongfully ousted, he has usually no adequate remedy, since his remedy is in damages which may fail for want of a proper measure or for want of ability on the part of the landlord to respond. More than this, he should not be ousted except for a wrongful breach of the

conditions, and, clearly, if facts exist which would excuse the breach, whether these facts present a defense, legal, or equitable, he ought to be permitted to show them before an actual ouster. We cannot conclude, therefore, that a defendant in an unlawful detainer action can in no case present an equitable defense; his right to do so, we think, must depend upon the acts which give rise to the action. If he acquires possession lawfully and it is sought to oust him because of his subsequent acts, he may defend by setting up any defense which will justify his acts. On the other hand, if his possession was wrongfully acquired, or if acquired under circumstances where to permit him to hold possession would violate the express provisions of the statute, he may not defend by showing right of possession either legal or equitable.

But this court has not uniformly applied the rule for which the appellant contends. In *Brown v. Baruch*, 24 Wash. 572, 64 Pac. 789, an action of forcible detainer, the defendant pleaded facts by way of an equitable estoppel, and this court sustained a judgment in his favor based on such facts, notwithstanding the objection of the plaintiff that such a defense was not available because of the nature of the action. Other instances where this principle is recognized, although not directly presented, can be found in the following cases: *Teater v. King*, 35 Wash. 138, 76 Pac. 688; *Watkins v. Balch*, 41 Wash. 310, 83 Pac. 321, 3 L. R. A. (N. S.) 852; *Northcraft v. Blumauer*, 53 Wash. 243, 101 Pac. 871, 132 Am. St. Rep. 1071; *Hutchinson Investment Co. v. Van Nostern*, 99 Wash. 549, 170 Pac. 121.

[4-6] The next contention is that the evidence by which the estoppel pleaded was sought to be established violated the parole evidence rule. It is true undoubtedly, if the right of the respondent to make the alterations in the room and use it for purposes other than those stipulated in the written leases rested alone on the agreement he had with the agent, the evidence concerning the agreement could not be considered, since the agreement was prior to or contemporaneous with the signing of the written lease, and under the parole evidence rule is presumed to have been merged therein. But the evidence here goes much farther than this; it not only shows the parole agreement, but it shows a subsequent acting on the agreement by one of the parties, to his detriment if it is not to be recognized, under circumstances charging the other party with knowledge of his acting, and under circumstances making it the duty of the other party to speak if recognition of the agreement was not intended. While the rule known as the parole evidence rule is usually referred to as a rule of evidence, it is more properly a rule of sub-

stantive law and not any rule relating to the admissibility of evidence that gives the rule effect. In other words, it is the law and not a rule of evidence that conclusively presumes the finality of written agreements. When therefore the acts and conduct of the parties to a written agreement occurring subsequent thereto show an addition to or a modification of a written agreement, or the acts of one party, acquiesced in by the other, show such modification, no rule of evidence precludes a showing of the entire transaction, even if a part thereof is a parole contemporaneous agreement, adding to, varying, or modifying a written agreement. The parole evidence rule is intended to prevent, not to promote, frauds, and it would be a fraud to allow a party to a written agreement to enforce it as written when he has agreed not to do so, where the other, on the faith of the agreement, has acted thereon to his detriment.

[7, 8] The remaining question is whether the facts are sufficient to justify the judgment entered. We think they are, on the principle of estoppel. As was said by Judge Dunbar, in *Carruthers v. Whitney*, 56 Wash. 333, 105 Pac. 833, 134 Am. St. Rep. 1114:

"Estoppel is an equitable proceeding, *pr.* speaking more accurately perhaps, it is the equitable result of a wrongful proceeding or act, a reliance upon which would, in the absence of an estoppel, work an injustice to an innocent person. At the common law estoppel was founded on deeds and records of courts, but estoppel in equity is estoppel in pais. The principle now applied because it has been found that the common-law rule was too narrow and inadequate for the attainment of justice under the multiplied transactions of modern times, and hence the equitable estoppel of the present day. The well-understood idea of equitable estoppel is that, where a person wrongfully or negligently by his acts or representations causes another who has a right to rely upon such acts or representations to change his condition for the worse, the party making such representations shall not be allowed to plead their falsity for his own advantage."

So Judge Morris, in the case of *Rogers v. Reynolds*, 95 Wash. 470, 164 Pac. 80:

"* * * Neither is it necessary to point to any special word or act on the part of those now represented by appellant to justify an estoppel. For an estoppel will be created by silence, where it operates as a fraud, as effectually as by spoken word or overt act. Estoppel is a doctrine enforceable by the courts whenever the equities of the particular case demand it. Sometimes it may be predicated upon word or action, sometimes upon the lack of them; but, whatever its origin, it is invoked in the interest of equity and good conscience."

The facts of the present case bring it within these principles. The respondent was permitted to occupy the room in contravention of the terms of the written lease during the entire period of his first tenancy, without re-

monstrance or objection of any kind on the part of the appellant. He was so occupying it at the time the lease was renewed, and express consent was then given him, not only to continue to do so, but to make alterations thought by him to make the place more suitable for this purpose. On the faith of the promise, he went to the trouble of getting a permit from the city authorities to make the alterations, and spent a large sum of money in making them. In spite of their denials, we think the facts justify the conclusion that the appellant's principal officers had knowledge of these facts. But, if they did not, the agent had such knowledge, and the appellant is chargeable therewith. To permit it now to claim a forfeiture of the conditions of the lease would be to permit it to take advantage of its own wrong and perpetrate a fraud upon the respondent. This it should not be permitted to do.

The judgment is affirmed.

HOLCOMB, C. J., and PARKER, MOUNT, and BRIDGES, JJ., concur.

(108 Wash. 214)

QUIGG CONST. CO. v. CHELAN COUNTY.
(No. 15357.)

(Supreme Court of Washington. Aug. 26, 1919.)

1. HIGHWAYS §113(4)—COUNTY COMMISSIONERS NOT ESTOPPED TO DISALLOW EXTRAS IN CONSTRUCTION.

If it be assumed that county commissioners might be guilty of conduct which would estop the county from invoking the contract made under 3 Rem. & Bal. Code, §§ 5879—1 to 5879—10, and statutory provisions of section 5879—9 that no extras should be allowed on a contract for construction of road unless the same have been approved by resolution of the county commissioners and the copy transmitted to the highway commissioner, such assumption of estoppel could not arise where the proof was not of the clearest and most satisfactory kind.

2. HIGHWAYS §113(4) — ROAD CONTRACTOR COULD NOT RECOVER FOR EXTRAS ON QUANTUM MERUIT.

Where contract with county for road construction had at no time been rescinded nor modified, and it specifically covered the manner in which extras could be allowed, contractor could not maintain an action for extras on quantum meruit.

3. HIGHWAYS §113(4) — INSUFFICIENCY OF EVIDENCE TO DETERMINE EXTRA YARDAGE ON CONSTRUCTION CONTRACT.

In action by contractor against county to recover for extras due to changes made in construction of highway, where evidence shows total amount of excavation, including overbreakage for entire length of road, and deducts from this preliminary estimate to determine ex-

tra yardage, and contract makes no allowance for overbreakage extra yardage at places of change cannot be determined or recovery had thereon.

Department 1.

Appeal from Superior Court, Chelan County; John Truax, Judge.

Action by the Quigg Construction Company against Chelan County. Judgment for defendant, and plaintiff appeals. Affirmed.

Crollard & Steiner and Reeves & Reeves, all of Wenatchee, for appellant.

W. F. Whitney, of Wenatchee, and Peters & Powell, of Seattle, for respondent.

MAIN, J. This action is based upon a claim for extras alleged to have been earned in the performance of a road contract. The cause was tried to the court without a jury, and resulted in findings of fact, conclusions of law, and judgment denying a recovery. From this judgment the plaintiff appeals.

On the 26th day of July, 1915, the respondent contracted with the appellant for the building of a road approximately one mile in length along the shore of Lake Chelan. This road is known as "permanent highway No. 7," and the contract was made under and pursuant to sections 5879—1 to 5879—10, vol. 3, Remington & Ballinger's Code. The contract was for a lump sum of \$16,000, which has been paid. The road was to be constructed along the side of a high hill, and much of it was to be blasted out of solid rock. The contract provided that no payment should be made for any extra work outside of that embraced in the plans, specifications, and estimate, nor should there be any alterations made during the progress of the work, "unless the same shall be authorized by the board by resolution and said resolution approved by the state highway commissioner, and ordered in writing by the engineer." The statute under and pursuant to which the contract was made, and which is referred to therein (section 5879—9, supra), among other things provides:

"No payment shall be made for any incidental changes during the progress of the work unless the same shall have been approved by the board of county commissioners by resolution and a copy of said resolution shall have been transmitted to the state highway commissioner."

The provisions of the contract and the statute, requiring that charges for extras during the progress of the work shall not be allowed unless approved by the board of commissioners by "resolution" and a copy of said resolution be transmitted to the state highway commissioner, was not complied with. No resolution of the board authorizing or approving the extras was ever passed. Notwithstanding this fact the appellant

brings this action for the purpose of recovering approximately the sum of \$25,000 for extras claimed to have been earned during the progress of the work. As the work proceeded one item of extra work, for the sum of \$1,309, was approved by the board by resolution, and subsequently paid. Over this item there is no controversy here.

The lump sum contract price for the work, as above stated, was \$16,000. The contract apparently is the usual contract in such cases, and provided that the work should be done in accordance with the plans and specifications, which became a part of the contract. The appellant claims that the respondent is estopped from invoking the provisions of the contract and the statute referred to. During the progress of the work the engineer representing the county, as he testifies, found that the road in certain places could not be built according to the plans and specifications, because it would not hold, and called this fact to the attention of the commissioners. The commissioners, or one of them in the presence of the others, informally replied that it was up to the engineer to build the road.

[1] For the purpose of this opinion only, it will be assumed, but not decided, that the commissioners might be guilty of conduct which would estop the respondent from invoking the contract and the statutory provisions to the effect that no extras should be allowed, unless the same were approved by the board of county commissioners by resolution and a copy of the resolution transmitted to the highway commissioner. If there could be such estoppel, it could only be upon proof of the clearest and most satisfactory kind. *Brown v. Winehill*, 3 Wash. 525, 28 Pac. 1037; *James Reilly Repair & Supply Co. v. Smith*, 177 Fed. 168, 100 C. C. A. 630. The evidence in this case is not of that clear and satisfactory character which would bring it within the rule. The statute was enacted for a purpose, and it cannot be lightly avoided, if at all.

[2] The appellant attempted to bring the action upon the contract, and also upon quantum meruit. The contract had at no time been rescinded or modified, and specifically covered the manner in which extras could be allowed. In such a case an action on the quantum meruit for extras cannot be maintained. The rule upon this question, as stated in *Hawkins v. United States*, 96 U. S. 689, 24 L. Ed. 607, is:

"* * * That, if there be an express written contract between the parties, the plaintiff in an action to recover for work and labor done, or for money paid, must declare upon the written agreement, so long as the special agreement remains in force and unrescinded, as he cannot recover under such circumstances upon a quantum meruit."

The case of *Green v. Okanogan County*, 60 Wash. 309, 111 Pac. 226, 114 Pac. 457, has no

application, because in that case there was no express contract. The contract which the parties attempted to make was void, because of failure to comply with the statutory requirements.

[3] There is another reason why the appellant cannot prevail in this cause. The changes made in the highway, after the work was begun, consisted in causing the work to be moved farther into the hill in two or three places, the aggregate distance of which was from 300 to 600 feet. According to the contract the slope left by the excavating in solid rock was to be one-fourth of a foot horizontal to one foot perpendicular, and no allowance for excavations outside the limit of such slope was to be made, unless by special order of the engineer. Any excavation beyond this specified slope was what is referred to as overbreakage. In other words, overbreakage is the amount of material taken from the inside bank, outside of the standard slope as specified in the specifications. The trial court found that no measurement or estimate was ever made by the engineer of the number of yards of rock or other material which the appellant was required to excavate or move, or did excavate or move, by reason of any changes in or alterations of the plans and specifications. The changes as above mentioned consisted in setting the road farther into the hill in two or three places. The evidence does not show the extra amount of material that it was necessary to move by reason of these changes. If we understand the evidence correctly, it takes the total amount of yardage removed including the overbreakage, for the entire length of the road, and deducts from this the preliminary estimate, and thus arrives at a balance for extra yardage. Under the contract and specifications, no allowance was to be made for the overbreakage. Since the evidence does not show the amount of extra yardage removed at the places where the alignment of the highway was changed, and includes items for which no recovery can be had, there is no evidence in this case which would furnish a basis for estimating the damages. The finding of the trial court on this question was right, and should be sustained.

It is claimed, however, that the engineer made a final estimate of the amount of extras, and submitted it to the board of commissioners, and that therefore the respondent is bound thereby. The engineer made a number of so-called final estimates. The last, here referred to, was made after the engineer realized that the matter of extras would be litigated, and after the engineer had discussed the matter with the county attorney, the commissioners, and the appellant. The trial court found, referring to the last final estimate, that it was made by the engineer "both arbitrarily and by mistake, and the same is wholly false." Un-

der the evidence no other finding could properly be made.

Assuming, as we have, for the purpose of this decision only, that the appellant had made a case which would justify the consideration of the merits, it cannot prevail upon the evidence offered. The view we take of the case, as above indicated, renders it unnecessary to consider the other points discussed in the briefs, or to review the numerous authorities therein cited.

The judgment will be affirmed.

HOLCOMB, C. J., and MACKINTOSH, TOLMAN, and MITCHELL, JJ., concur.

(108 Wash. 340)

STATE ex rel. MULLEN v. HOWELL, Secretary of State. (No. 15440.)

(Supreme Court of Washington. Sept. 18, 1919.)

STATUTES \S 35 $\frac{1}{2}$ —WHO ARE "LEGAL VOTERS," AUTHORIZED TO SIGN REFERENDUM PETITION.

Persons who are qualified to vote under Const. art. 6, § 1, and who have been registered to vote in their precincts, but whose registrations have been canceled because of failure to vote at the last state, county, or municipal election, under section 7, and Laws 1915, p. 40, § 11, are not "legal voters," within 3 Rem. & Bal. Code, § 4971—12, requiring secretary of state to file initiative and referendum petitions bearing the requisite number of signatures of "legal voters," notwithstanding section 4971—10.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Legal Voter.]

Department 1.

Mandamus by the State, on the relation of Frank P. Mullen, against I. M. Howell, Secretary of State. Denied.

See, also, 181 Pac. 920.

John F. Murphy, of Seattle, for relator.

L. L. Thompson, Atty. Gen., for respondent.

MAOKINTOSH, J. The relator seeks by writ of mandate to compel the secretary of state to return petitions on Referendum No. 14 (the Prohibition Amendment to the federal Constitution) to the registration officers of the various cities and towns of the state for the purpose of having such officers certify as legal voters those signers of the petitions whose registrations had been canceled because of their failure to vote at the last state or municipal election.

It is urged that mandamus is not the proper remedy, that the question raised by the pleadings is a moot one, and that the court has no jurisdiction. While some or all of

these contentions of the respondent may be correct, we prefer to leave them undiscussed here, and to rest this decision upon the merits, and determine what is meant by the term "legal voters," as used in section 12, chapter 138, Laws 1913 (3 Rem. & Bal. Code, 4971—12). That section referring to initiative and referendum petitions, provides:

"The secretary of state upon any such petition being submitted to him for filing shall examine the same, and if upon examination said petition appear to be in proper form and to bear the requisite number of signatures of legal voters, * * * the secretary of state shall accept and file said petition in his office. * * *"

Section 1, article 6, of the state Constitution, as amended at the election in November, 1910, reads as follows

"All male persons of the age of twenty-one years or over, possessing the following qualifications, shall be entitled to vote at all elections: They shall be citizens of the United States; they shall have lived in the state one year, and in the county ninety days, and in the city, town, ward or precinct 30 days immediately preceding the election at which they offer to vote," etc.

The relator argues that all persons meeting the requirements as in this section set forth are "legal voters," entitled to sign initiative and referendum petitions, and calls attention to Rem. & Bal. § 4971—10, which provides for the method of certification of petition signatures by the officers, who shall compare them as they appear upon the petitions with those upon the registration books of the precincts where registration is required.

In the instant case the signatures which it is claimed should be counted are those of persons who possess the qualifications provided in section 1, article 6, of the state Constitution, and who have registered as voters in their various precincts, but who failed to exercise their right to vote at the last general election, and whose names have therefore been stricken in conformity with section 11, chapter 16, Laws 1915:

"If any registered voter shall fail to vote at any general state, county or municipal election, * * * his registration shall become void, and his name shall be stricken from the registration books. * * * Before said voter shall again be allowed to vote, he shall re-register in his proper precinct, as required in cases of original registration."

This act was passed in pursuance of the power given the Legislature by section 7 of article 6 of the Constitution:

"The Legislature shall enact a registration law, and shall require a compliance with such law before any elector shall be allowed to vote: Provided, that this provision is not compulsory upon the Legislature, except as to cities and towns having a population of over 500 inhabitants. In all other cases the Legislature may

or may not require registration as a prerequisite to the right to vote, and the same system of registration need not be adopted for both classes."

The Constitution and the statute enacted in compliance with its mandate have determined that, in addition to the qualifications of citizenship and residence mentioned in section 1, article 6, of the Constitution, there must be in cities and towns of over 500 inhabitants a registration in order to make one a legal voter; registration which has been canceled for failure to vote being made void by the statute, the certifying officer has no more right to consider the names so stricken than he has to certify the names of all persons in cities and towns of 500 and over population who may meet the qualifications of section 1, article 6, of the state Constitution, but who have never registered. The rights and status as voters of those who are qualified and have registered and failed to vote, and those who are qualified but have never registered, are the same. The Legislature, having the right to provide the means of determining the validity of signatures to initiative and referendum petitions (*State ex rel. Kiehl v. Howell*, 77 Wash. 651, 138 Pac. 286), has said that citizens of cities and towns where registration is required are not "legal voters" if unregistered, and they are unregistered when they have not had their names upon the poll books, or having had them there, have suffered them to be canceled by failure to vote; in either case they cannot exercise the right to petition for the initiation or reference of laws. The rule is sensible, salutary, and sound.

The respondent was correct in his interpretation of the law, and the writ will be denied. It is so ordered.

HOLCOMB, C. J., and BRIDGES, MAIN, and PARKER, JJ., concur.

(108 Wash. 382)

HEITMILLER et ux. v. PRALL et ux.
(No. 15262.)

(Supreme Court of Washington. Oct. 8, 1918.)

1. APPEAL AND ERROR ⇨1002—CREDIBILITY OF WITNESSES FOR JURY.

Where evidence is conflicting, it is the province of the jury to say on which side the truth lays, a province with which the appellate court has no right to interfere.

2. TRIAL ⇨295(5)—INSTRUCTIONS TO BE CONSTRUED AS A WHOLE.

In lessees' action for lessors' breach of agreement to install irrigation pump within required time, where lessors denied lessees' allegation that lessees had given the orchard proper care, and set up such want of care affirmatively, to

lessors' damage, and prayed judgment for such damage, an instruction withdrawing affirmative defense, and one requiring lessees to prove proper care, held not to have been misleading, in view of instructions as a whole, and in view of nominal verdict for lessees.

3. APPEAL AND ERROR ⇨1033(5)—APPELLANT CANNOT COMPLAIN OF FAVORABLE INSTRUCTION.

Where gist of action was recovery of damages for breach of contract, plaintiff could not complain on appeal of instruction authorizing nominal damages, if jury found there had been a breach of contract and substantial damages had not been proven.

4. PLEADING ⇨236(4)—IN ACTION ON CONTRACT, AMENDMENT AFTER CONCLUSION OF EVIDENCE, ALLEGING DECEIT, IMPROPER.

In action for breach of contract, court properly refused plaintiff permission to amend complaint at conclusion of the evidence, so as to show false representations and deceit, since such amendment would have changed entire scope and nature of action, making it one for false representations and deceit, and would have required a practical retrial of the case.

Department 2.

Appeal from Superior Court, Yakima County; Harcourt M. Taylor, Judge.

Action by H. W. Heitmiller and wife against J. W. Prall and wife. From a judgment for plaintiffs, giving them insufficient relief, they appeal. Affirmed.

H. J. Snively and I. J. Bounds, both of Yakima, for appellants.

E. M. Heyburn, of Spokane, for respondents.

FULLERTON, J. On April 14, 1917, the respondents Prall were the owners of certain lands situated in Yakima county, and on that day leased the same for one year to the appellants Heitmiller. The land had upon it a matured orchard of about 12 acres, and the remainder of the land was suitable for growing grains and grasses for hay, and for growing garden vegetables. It is in the arid region, and irrigation is necessary to produce crops of any sort. The source of supply for water is an artesian well, situated on the premises, which flows during the winter season and spring, usually down to about the middle of May, after which time it is necessary to raise the water by means of a pump. At the time of the lease there was no pump at the well, and the respondents agreed in the lease to "pay the fair and actual cost of installing a pump and electric motor in the artesian well on the premises; * * * the cost of said pump and motor not to cost above \$300." As a consideration for the lease the appellants agreed to pay the maintenance cost of the pump and motor, properly spray, prune, irrigate, and care for the orchard, harvest and sell the fruit grown thereon, and pay

to the respondents one-third of the gross amount received from such sale. Nothing is said in the lease concerning such other crops as might be grown on the land.

The appellants entered on the land under the terms of the lease, caused the orchard to be sprayed and pruned, planted to grain and vegetables certain portions of the land, and opened the irrigating ditches leading from the well to the parts of the land to be irrigated. The water flowed from the well until about the usual time, but the pump was not installed therein until some 36 days later. The crops were failures, no marketable fruits or vegetables maturing, and the hay crop was of no material value.

The appellants sought in this action to recover from the respondents damages in the sum of \$6,476.46. They averred a breach of the contract to install the pump, and that the loss of the crops was the result of the breach. After issue joined the cause was tried to a jury, who returned both a general and a special verdict. In their special verdict they found that the respondents unreasonably delayed the installation of the pump, but further found that the delay was not the cause of the loss of the crops. By their general verdict they found in favor of the appellants in the sum of \$1. The appellants moved for a new trial, basing the motion on the grounds of inadequacy of the verdict and errors occurring at the trial. The motion was overruled, and a judgment entered on the verdict. This appeal is prosecuted from the judgment so entered.

[1] The assignment first discussed is the refusal of the court to grant a new trial on the ground of inadequacy of the verdict. It is asserted that there is abundant evidence in the record which would warrant the jury in finding that the loss of the fruit crop was due to the lack of water during the period intervening between the time the well ceased to flow and the time the pump was installed, and that there was no evidence to the contrary. On the first of these contentions we can agree with the appellants, but the second we think is not in accord with the record. It is needless to set forth the testimony, or review it at length, but plainly there was evidence from which the jury could well have found that the failure of the orchard crop, the only failure on which a recovery against the respondents could be based, was not due to a lack of water. The appellants had had no previous experience with irrigated orchards, and there was evidence tending to show that they did not commence irrigating as soon as they should have commenced; that they did not apply the water to the orchard to the extent they could or should have done after they did so commence; that the orchard had suffered from neglect in prior years, and required more than the usual care to make it produce marketable fruit; and that this care was not

given it. While the evidence was conflicting, it was the province of the jury to say on which side the truth lay, a province with which the appellate court has no right to interfere.

It is next complained that the court erred in its instructions to the jury. The respondents, after putting in issue the appellants' allegations to the effect that they had tended and cared for the orchard in a proper manner, set up affirmatively such want of care, and that such want of care caused a loss to them of their interest in the crop, to their substantial damage, and demanded judgment against the appellants for such damage. At the trial they offered no evidence as to the amount of the damage suffered by them, and the court withdrew the affirmative defense from the consideration of the jury by the following charge:

"The defendants claim that the plaintiffs failed to properly spray, prune, irrigate, and care for the fruit trees, in consequence of which they have become infected and dried up for want of water, so that all were stunted and injured, and some perished, causing a loss to the defendants of \$3,000, for which sum they ask judgment against the plaintiffs. This is called a cross-complaint, and is denied by the plaintiffs. The defendants have not introduced any evidence in support of such claim, and it is therefore withdrawn from your consideration, and you must disregard it."

In another part of the instructions the following was given:

"As I have told you, the plaintiffs' case is founded upon the lease, which makes it incumbent upon the plaintiffs to properly spray, prune, irrigate, and care for all the fruit trees on the leased land. In order to entitle the plaintiffs to recover even nominal damages, they must have convinced you by a preponderance of the evidence that they substantially carried out and performed their obligations in the agreement, unless you are also convinced that they were prevented from performing those obligations by omission on the part of the defendants, if any, to install the pump and motor and make the power arrangements within a reasonable time."

[2] It is contended that these instructions are conflicting, entitling the appellants to a reversal. Counsel say:

"Now, in one instruction they [the jury] are told that they need not consider the failure of the plaintiffs to perform their part of the contract, and then in the part of the instruction excepted to they are told that they were to consider, and it was necessary for them to find, that the plaintiffs had performed their part of the contract before they could return a verdict even for nominal damages for the plaintiffs. It is our contention that there was no issue at any time in the case on the failure of plaintiffs to perform their part of the contract; furthermore, that the evidence, without contradiction, showed that the plaintiffs did everything they were required to do, and even more, and the orchard up to the time the water was shut off

was in excellent condition, and gave every prospect of a bumper crop."

We cannot, however, think the criticism just. Manifestly, in the first instruction the court was considering the affirmative defense, and the instruction was intended to do no more than withdraw that defense from the consideration of the jury. The second instruction related to the issues made by the allegations of the complaint and the denials thereto, and was clearly pertinent to that issue. There was therefore no contradiction in the instructions viewed from a legal aspect; that is to say, the instructions were not so far contradictory that error must be conclusively presumed. The only question then is: Were the jury misled by them? As to this we think the verdict shows conclusively that they were not. No verdict in damages was returned in favor of the respondents, and the verdict as returned is clearly within the issues as made by the allegations of the complaint and the denials thereto. More than this, the instructions as a whole were so clear on the point as to leave no possible doubt as to the court's meaning. The other contentions made in this connection are sufficiently answered by what we have said concerning the proofs.

The court further instructed the jury that, if they were convinced by the evidence that the respondents failed to install the pump within a reasonable time after the water ceased to flow from the artesian well, the appellants were entitled to recover at least nominal damages, even if they suffered no substantial damages thereby; further instructing them that, if they found certain other facts, the appellants were entitled to recover substantial damages. Citing 8 R. C. L. 423, to the effect that nominal damages are those recoverable where a legal right has been invaded and no actual damages whatever have been or can be shown, the appellant contends that the instruction, in so far as it related to nominal damages, was error, since here actual damages could be shown. But we think the appellant has mistaken the meaning of the writer of the cited text. If we read it correctly, he was distinguishing between those instances where certain of the courts have held nominal damages properly recoverable and where they have held that they are not. For illustration: This court has held that nominal damages are properly recoverable in an action in the form of an action for damages, where the recovery of damages is not the gist of the action, but is maintained to vindicate a right of the plaintiff which the defendant has invaded; while, on the other hand, it has held that they are not so recoverable where the gist of the action is the recovery of damages and there is

a failure to prove substantial damages. This court is not alone in so holding, although it is not the uniform rule, and the text cited was but marking this distinction; it was not intended to be said that nominal damages could be recovered only in actions where substantial damages could not be proven.

[3] But, conceding the instruction to be contrary to our holdings, it is not error for which the appellants can complain. Since the gist of the present action is to recover damages, to instruct that nominal damages was recoverable if they found there had been a breach of contract and substantial damages had not been proven is an error for which the respondents could have complained, but it is not error against the other side. It was error in their favor, not error against them.

The appellants alleged in their complaint that the respondents, through their agents, at the time the lease was entered into, represented that there was plenty of water to irrigate the land, and that when applied to the land it would produce maximum crops of both fruit and produce, and further represented that the pear trees were capable of producing and would produce from one to two tons of pears per tree, and it was these representations that induced them to enter into the contract of lease. It was not alleged that these representations were false or fraudulent, and recovery was asked because of a breach of the contract to install the pump. At the trial, by cross-examination of the appellants' witnesses, the respondents sought to show that there was some alkali in the soil of a part of the land, and that the trees had been neglected in prior years, which facts tended to render the orchard less productive than it otherwise would have been.

[4] At the conclusion of the evidence the appellants asked leave to amend their complaint, so as to show false representations and deceit, and asked to have the jury instructed on this theory. The court refused to allow the amendment, and its refusal is assigned as error. But we find no error in the ruling. The action as instituted was one in damages for a breach of contract, and the effect of the amendment sought to be made was to change it into an action for false representations and deceit. This would have changed its entire scope and nature, and would have required a practical retrial of the case. Whether it would have been an abuse of discretion to have granted the motion we need not consider. We are clear that it was not so to deny it.

There is no reversible error in the record, and the judgment will stand affirmed.

HOLCOMB, C. J., and MOUNT, PARKER, and BRIDGES, JJ., concur.

(106 Wash. 326)

In re HAMILTON'S ESTATE. (No. 15386.)

(Supreme Court of Washington. Sept. 17, 1919.)

1. EXECUTORS AND ADMINISTRATORS ¶194(1)
—NOTICE OF MOTION TO AWARD HOMESTEAD.

A notice of the petition of the widow, administratrix, posted under the order of the court as permitted by Laws 1917, p. 670, § 103, to have property specified in that section set aside as a homestead, was sufficient to give court jurisdiction.

2. EXECUTORS AND ADMINISTRATORS ¶194(6)
—FINALITY OF JUDGMENT AWARDED HOMESTEAD TO SURVIVING SPOUSE.

Where the court has acquired jurisdiction of the parties and the subject-matter, its judgment awarding property as a homestead for the surviving spouse on petition under Laws 1917, p. 670, § 103, is not void because the court erred in its judgment, but is final, except on appeal or for fraud, as the section provides.

3. CONSTITUTIONAL LAW ¶807—FINALITY OF AWARD OF HOMESTEAD TO SURVIVING SPOUSE NOT WANTING IN DUE PROCESS.

Laws 1917, p. 670, § 103, specifically provides that award of homestead thereunder shall be conclusive and final, except on appeal or for fraud, and the denial of a remedy by untimely motion or petition to avoid the judgment to set aside the award after time for appeal has elapsed, is not a violation of the constitutional provision as to due process of law.

Department 2.

Appeal from Superior Court, Snohomish County; Ralph C. Bell, Judge.

In the matter of the estate of Eric Hamilton, deceased. A motion by William Hamilton to vacate or set aside an order granting petition of the administratrix, widow of deceased, to have certain property set aside to her as surviving spouse, was denied, and he appeals. Affirmed.

G. D. Eveland, of Everett, for appellant.

Francis W. Mansfield, of Everett, for respondent.

HOLCOMB, C. J. Section 103, c. 156, Laws of 1917, provides:

"If it shall be made to appear to the satisfaction of the court that no homestead has been claimed in the manner provided by law, either prior or subsequent to the death of the person whose estate is being administered, then the court, upon such notice as may be determined by the court, upon being satisfied that the funeral expenses, expenses of last sickness and of administration have been paid or provided for, and upon petition for that purpose, shall award and set off to the surviving spouse, if any, property of the estate, either community or separate, not exceeding the value of \$3,000, * * * which property so set off shall include the home and household goods, if any, and such award shall be made by an order or judgment of the court and shall vest the absolute title, and there-

after there shall be no further administration upon such portion of the estate so set off, but the remainder of the estate shall be settled as other estates. The order or judgment of the court making the award or awards provided for in this section shall be conclusive and final, except on appeal and except for fraud. The awards in this section provided shall be in lieu of all homestead provisions of the law and of exemptions."

[1] On January 10, 1917, and before the above law went into effect, Eric Hamilton died, leaving certain property, the heirs to which were his widow and several brothers and sisters, among them the appellant. On the 19th day of January of that year, the widow was appointed administratrix of the estate; decedent's will having been set aside by the court because of mental incompetency. February 20, 1918, and after the above law was effective, the widow petitioned the superior court to set aside to her, according to the terms of the foregoing section, the house in which she and the deceased had dwelt, together with certain household goods therein. Notice of hearing of her petition was given by posting under the order of the court, as permitted by the Probate Code of 1917. The court found that the provisions of section 103 as to the value of the property, the expenses of last sickness and for the funeral, etc., had been properly complied with, and entered its order, granting the petition, and setting aside the property as a homestead as prayed. The balance of the estate, of which there was considerable, proceeded to probate in the usual course of law.

Months thereafter, when it was too late for an appeal, William Hamilton, a brother of the deceased and one of his heirs, moved the superior court to set aside the order theretofore entered granting the administratrix's petition, principally upon two grounds: First, that William Hamilton had had no notice of the petition in question; and, second, that section 103 "either has no application to said matter or is unconstitutional and void." The motion was denied by the superior court for the reason that, aside from any constitutional question, the vacating of the order was improperly moved; the remedy, as provided by the section itself, being by appeal from the order, or for fraud:

"* * * The order or judgment of the court making the award or awards provided for in this section shall be conclusive and final, except on appeal and except for fraud."

The determining question emerging in this case is: Is the alleged error of the superior court in setting aside to the widow the property petitioned for properly attacked by a motion to vacate such order, or is the appellant restricted to an appeal; the matter of fraud not being involved either in fact or law in this case?

Disposing briefly of the contention as to lack of notice, the superior court found, and we are satisfied with its finding, that the procedure under the section was sufficient to give it jurisdiction of the matter, and that it had jurisdiction of the subject-matter and of the persons concerned.

[2] The language of section 103 clearly makes the order of the probate court, setting aside the property therein specified to the surviving spouse, a final judgment of the court:

"The order or judgment of the court making the award or awards provided for in this section shall be conclusive and final. * * *

The trial court, having jurisdiction of the parties and the subject-matter, may have erred in law or fact. Possibly the superior court may upon timely motion vacate such final judgment upon other grounds than fraud to correct its own errors before the judgment is final. But when it acquired jurisdiction of the matter and of the parties, and merely erred in its judgment, such judgment certainly is not void.

[3] The section itself explicitly provides that such question, or indeed any question concerning the award, save that of fraud, cannot be raised, except by appeal from that final judgment. In view of the express declaration of the statute, the only constitutional question now possible is whether we have here an attempted deprivation of right without due process of law, which we have not sustained. This is not the constitutional question learnedly argued by counsel for appellant, whose attack is upon the ground that, to give the statute effect upon heirs in whom property vested by operation of law prior to the enactment of section 103, would be such deprivation of right as is prohibited by the Constitution. All the weight of his argument in that respect was properly conceded by the superior court, and may be conceded here, without affecting the question as to whether, by being restricted to an appeal, and denied a remedy by untimely motion, or petition to void the judgment, appellant is deprived of a constitutional right.

Appellant cites *Stark Bros. v. Royce*, 44 Wash. 287, 87 Pac. 340, where it is said, "A void judgment is properly set aside upon motion;" also *Lushington v. Seattle Auto, etc., Club*, 60 Wash. 546, 111 Pac. 785, stating that "the right to vacate such judgments does not arise out of, nor does the procedure to secure the right depend upon, the statute; * * * It is inherent in the court itself; it is no more nor less than the power possessed by every court to clear its records of judgments void for lack of jurisdiction;" and *Dane v. Daniel*, 28 Wash. 155, 68 Pac. 446, where we said, "We think, in the absence of any statute, the court has a right to set aside a void judgment; this power is inherent in the court." These cases are not

in conflict with the line of decisions wherein we have held the parties to the exclusive remedy of appeal.

There is an inherent power in the superior court to vacate certain void judgments, and this inherent right is not denied, but recognized, by the language of section 103. But an inherent right is not necessarily an exclusive right, or a right which may not be modified by proper authority. The very expression in *Dane v. Daniel*, supra, that "in the absence of any statute" the court has this inherent right, is clearly a recognition that this inherent right may be qualified by statute. In *Lushington v. Seattle Auto, etc., Club*, supra, the pronouncement is upon "judgments void for lack of jurisdiction"—a harmony of principle with the provision of section 103 that the superior court may vacate its own award on the showing of fraud. The bare statement in *Stark Bros. v. Royce*, supra, that "a void judgment" may be set aside upon motion, cannot be reasonably construed into a commission carte blanche to the superior court to vacate its judgments, regardless of statutory control. In *Ostlund's Estate*, 57 Wash. 359, 106 Pac. 1116, 135 Am. St. Rep. 990, we sustained a decree of distribution depriving pretermitted heirs of their alleged vested rights in the property, saying:

"When the statutory provisions are complied with, the distribution is said to partake of the nature of a proceeding in rem, and is conclusive upon all persons having any interest in the estate." * * * The decree was a final adjudication by a court of competent jurisdiction, upon due process of law, as to his right and title thereto."

On the other hand, this court has carefully upheld such statutory restrictions. It is only necessary to cite our decisions in this matter without particularizing them: *Coyle v. Seattle Electric Co.*, 31 Wash. 181, 71 Pac. 733; *Warren v. Hershberg*, 52 Wash. 38, 100 Pac. 149; *Okazaki v. Sussman*, 79 Wash. 622, 140 Pac. 904; *State ex rel. Lundin v. Superior Court*, 90 Wash. 299, 155 Pac. 1041; *Morgan v. Williams*, 77 Wash. 343, 137 Pac. 476.

The dissenting opinion in *Coyle v. Seattle Electric Co.*, supra, does not question the principle here involved, but simply argues that an order granting a new trial is not a judgment, and that therefore error in a ruling made upon a motion for such new trial may be cured by the superior court. But, as we have seen, the express language of section 103, here under consideration, is that the award there permitted is a judgment, final and conclusive in its terms.

The order of the lower court, denying the motion to vacate the original award, is affirmed.

FULLERTON, MOUNT, BRIDGES, and PARKER, JJ., concur.

(108 Wash. 479)

(184 P.)

GOWEY v. SEATTLE LIGHTING CO.
(No. 15338.)

(Supreme Court of Washington. Oct. 15, 1919.)

**1. MASTER AND SERVANT §361—EXTRA-
HAZARDOUS OCCUPATION IN "FACTORY" OR
"WORKSHOP" WITHIN WORKMEN'S COMPEN-
SATION ACT.**

Under Workmen's Compensation Act (Rem. Code 1915, §§ 6604—2, 6604—3), enumerating hazardous works, and defining "workshops" as places where machinery is used, and "factories" as undertakings in which the business of working at commodities is carried on with power-driven machinery, a gas company's general office, in which clerical work is carried on by a woman clerk injured in operating a power-driven machine for making plates for printing bills, is a factory or workshop, though her principal duties are clerical.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Factory; Workshop.]

**2. MASTER AND SERVANT §383—RIGHT OF
ACTION ON DEFAULT IN PAYMENTS BY MASTER
UNDER WORKMEN'S COMPENSATION ACT.**

Workmen's Compensation Act (Rem. Code 1915, § 6604—8), as amended by Laws 1917, p. 487, does not preserve the right of action existing in favor of an injured employé who would otherwise fall within the Workmen's Compensation Act against an employer who fails to pay into the accident fund the amount it would be required to contribute thereto, because the employé was within the act.

Department 2.

Appeal from Superior Court, King County;
A. W. Frater, Judge.

Action by Elizabeth C. Gówey against the Seattle Lighting Company. From a judgment for defendant, plaintiff appeals. Affirmed.

James Kiefer, of Seattle, for appellant.

Poe & Falknor, of Seattle, for respondent.

PARKER, J. The plaintiff, Elizabeth C. Gówey, commenced this action in the superior court for King county, seeking recovery of damages for personal injury which she claimed resulted to her from the negligence of the defendant lighting company. One of the defenses set up by the defendant in its answer is that the injury for which the plaintiff seeks recovery was received by her while engaged in an extrahazardous employment within the meaning of the Workmen's Compensation Act (Rem. Code 1915, §§ 6604—1 to 6604—32), and that therefore she must recover, if at all, from the accident fund provided for in that act. The cause was decided by the court in favor of the defendant and against the plaintiff upon this defense at the beginning of the trial, as a matter of law. While the question was first presented to the court in the form of a motion for judgment in favor

of the defendant upon admitted facts appearing in the pleading, there were some additional facts agreed upon by counsel for both sides and stated to the court upon the argument of the motion. These additional facts appear in this record by statement of facts duly settled and signed by the trial judge. From the judgment of dismissal rested upon the facts so appearing, the plaintiff has appealed to this court.

[1] The controlling facts may be summarized as follows:

"Defendant is * * * a corporation * * * and owns and operates a plant for the manufacture and sale of gas in the city of Seattle, and maintains in connection therewith general offices. * * * On the 24th day of April, 1918, the plaintiff was in the employment of the defendant and engaged in the operation of a multiple head imprinter of the type 'F,' and that it was the duty of the plaintiff in the operation of said machine to make certain zinc plates or stencils for the printing of gas bills. * * * Said machine is run by electric power, and in its complete condition has in front of the dies a metal guard placed thereon to prevent the crushing or catching of fingers of the person operating said machine, and prior to said 24th day of April, 1918, and by the orders of said Miller in charge of said office, the said guard had been removed from said machine in order to speed up the operation thereof, and said removal was unknown to the plaintiff, and had said guard been on said machine the accident to plaintiff could not possibly have occurred."

The machine "was used in the office of the defendant as an office device or appliance." The plaintiff was a clerk in the general office of the defendant, and, while the larger part of her duties were clerical, it was also a part of her employment to operate this machine. Plaintiff's hand was injured by the die of the machine coming down upon her hand when the electrical power was applied by another, at a time when she was not expecting the machine to start. In view of our conclusion touching the correctness of the decision of the trial court, it is not necessary for us to further notice the manner or extent of the plaintiff's injury, or the alleged negligence of the defendant.

Among the extrahazardous works enumerated in the Workmen's Compensation Act (section 6604—2, Rem. Code) are "factories, mills and workshops where machinery is used." In section 6604—3 as amended by Laws of 1917, p. 474, "factories" and "workshop" are defined as follows;

"Factories mean undertakings in which the business of working at commodities is carried on with power-driven machinery, either in manufacture, repair or change, and shall include the premises, yard and plant of the concern.

"Workshop means any plant, yard, premises, room or place wherein power-driven machinery is employed and manual labor is exercised by way of trade for gain or otherwise in or in-

cidental to the process of making, altering, repairing, printing or ornamenting, finishing or adapting for sale or otherwise any article or part of article, machine or thing, over which premises, room or place the employer of the person working therein has the right of access or control."

In section 6604—4, Rem. Code, as amended by Laws of 1917, p. 478, under the general heading "Factories Using Power-Driven Machinery" are enumerated, among other things, for the purpose of specifying the amounts to be contributed towards the accident fund by employers, the following: "Stamping tin or metal," "canneries, metal stamping extra;" "zinc, brass or lead articles or wares not otherwise specified;" "printing." It seems plain to us that the word "factories," as used in the general heading under which these enumerations appear is used in a very general sense and means workshops as well, since there there is no general heading containing the word "workshop," and the above-quoted items are as appropriate to work done in workshops as in factories.

Was the office of the defendant a "factory" or "workshop" wherein power-driven machinery was being employed, in so far as the operation of this machine by electric power in the making of zinc plates or stencils was concerned, within the meaning of the Workmen's Compensation Act? We think it was. It is plain that the machine was a power-driven machine, and that the operation of it in the making of zinc plates or stencils was the manufacture and change of zinc plates into the form of stencils; we also think the conclusion cannot be escaped that such work was extrahazardous, regardless of the fact that it may have been carried on in the general offices of the defendant rather than in some place apart from the office. Plainly, it was not clerical work. Its character, to our mind, was not different than if it had been carried on in a manufacturing plant devoted exclusively to such work. We are equally convinced that the plaintiff was engaged in extrahazardous work when she was operating this machine, though she also had other duties of a clerical nature, even though such duties constituted the larger part of her employment. The following decisions lend support to these conclusions: *Wendt v. Ind. In. Com.*, 80 Wash. 111, 141 Pac. 311; *Guerrieri Industrial Insurance Com.*, 84 Wash. 266, 146 Pac. 608; *Replogle v. Seattle School District No. 1*, 84 Wash. 581, 147 Pac. 196; *State v. Business Property Security Co.*, 87 Wash. 627, 152 Pac. 834; *Remsnider v. Union Savings & Trust Co.*, 89 Wash. 87, 154 Pac. 135, Ann. Cas. 1917D, 40.

Some contention is made rested upon the fact, which for present purposes we may deem as admitted, that the machine when

in perfect working order, with all of its attachments in place, rendered injury to the operator practically impossible. Such might be said of many machines to be found in factories and workshops, but the fact remains that it was possible for the machine to be in such condition that an operator's hand could be crushed. Plainly, we think, the impossibility of injury to the operator of a machine when it is in perfect order does not render its operation other than extrahazardous employment within the meaning of the compensation act.

[2] Some contention is made rested upon the fact that the defendant had failed to pay into the accident fund the amount it should be required to contribute thereto because of the employment of the plaintiff and others in the operation of this machine. This contention is rested upon section 6604—8, Rem. Code, relating to employers who are in default in such payments, and preserving to an injured workman his right of action against such defaulting employer. This, however, is no longer the law, since that section was amended by the Laws of 1917, p. 487, wherein the right of action existing in favor of an injured employé against such defaulting employer is not preserved as it was under that section as originally enacted. *Freyman v. Day*, 182 Pac. 940, just decided.

We conclude that the judgment of the trial court must be affirmed. It is so ordered.

HOLCOMB, C. J., and BRIDGES and MOUNT, JJ., concur.

(108 Wash. 344)

WILLIAMS v. GREAT NORTHERN RY. CO. (No. 15263.)

(Supreme Court of Washington. Sept. 24, 1919.)

1. CORPORATIONS ~~§~~456—CONTRACT FOR PERMANENT EMPLOYMENT NOT PREVENTING DISCHARGE.

No contract of employment by a corporation, though in terms for permanent employment, can be valid and binding on it, in the sense that it will deprive it of the power, given by Rem. Code 1915, § 3683, to remove the employé at will without liability.

2. EVIDENCE ~~§~~80(1)—LAW OF STATE OF CONTRACT PRESUMABLY SAME AS THAT OF FORUM.

The law of the state of the contract, not being pleaded or proved, will be presumed to be the same as that of the forum.

3. CORPORATIONS ~~§~~518(1)—INVALIDITY OF CONTRACT AVAILABLE AS DEFENSE WITHOUT PLEADING.

The contract on which defendant corporation was sued being, under Rem. Code 1915,

§ 3683, void and unenforceable as one of permanent employment of plaintiff, and it being so determinable as a matter of law from its face, without the determination of any issue of fact, such invalidity could be invoked as a defense without being specifically pleaded, under denial of any contract for permanent employment.

Holcomb, C. J., dissenting.

Department 2.

Appeal from Superior Court, Snohomish County; Ralph C. Bell, Judge.

Action by W. B. Williams against the Great Northern Railway Company. Judgment for defendant, and plaintiff appeals. Affirmed.

Cooley, Horan & Mulvihill, of Everett, for appellant.

F. V. Brown, of Seattle, F. G. Dorety, of St. Paul, Minn., and A. J. Langhon, of Spokane, for respondent.

PARKER, J. The plaintiff, Williams, seeks recovery of damages which he alleges resulted to him from the breach by the defendant railway company of an employment contract entered into by it with him. He set up in his complaint two causes of action; the first seeking damages for the alleged breach of the contract. We are here concerned only with the first cause of action. The case proceeded to trial, and at the close of the evidence introduced in behalf of the plaintiff, the trial court, upon motion made by counsel for the defendant challenging the sufficiency of the evidence to support any recovery upon the first cause of action, rendered its judgment of dismissal as to that cause of action from which the plaintiff has appealed to this court.

The controlling facts may be summarized as follows: In May, 1904, while employed as a switchman for the company in Minnesota, appellant was seriously injured as the result of a defective appliance upon one of its cars. In August of that year the company compromised and settled his claim for damages so resulting to him, by paying him \$4,000, when he signed a release evidencing full satisfaction therefor. At the time of this settlement, and in connection therewith, the claim agent of the company signed and gave to appellant the following writing:

"Mr. W. B. Williams, in addition to the amount paid him this date in settlement of his claims for personal injuries, will receive, upon application for the same, re-employment at a salary not less than he received when injured."

In December, 1905, appellant having recovered sufficiently to enable him to go to work, he was again employed by the company, and was so employed until June, 1917, when he was discharged, being then in the company's employ in this state. Thereafter,

in May, 1918, he commenced this action in the superior court for Snohomish county.

[1] It does not appear in the record before us upon what ground the superior court rested its order of dismissal as to the first cause of action; but counsel for the company contend that the judgment of dismissal must be affirmed, upon the ground, among others, that the contract of employment, if it be a contract for permanent employment, as appellant contends, and we shall assume that it was for present purposes, is void and unenforceable as a contract for permanent employment. We find it unnecessary to notice other grounds urged in support of the judgment of dismissal. The company by its answer denied that it had made any contract with appellant for permanent employment, but did not specially allege in its answer that the contract for employment, if it should be construed as one for permanent employment, was void and unenforceable as such; nor did appellant allege or attempt to prove that such contract was valid and binding under the laws of Minnesota, the state in which it was made.

Section 3683, Rem. Code, prescribes the powers of corporations organized under the laws of this state, and reads in part as follows:

"To appoint such officers, agents, and servants as the business of the corporation shall require, to define their powers, prescribe their duties, and fix their compensation; to require of them such security as may be thought proper for the fulfillment of their duties, and to remove them at will."

These statutory provisions have been given full force and effect by us in the following of our decisions: *Llewellyn v. Aberdeen Brewing Co.*, 65 Wash. 319, 118 Pac. 30, Ann. Cas. 1913B, 667; *Hewson v. Peterman Mfg. Co.*, 76 Wash. 600, 136 Pac. 1158, 51 L. R. A. (N. S.) 398, Ann. Cas. 1915D, 346; *Murray v. MacDougall & Southwick Co.*, 88 Wash. 358, 153 Pac. 317; *Barager v. Arcadia Orchards Co.*, 91 Wash. 294, 157 Pac. 675. In the last cited case we held that no contract of employment could be valid and binding upon the corporation, in the sense that it would deprive the corporate authorities of the statutory power to "remove" at any time, without incurring liability by the corporation, an employé, who goes into the corporation's employ under a contract of employment for a specific time, though in the case first cited there was language used in the course of the decision which seemed to intimate that the statute applied only to "employés of a fiduciary character who are to occupy positions of responsibility and trust," such as there might be occasion to require security from for the faithful performance of their duties. We think it follows that this contract, in so far as it was a contract for permanent employment, was wholly void and

unenforceable in this action, if the law of this state is controlling.

[2] That the law of this state is controlling in our disposition of this case we think is plain, in view of the fact that the law of Minnesota, where the contract was made, was neither pleaded nor sought to be proven by appellant in this action. We must therefore proceed upon the assumption that the law of Minnesota is the same as our own upon this subject. *Marston v. Rue*, 92 Wash. 129, 159 Pac. 111.

[3] Some contention is made in behalf of appellant that the question of the validity of this contract as a contract for permanent employment is only a question of ultra vires, and that therefore the company should have pleaded in its answer that the contract was void because beyond the power of the corporation to make, before it could invoke the defense of the invalidity of the contract. There might be some force in this contention if the question of the power of the company to make such contract and render it binding upon the company in the future were here involved as a question of fact, requiring proof of facts to establish such invalidity, rather than being determinable purely as a question of law. The real question here is something more than a question of ultra vires as a question of fact. The company was not required to plead in its answer that it intended to rely upon this statute rendering the contract void as a contract of permanent employment. The contract being void and unenforceable as a contract of permanent employment, and it being so determinable as a matter of law from the face of the contract, without the determination of any issue of fact, the company was privileged to invoke such invalidity as a defense without specifically pleading it. The decision of this court in *Reed v. Johnson*, 27 Wash. 42, 55, 67 Pac. 381, 57 L. R. A. 404, is in harmony with and lends support to this conclusion.

The judgment is affirmed.

FULLERTON, MOUNT, and BRIDGES, JJ., concur.

HOLCOMB, C. J., dissents.

(108 Wash. 401)

SCHULZE v. GENERAL ELECTRIC CO.
(No. 15221.)

(Supreme Court of Washington. Oct. 10, 1918.)

1. SALES ⇐32—EVIDENCE INSUFFICIENT TO SHOW CONTRACT.

In an action for damages for defendant's refusal to accept and pay for timber products, which plaintiff claimed it had contracted to purchase, correspondence between the parties held not to show any meeting of the minds;

it appearing, after defendant agreed to the terms, plaintiff, the seller, instead of accepting, countered with a new proposal.

2. SALES ⇐53(1)—WHETHER LETTERS CREATED CONTRACT QUESTION FOR COURT.

Where the negotiations between the buyer and seller consisted wholly of letters and telegrams, it is for the court to determine as a matter of law whether such correspondence constituted a contract.

Department 2.

Appeal from Superior Court, King County; R. M. Webster, Judge.

Action by August Schulze, doing business as the Pacific Coast Pole Company, against the General Electric Company. Judgment for plaintiff, and defendant appeals. Reversed, with instructions.

Ripley & Quackenbush, of Spokane, for appellant.

Post, Russell & Higgins, of Spokane, and John M. Gearin, of Portland, Or., for respondent.

TOLMAN, J. Respondent, as plaintiff below, brought this action to recover from appellant damages alleged to have been sustained through the refusal of appellant to accept and pay for certain timber products which it is claimed it had contracted to purchase. The case was tried to a jury, and from a verdict and judgment for the full amount demanded the case is brought here on appeal.

[1] The first and most forcibly presented question is whether the correspondence between the parties shows a meeting of the minds and a consummated agreement or contract. The correspondence began with a letter from appellant, asking respondent to quote his best prices for furnishing certain cedar poles and cross-arms, to be delivered at Cruz Grande, Chile, shipment to be January 1, 1916. Another letter shortly followed increasing the number of poles to be furnished. Respondent answered to the effect that as soon as he could get shipping rates he would make quotations, and thereafter wrote quoting prices, and said, "These prices include cost, insurance, freight, duty, and unloading," stated that delivery would be made during January, February, and March, and asked for terms of payment. Appellant replied by night lettergram as follows:

"Dec. 6, 1915.

"We accept your quotation November thirteenth, poles and cross-arms, Cruz Grande, Chile, on condition poles meet American Telephone & Telegraph specifications and our inspection before shipment, you to arrange shipment so at least one-third shipped each month, January, February, March. Our representative will arrange unloading destination in four days your expense. Terms of payment seventy-five per cent. against shipping documents, twenty-five per cent. on delivery Cruz Grande.

Wire if satisfactory; will then mail formal acceptance."

To which respondent sent the following answer:

"Dec. 8, 1915.

"Wire Grace and Co. San Francisco regarding your shipping request. In answer they raise freight ten cents a foot to discharge five hundred poles a day; demurrage one thousand dollars a day, February, March, April shipments ships option; thinks they can take all on February; what shall we do?"

In due course appellant sent its answer thereto, which reads:

"Dec. 10, 1915.

"Your night letter eighth. Accept proposition poles for Chile at increased freight rate ten cents per foot. Will unload five hundred poles per day and accept demurrage required. Will mail acceptance on receipt of telegraphic reply."

Although this message appears to accept the terms and conditions theretofore made by respondent, yet in view of the changes and new conditions which had appeared in each interchange of communications, it not unreasonably called specifically for a telegraphic reply before acceptance. Had there been such a telegraphic reply of acceptance on the part of respondent, clearly we could say that the minds of the parties had met and a contract had been made, or, had there been no reply whatever, it might possibly be argued that we should draw the inference from mere acquiescence that the parties had reached a mutual agreement and understanding. Yet the specific request for a reply before acceptance, under many authorities, would be sufficient to show that something was left unfinished and still to be done before the contract could be regarded as completed. *McDonnell v. Cœur d'Alene Lumber Co.*, 56 Wash. 495, 106 Pac. 135; *Stanton v. Dennis*, 64 Wash. 85, 118 Pac. 650. But the facts do not call for the application of that rule here, as respondent, evidently then believing that the contract was not then made, instead of wiring an acceptance as he had been invited to do, proceeded to send a telegraphic reply as follows:

"Dec. 11, 1915.

"Booked Cruze Grande material with Grace and Company San Francisco earliest possible delivery; will secure for cost and freight plus ten per cent.; your favor increased cost respectively, poles three sixty and four ten, cross-arms twenty twenty-five and thirty-five; terms twenty per cent., and you prepay freight; will write when to send inspector."

This telegram changed the date of delivery from January, February, and March, as set forth in the earlier communications, and from February, March, and April, as named in the telegram of December 8th, to "earliest possible delivery," which might mean, and under the conditions disclosed by the record

probably did mean, something quite different, and which would enable respondent to cast all responsibility for delay upon the transportation companies. It clearly indicated an increased price for both poles and cross-arms; it called for quite different terms of payment, and, as the record shows that the 75 per cent. mentioned in the lettergram of December 6th to be paid against shipping documents, would not be more than sufficient to pay the freight, it appears conclusively that respondent was still trying to secure better terms. Though it is not claimed that a contract was made subsequent to the exchange of messages quoted, it is argued that as appellant in later communications used such expressions as "Consider our orders for the above canceled," and as it sent its inspector to Everett to confer with respondent and examine the poles he was offering, and something was there said about arbitration when the parties failed to agree as to the size of the poles specified, it thereby admitted an existing contract. We cannot so hold. The quoted expression as to cancellation was expressly based upon unsatisfactory prices and delivery for poles to be furnished by respondent, and meant no more than a refusal to proceed further. The sending of the inspector does not necessarily mean more than a hope or expectation that a contract might be arrived at, and indeed, as the inspector brought with him a contract in written form which he requested respondent to sign, and which, after some delay and temporizing respondent changed and signed, and which appellant refused to accept as so changed, it seems apparent that the inspector was sent only in the hope that a contract might be arrived at. Upon the whole record we are satisfied that the minds of the parties never met. At the one time when respondent might have signified his acceptance of the terms and conditions then outlined, and thus secured a binding contract, he, instead of so doing, countered by demanding better prices, terms, and conditions, which were never accepted by appellant.

In *Kuh v. Lemcke*, 180 Pac. 889, we quoted with approval the rule laid down in *Baker v. Johnson County*, 37 Iowa, 186, which is:

"An offer by one party, assented to by the other, will generally constitute a contract, but the assent must comprehend the whole of the proposition. It must be exactly equal to its extent and terms, and must not qualify them by any new matter. A proposal to accept, or an acceptance of, an offer on terms varying from those proposed, amounts to a rejection of the offer."

So here, by his night letter of December 11th, respondent rejected the offer contained in appellant's telegram of December 10th. These views harmonize in principle with our many decisions involving contracts made or attempted to be made by correspondence. *Chinook Lbr. & Shingle Co. v. McLane Lbr.*

& Shingle Co., 182 Pac. 625; Sillman v. Spokane Sav. & Loan Society, 103 Wash. 619, 175 Pac. 296; Richardson Roller Mills v. Miller, 99 Wash. 654, 170 Pac. 357.

[2] The negotiations between the parties consisting wholly of letters and telegrams, it was for the court to determine as a matter of law whether such correspondence constituted a contract, and it therefore follows that the trial court erred in denying appellant's challenge to the sufficiency of the evidence and motion for judgment. Since these views dispose of the case, it is not necessary to consider the other points raised.

The judgment appealed from is reversed, with instructions to grant appellant's motion for judgment in its favor.

HOLCOMB, C. J., and MITCHELL, MACKINTOSH, and MAIN, JJ., concur.

(108 Wash. 348)

SOHELLER et al. v. TACOMA RY. & POWER CO. (No. 15286.)

(Supreme Court of Washington. Sept. 24, 1919.)

1. RAILROADS ⇨72(5)—AGREEMENT TO CONSTRUCT AND MAINTAIN COVENANT RUNNING WITH LAND.

An agreement on which land was deeded to a railroad company, providing for construction and maintenance of a railroad through the land, held to create a covenant running with the land, and not a condition subsequent.

2. RAILROADS ⇨72(8)—PURCHASER AT FORECLOSURE CAN ENFORCE COVENANT RUNNING WITH LAND.

When an agreement on which land is conveyed to a railroad company creates a covenant running with the land, one acquiring title to the remainder of the grantor's tract by mortgage foreclosure is proper party to maintain action for breach of the covenant.

3. RAILROADS ⇨72(1)—COVENANT TO CONSTRUCT AND MAINTAIN COMPLIED WITH BY OPERATION FOR 25 YEARS.

Covenant on which land was conveyed to a railroad company, that it should construct and maintain a railroad through it, did not require the company to operate the road in perpetuity, and was substantially complied with by operation for 25 years.

Holcomb, C. J., dissenting.

Department 1.

Appeal from Superior Court, Pierce County; E. M. Card, Judge.

Action by Frank Scheller, administrator, and others, against the Tacoma Railway & Power Company. Judgment for defendant, and plaintiffs appeal. Affirmed.

Guy E. Kelly and Thomas MacMahon, both of Tacoma, for appellants.

F. D. Oakley, of Tacoma, for respondent.

MACKINTOSH, J. Respondent's predecessor was incorporated for the purpose of building and operating an electric railroad line between Tacoma and Stellacoom. One Whyte at the time was owner of section 22, which was situated near the line of the proposed railroad. Whyte platted a portion of the southwest quarter of that section, and, by written agreement with the railroad company, agreed to convey to it the E. $\frac{1}{2}$ of N. E. $\frac{1}{4}$ of S. W. $\frac{1}{4}$, E. $\frac{1}{2}$ of E. $\frac{1}{4}$ of N. W. $\frac{1}{4}$, blocks 7, 8, 15, 16, together with a strip of land 30 feet wide through the S. E. $\frac{1}{4}$ of the section upon which the railroad had been located. The agreement between Whyte and the railroad company provided that Whyte should give a warranty deed to it and its assigns, which deed was to be deposited in escrow—

"to be delivered to the said party of the second part upon the performance by the said party of the second part of the following covenants and conditions, that is to say:

"The said party of the second part is to pay to the said parties of the first part the sum of one dollar, amount expressed in said deed as the consideration thereof, and shall on or before the 30th day of January, 1891, build, equip and operate a narrow gauge railroad between its point of beginning at, in or near the city limits of the city of Tacoma, Pierce county, state of Washington, along, through, over and by that certain lot, piece or parcel of land belonging to the said party of the first part, particularly described as follows:

"A strip of land thirty (30) feet in width through the southeast one-quarter of section No. twenty-two (22) in township No. twenty (20) north of range two (2) east of Willamette M. said strip being fifteen (15) feet on either side of the center line of the railroad track of the said party of the second part as the same is now located and shall be hereafter constructed through said tract, which said last described tract of land the said parties of the first part for the consideration of one dollar, the receipt whereof is hereby acknowledged do hereby grant and convey unto the said party of the second part its successors and assigns forever in fee simple for the use, and purpose of a right of way for said railroad forever disclaiming any and all interest in and to said tract, provided however, that said party of the second part shall use said described tract for the purpose of said right of way and other railroad purposes, and from thence to such a point at or near section 29 in township 20, north of range 2, E. W. M. (or further if considered practicable or desirable), as the said party of the second part may determine and shall at all times maintain and operate said narrow-gauge railroad either by itself or assigns between its terminal points and shall establish and maintain a station at such point upon or near the land last hereinabove described as shall be determined on, on the line of said rail-

road, and as shall be most advantageous to the parties hereto and shall stop the trains of said railroad at such stations on all trips either coming or going between said terminal points for the accommodation of the parties of the first part herein and any and all passengers who may desire or seek transportation from said station by said route or line of railroad.

"And it is stipulated, understood and agreed by and between the parties to this contract that as soon as said line of railroad is established, completed and equipped along and upon said last described lands said Pacific National Bank, who holds said deed in escrow, shall and may then deliver as the act and deed of the parties of the first part the said deed to the party of the second part herein for its own use and benefit, and for the benefit of its assigns.

"And it is understood and agreed between the parties hereto that the party of the second part is to have the immediate possession and control of said premises from and after the execution of said contract, and should said party of the second part fail to build and equip said railroad and to build and maintain such station as herein provided, then the said Pacific National Bank, who holds said deed in escrow, shall deliver said deed back to said parties of the first part, their heirs or assigns, and this agreement shall thereupon be void and of no effect."

The railroad company constructed the road, obtained the deed, and took possession of the property, selling and disposing of that portion thereof not used by it for its right of way. At the time of platting, Whyte mortgaged all of the S. W. $\frac{1}{4}$ of the section except the E. $\frac{1}{2}$ of E. $\frac{1}{2}$ of S. E. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$ and E. $\frac{1}{2}$ of S. E. $\frac{1}{4}$ of N. E. $\frac{1}{4}$ of S. W. $\frac{1}{4}$, to the Mason Mortgage Company, which sold the mortgage to the ancestor of the plaintiffs, who purchased the mortgage, relying upon the value of the property as the same was enhanced by the railroad and transportation facilities; the property not then or now being worth the purchase price except as the same should be connected with Tacoma by adequate transportation facilities. Thereafter the respondent in this action purchased all the property and franchises of the Tacoma & Stellacoom Railway Company and operated the road for 25 years or more. The appellants' ancestor was compelled to and did foreclose the mortgage and bought in the property at the mortgage sale, and died, devising the property to the appellants. Thereafter the respondent discontinued the operation of the railroad at this point and tore up and abandoned the same, and the appellants brought this action at law seeking to recover damages from the respondent for its failure to comply with the agreements in its contract, upon the theory that these agreements constituted covenants running with the land and that the abandonment of the railroad constituted a breach of such covenants which entitled the appellants to maintain an action for damages. A demurrer was sustained to the complaint, and the

action was dismissed, upon which this appeal was taken.

[1] It is to be borne in mind that this is not an action seeking to enjoin the railroad company from abandoning the line, such as was the case of *Day v. Tacoma Ry. Co.*, 80 Wash. 161, 141 Pac. 347, L. R. A. 1915D, 547, which relates to the same situation and to which case reference is made for the facts relative to the abandonment; that being an action where the property owners were attempting to obtain equitable relief by way of injunction. Nor is this an action in equity seeking to recover property granted to the railroad company upon a breach of the conditions accompanying the grant. The appellants argue that the agreement between Whyte and the railroad company created covenants running with the land, and that therefore they, being now the owners of the land, can recover for the breach of such covenants. The respondent argues that the agreement merely created conditions subsequent for a breach of which the proper parties in interest would be confined to a forfeiture of the property granted, and that the appellants, not being the grantor nor his heirs, are strangers to and have no right under the contract to enforce such forfeiture or recover damages. This phase of the case involves one of the most complicated questions in the law. From the time of *Spencer's Case*, reported in 5 Coke, 16, till the present day, the courts have been engaged in painstaking and irreconcilable expositions of the subject, until, as was said by this court in *Pioneer S. & G. Co. v. Seattle Cons. & D. D. Co.*, 102 Wash. 608, 173 Pac. 508:

"Many of the old doctrines have since been expressly overruled; others seem to be ignored; and more and more equity has come to enforce covenants which technically do not run with the land. * * * At any rate, the contract appears to be such a covenant regulating or restricting the use of the land as will be enforced in equity, when the party acquiring title took with notice, whether it is technically a covenant running with the land or not."

The law not looking with favor upon forfeitures, the courts have been inclined, in cases difficult of solution, to resolve the doubt in a disputed agreement as creating a covenant running with the land rather than as a condition subsequent. *Union Stockyards Co. v. Nashville Packing Co.*, 140 Fed. 701, 72 C. C. A. 195. The following cases, including the *Pioneer S. & G. Co. v. Seattle Cons. & D. Co.*, just cited, would incline us to the view that the agreement between Whyte and the railroad company gave rise to covenants running with the land: *Withers v. Wabash Railroad Co.*, 122 Mo. App. 282, 99 S. W. 34; *Dorsey v. St. Louis*, etc., 58 Ill. 65; *Georgia So. Ry. v. Reeves*, 64 Ga. 492; *Gilmer v. M. & M. Ry.*, 79 Ala. 569, 58 Am. Rep. 623; *Whalen v. B. & O. Ry.*, 108 Md. 11, 69 Atl. 390, 17 L. R. A. (N. S.) 130,

129 Am. St. Rep. 423; *Blanchard v. Detroit, Lan., etc., Ry.*, 31 Mich. 43, 18 Am. Rep. 142; *Ford v. Ore. Electric Ry. Co.*, 60 Or. 278, 117 Pac. 809, 56 L. R. A. (N. S.) 358, Ann. Cas. 1914A, 280.

The case of *Mills v. Seattle Montana Ry. Co.*, 10 Wash. 520, 39 Pac. 246, holding that the agreement there under consideration was a condition subsequent, is based upon the fact that the grantee was in that case insisting upon such a construction; the court saying:

"It is a proposition too well understood to require argument or citation, that courts do not favor forfeitures, and that for that reason they go very far in construing the provisions of a deed poll against the grantor, to the end that the estate granted may not be defeated, since the almost universal effect of sustaining a stipulation in such an instrument as a condition subsequent is to work great hardship upon the grantee. But wherever the terms of the instrument are plain and unambiguous, there is no hesitation in enforcing the actual contract made by the parties.

"Where, however, the rare instance occurs, as it does here, that the grantee is found insisting upon the construction of a condition subsequent, and that forfeiture shall take place, all consideration for him and all idea of hardship to him is eliminated, and the court is free to act without such consideration. The appellant here has all along been urging the theory of a condition subsequent, and has by its answer offered to pay the just value of the land taken by it, and damages to land of the respondent not taken."

Mouat v. Seattle Electric Ry., 16 Wash. 84, 47 Pac. 233, was dealing with a stipulation in a deed which on its face was apparently intended as a condition subsequent. The same is true of the case of *Sherman v. Town of Jefferson*, 274 Ill. 294, 113 N. E. 624; and *Fowler v. Coates*, 201 N. Y. 257, 94 N. E. 997.

[2, 3] On the assumption then that Whyte's contract with the railroad company created a covenant running with the land, it would follow that the plaintiffs in this action were the proper parties, and that an action for damages for breach of those covenants would be maintainable by them if not defeated by other principles of law; which brings us to the consideration of the next point presented by the respondent, viz.: That the contract did not impose upon the railroad company the duty of operating the railroad in perpetuity or during any specified period; that the terms of the contract were substantially complied with by the railroad having been operated for a period of 25 years. With this statement the law seems to agree with practical unanimity. *Mead v. Ballard*, 74 U. S. (7 Wall.) 290, 19 L. Ed. 190, was an action brought in ejectment to recover land conveyed upon the understanding that an institution of learning "shall be permanently located upon said lands," which institution

was located with the intention that there should be its permanent situation. The buildings were thereafter destroyed by fire and the institution subsequently erected upon another piece of land. The Supreme Court of the United States, in that case, said:

"The thing to be done was the location of the institute. Did this mean that all the buildings which the institution might ever need were to be built within that time, or did it mean that the officers of the institution were to determine, in good faith, the place where the buildings for its use should be erected? It is clear to us that the latter was the real meaning of the parties, and that when the trustees passed their resolution locating the building on the land, with the intention that it should be the permanent place of conducting the business of the corporation, they had permanently located the institute within the true construction of the contract.

"Counsel for the plaintiff attach to the word 'permanent,' in this connection, a meaning inconsistent with the obvious intent of the parties, that the condition was one which might be fully performed within a year. Such a construction is something more than a condition to locate. It is a covenant to build and rebuild; a covenant against removal at any time; a covenant to keep up an institution of learning on that land forever, or for a very indefinite time. This could not have been the intention of the parties.

"We are of opinion that the testimony shows, in any view that can be taken of it, that the condition was fully complied with and performed, and with it passed all right of reversion to the grantor or his heirs."

The Supreme Court of the United States, in *Newton v. Mahoning County*, 100 U. S. 548, 25 L. Ed. 710, was considering a case where the county seat of one of the counties of Ohio "was permanently established in the town of Canfield"; the citizens of that town having furnished the land for the purpose of having the county buildings erected thereon. The court held, although the contract provided for a permanent establishment (it will be noticed that the contract before us merely provided for construction and maintenance and nowhere is the word "permanent" or its equivalent used), that the contract should not be construed so as to compel the county seat to remain forever upon the land granted, and that the grantor must be presumed to have known that the Legislature had power to remove the county seat at pleasure, and that he must be held to have had in view the possibility of such change when he made his grant. So here, when Whyte made his grant he realized that he was dealing with a public service corporation, and its duties to and control by the public were matters which must be held to have entered into his contract.

The leading case on this subject is *Texas & Pac. Ry. Co. v. Marshall*, 136 U. S. 393, 10 Sup. Ct. 846, 34 L. Ed. 385, being a case where the city of Marshall, Tex., gave to the

railroad company \$300,000 in bonds and 66 acres of land for shops and depot; the company in consideration of this action agreeing to "permanently establish its eastern terminus and Texas offices at the city of Marshall" and "to establish and construct at said city the main machine shops and car works of said railway company." The city performed its agreements, and the company, on its part, made Marshall its eastern terminus, and built depots and shops, and established its principal offices there. After the expiration of a few years, Marshall ceased to be the eastern terminus of the road, and some of the shops were removed. The Supreme Court held that the contract on the part of the railway was satisfied and performed when the city had been made the terminus, stores and shops set up and kept going eight years, until the interests of the public and of the railroad demanded the removal of some or all of those subjects of the contract to another place; that the contract, under the circumstances, had been complied with; and that the public interest was served by abandoning and removing the property.

Whalen v. Balto. & O. R. Co., 112 Md. 187, 76 Atl. 166, had been once before the court as an action in equity to compel the railroad company to specifically perform its agreement which it had made with the plaintiff's predecessors to construct and operate and maintain a side track. Whalen v. Baltimore & O. Ry., 108 Md. 11, 69 Atl. 390, 17 L. R. A. (N. S.) 130, 129 Am. St. Rep. 423. The side track was maintained for a period of 59 years and then abandoned. The Supreme Court of Maryland having dismissed the equity action, the plaintiffs began an action in law for damages for breach of contract. The court held that the word "maintained," as used in such agreement, did not require the railroad company to continue the side track permanently; that the length of time during which the covenant had been complied with constituted a substantial performance thereof, so that the railroad was not liable in damages for its breach:

"Considering the language used in the covenant before us, it is to be observed that, while it distinctly provides for the construction and maintenance of the turnout and siding, * * * it is entirely silent as to the duration of the maintenance of those structures or that service. We cannot yield our assent to the contention of the appellant that the word 'maintain' ordinarily means to maintain indefinitely or forever. Its meaning in that respect depends upon the context in which it appears and the subject-matter to which it relates. There is plainly no specific or positive provision in the covenant touching the duration of the time during which the covenanted acts are to be done or privileges furnished."

Judge Taft, in Jones v. Newport News, etc., 65 Fed. 736, 13 C. C. A. 95, held that an agreement by a railroad company and one owning land adjacent to its track to estab-

lish and maintain switch connections could not be the basis of a recovery of damages upon the railroad's discontinuing the service, the court saying that to hold otherwise would "forever limit the discretion of the directors to deal with a subject which may seriously affect the convenience or safety of the public in its use of the road."

Texas & Pac. Ry. v. Scott, 77 Fed. 728, 23 C. C. A. 424, 37 L. R. A. 94, dealt with a contract between Scott and the railroad company whereby Scott contracted to give a right of way over his land if the company would establish a depot thereon. The railroad was built and the depot established and maintained for 36 years, when it was abandoned for reasons connected with the best interests of the public and the company. The court held that the contract did not bind the railroad company to keep up a depot forever, but that its maintenance until such time as the best interests of the public and the corporation required abandonment was a substantial compliance with the contract.

In Lucas v. N. Y., etc., R. Co., 130 Fed. 438, 64 C. C. A. 638, the defendant had contracted with the plaintiff in consideration of his dedicating a strip of land for the purpose of constructing a roadway that it would make, when it changed its passenger station, a suitable entrance way into its station grounds and continue the roadway eastward. This the railroad did, but very shortly thereafter the roadway and entrance were discontinued. It was held that defendant did not bind itself to maintain a permanent entrance and road, and, having maintained the same until the city had changed the grade, it was not liable for breach of its covenant.

In Union Stockyards Co. et al. v. Nashville Packing Co., above, the plaintiff conveyed land to the defendant upon a contract by which the defendant agreed to build and maintain a packing house of specified capacity, the contract providing no time during which the agreement should endure, the deed reciting that it was made "upon condition of the due performance of the contract by the grantee." The packing house was built, but its operation subsequently abandoned.

"Another feature of the transaction which seems to us of much significance is that no time was fixed during which the obligation to maintain and operate the packing house should endure. It seems to be hardly reasonable to suppose that the parties could have understood that this covenant should continue to operate perpetually. Indeed, one can hardly withstand the conviction that the covenant was expected by the parties to have some limitation in respect of time, and, if so, it might be a question whether any other limitation is more natural or probable than that it should abide such contingencies of the business as could not in the natural course of things be avoided, as, for instance, could not, with prudent management, be carried on without loss. Of course, we are not now undertaking to lay down a par-

ticular definition of the contingencies which might terminate the obligation."

These cases would seem to be squarely in point on the question before us and to determine it in respondent's favor. This being true, the demurrer was properly sustained.

FULLERTON, TOLMAN, MAIN, and MITCHELL, JJ., concur.

HOLCOMB, C. J., dissents.

(108 Wash. 443)

STATE ex rel. RATLIFF et al. v. SUPERIOR COURT FOR WHITMAN COUNTY et al. (No. 15383.)

(Supreme Court of Washington. Oct. 10, 1919.)

1. PARTNERSHIP \Leftrightarrow 8—AGREEMENT OF LANDLORD AND TENANT FOR THE USE OF FARM A LEASE.

An instrument leasing land for one-third of crops, lessor to receive another one-third for furnishing horses and machinery, etc., for operating the farm, lessor to pay for upkeep and repair of equipment, lessees to bear the expense of operating the farm, the agreement prohibiting subletting, incumbering or disposing of crops and the permitting liens, with no agreement for sharing losses, and permitting lessor's entry for uses consistent with the lease and his termination of lease for lessees, etc., construed a lease and not a copartnership or combined lease and joint adventure.

2. LANDLORD AND TENANT \Leftrightarrow 53(2)—RIGHT OF LANDLORD'S ASSIGNEE OF LEASE TO POSSESSION OF LAND PREVIOUSLY SOLD.

Where a lease of two farms gave landlord one third grain rent and one third additional for use of farming equipment, and he sold the upper farm to plaintiffs subject to the lease which they and tenants canceled, as to such farm, and defendants' vendor purchased the lower farm, farm equipment, and an assignment of landlord's lease rights, defendants were not entitled as against plaintiff owners to possession of the upper farm, because of any right to have the original tenants use the farm equipment on plaintiffs' lands; defendants' remedy, if any, being against such tenants for breach of contract.

Department 2.

Certiorari by the State, on the relation of Frank A. Ratliffe and others, against the Superior Court for Whitman County, Hon. R. L. McCroskey, Judge, to review a judgment against relators, defendants, in an action for possession of real estate. Judgment affirmed.

Burcham & Blair, of Spokane, for relator Cunningham.

Sam'l P. Weaver, of Sprague, for defendants.

BRIDGES, J. This is an action for the possession of real estate. We will refer to

the parties as plaintiffs and defendants. The facts are substantially as follows:

On November 29, 1916, one George Strachan was the owner of two farms located in Whitman county, Wash. One has been and will be referred to as the upper, and the other as the lower, farm. Strachan was also the owner of various farm machinery, tools, implements, and appliances, and also several head of work horses. On the date above mentioned, Strachan, as the party of the first part, and J. E. Neece and W. E. Neece, as the parties of the second part, entered into a written instrument, which was termed a farm lease, whereby both farms were leased by the first party to the second parties for three years. This instrument also turned over to the tenants all the above-mentioned farming equipment, horses, harness, etc. It was provided that the lessees should do all work in a first-class manner and should sow grain to such parts of the land as should be fit for grain, and all hay land was to be sown to hay. The lease then continues:

"First party is to receive and be entitled to the following proportions of the products raised on the above described lands, to wit: Wheat, one-third; oats, one-third; hay, one-third. All grain which belongs to the first party is to be delivered by the second party at the nearest warehouse in sacks to be furnished by the first party. All hay and grain belonging to the first party is to be well housed and sacked so as to shed rain, until delivered at warehouse.

"Second party agrees to give first party at least ten days' written notice of the time and place of threshing all grain grown on said lands, and not to assign this lease or sublet said premises without the written consent of the said party of the first part, and at the expiration of this lease to surrender up peaceable possession of said premises in good condition to the party of the first part.

"The title to all of the products shall be and remain in the first party until such time as he shall have received his full proportion thereof, and second party shall not mortgage or dispose of any part thereof to the prejudice of the party of the first part.

"The first party has the right to go upon the said premises at any time and perform such work thereon as he may deem advisable which does not prevent the party of the second part from carrying out the terms and conditions of this lease. Second party is to keep all buildings and fences in good repair. All damages caused by second party not complying with the terms of this lease shall be at a loss of second party.

"It is further agreed that no lien shall be claimed or filed by any party performing any labor or work of any kind whatever on said premises or on or about said products, and that no lien or right of lien shall exist therefor.

"Party of the first part agrees to furnish 24 head of work horses and harness for same, and all implements of every kind necessary to farm the said land and harvest the crops thereon, and to pay for all new extra parts needed to keep said machinery in good repair.

"Party of the first part agrees to furnish all seeds and feed necessary to till and sow said lands in the fall of 1916, and spring of 1917, one-half of whatever seed and feed is used in 1916 and 1917 to be returned to the first party at the termination of this lease by the party of the second part.

"Party of the first part and parties of the second part further agree that all grain and crops grown on the said lands after the rent of one-third has been paid shall be divided equally between the parties hereto, each party to furnish his own sacks to sack the grain, and the party of the second part is to do all the hauling of the grain and crops, and party of the first part agrees to pay wages for the man while they are hauling his share of the crops mentioned herein.

"It is further agreed by and between the parties hereto that all increase from the stock furnished by the party of the first part shall be divided equally between the parties hereto. Party of the first part agrees to furnish a stallion for work and breeding purposes.

"It is further agreed that all increase from the cattle furnished by the party of the first part shall be equally divided by the parties hereto."

The lease further provides how the increase of the stock shall be divided, and that the lessees shall take proper care of all such stock; that at the time of the making of the lease there were about 350 acres of summer fallow; that at the termination of the lease an equal number of acres of summer fallow should be left on the lands; that all straw and pasturage on the place at termination of the lease should become the property of the lessor; that it was understood that the lands were being offered for sale and might be sold subject to the lease; and that if the lessees failed to strictly comply with the terms of the lease the same might be terminated by the lessor for that reason.

The contract seems to provide that Strachan is to receive one-third of the crops for the use of the lands and is to receive another one-third of the crops for the use of his teams and farming equipment, which is, of course, the same thing as receiving two-thirds of the crops for the use of the lands, horses, farming equipment, etc.

These farms were operated under this lease until July 17, 1917, when the lessor conveyed the upper farm to the plaintiffs, subject, however, to the terms of the lease. After the plaintiffs became the owners of the upper farm, they stepped into the shoes of the original landlord in so far as that farm was concerned, and the Neece brothers continued to operate both farms under the terms of the lease, employing the machinery and farming equipment mentioned in the original lease for that purpose. The one-third of the crops was delivered to the plaintiffs instead of to Strachan, the original lessor. On May 11, 1918, Strachan conveyed the remainder of the land, to wit, the lower farm, together with all of the above-mentioned farming ma-

chinery, horses, cattle, etc., to the defendants' vendor. At about the same time Strachan assigned to defendants' vendor all his interest in the lease. The Neece brothers, the tenants, continued to operate under the terms of their lease until on or about the 1st day of October, 1918, when they and the plaintiffs entered into an agreement whereby the original lease, in so far as the upper place was concerned, was canceled and annulled and possession of that place was turned over to the plaintiffs. They entered into actual possession about the 1st of October, 1918; but in a few days plaintiffs were ousted by defendants, who proceeded to plow, cultivate, seed, and otherwise operate both the upper and lower farms. On October 12, 1918, Neece brothers informed the defendants that they would not further operate either of the farms and would surrender the possession of the lower farm and all the machinery and farm equipment covered by the original lease, to them. After some controversy concerning the surrender and some effort on the part of the defendants to persuade Neece brothers to continue the operations, they met and divided the stock as provided in the lease, and all machinery, tools, implements, and appliances covered by the original lease and the lower farm were given into the possession of the defendants. At that time the defendants requested Neece brothers to assign to them all of their interest in the Strachan lease, which request Neece brothers agreed to comply with, but thereafter failed or refused so to do. Immediately after the defendants had dispossessed the plaintiffs of the upper farm, the latter gave the usual notice to the former demanding possession. This, defendants refused, and this suit followed. The case was tried to the court without a jury. The testimony took a very wide range. The trial court found for the plaintiffs and entered judgment accordingly. The defendants sued out a writ of certiorari for review by this court, of the proceedings in the trial court, and the record is now before us.

It must at all times be kept in mind that the only question involved in this action is the possession and right to possession of the upper farm.

[1] It is contended by defendants, as we understand them, that the instrument called a farm lease is of a dual character, being a combined lease and joint adventure; that so far as it undertakes to lease the land itself it creates the relationship of landlord and tenant, but in so far as it affects the farm equipment and the use thereof it creates a joint adventure; that the joint adventure feature of the instrument could not be terminated by agreement between Neece brothers, the tenants, and the plaintiffs; at any rate, it could not be terminated so as to affect any rights which the defendants might have by virtue of the joint adventure rela-

tionship; that defendants had the right to have their equipment used on the plaintiffs' land and thus made to earn one-third of the crops; and when Neece brothers refused to so use the equipment the defendants had the right to use the same on plaintiffs' farm, and consequently they had the right to the possession of that land in order to make such use of their equipment. The plaintiffs contend that the contract was a simple lease creating only the relation of landlord and tenant.

We agree with the finding of the trial court to the effect that plaintiffs were in the actual possession of their farm on the 1st day of October, 1918, and remained in possession until about October 12, 1918, when they were dispossessed by the defendants.

The courts and authorities have not yet laid down any very certain definition of a joint adventure, nor have they established any very fixed or certain boundaries thereof; but generally they have been content to determine whether the given or conceded facts in a particular case constitute the relationship of joint adventurers or copartners. Generally speaking, the authorities seem to hold that a joint adventure very closely resembles a copartnership, and that the rules of law governing the latter are generally applicable to the former. It is conceded that a joint adventure creates a close and even fiduciary relationship between the parties, and that whether an instrument establishes the relationship of landlord and tenant or joint adventurers or copartners is to be ascertained from the contract. 15 R. C. L. p. 500 et seq.; 23 Cyc. 453 et seq.; *Shrum, Adm'r, v. Simpson*, 155 Ind. 160, 57 N. E. 708, 49 L. R. A. 792; *Westcott v. Gilman*, 170 Cal. 562, 150 Pac. 777, Ann. Cas. 1916E, 440 and notes; *Brotherton v. Glichrist*, 144 Mich. 274, 107 N. W. 890, 115 Am. St. Rep. 397 and note.

A careful study of the written instrument involved in this case convinces us that it is nothing more nor less than a simple lease creating only the relationship of landlord and tenant, and that it lacks many of the essentials of a copartnership or joint adventure. Almost everything in the instrument shows that it was the intention of the parties to execute a lease, and that only. By the instrument, Strachan leased to Neece brothers two certain farms owned by him, for the use of which lands he was to receive one-third of the crops. Strachan also leased or hired to Neece brothers a complete farming equipment, such as horses, harness, plows, harrows, etc., for the use of which he was to be paid an additional one-third of the crops to be raised. The tenants were to do all of the work and be at all of the expense of operating the farm. They had no authority to hire farm help and charge any portion of the expense to the lessor, nor did the lessor have any authority to create any indebtedness concerning the operation of the

farm. Strachan was to be at the expense for the upkeep and repair of all the farming equipment. He was to furnish certain seed, but it was to be returned to him in kind. The tenants were expressly prohibited from assigning the lease or subletting it and were to surrender the premises in good condition at the termination of the lease. They were expressly prohibited from incumbering the crops or disposing of the same. The lessor reserved the right to go upon the land and use it in any way which was not inconsistent with the uses to which the tenants desired to put the same under their lease. The tenants were expressly forbidden to permit any liens for work or otherwise, and finally it was agreed that the lessor might terminate the lease should the tenants fail to faithfully live up to its terms. There was nothing in the agreement whereby the losses, if any, were to be shared. These provisions of the lease are, in our judgment, wholly inconsistent with the idea of a copartnership or joint adventure. These questions are very intelligently discussed in the case of *Z. C. Miles Co. v. Gordon*, 8 Wash. 442, 36 Pac. 265, where the court, speaking through Chief Justice Dunbar, said:

"It seems to us that this agreement cannot be construed to be a formation of a partnership in any sense. It purports to be a lease. It is recited in the instrument itself that it is a lease, and while of course such recitation would not make it a lease if the elements of partnership were in the agreement, yet it seems to us that these elements are entirely wanting. Leases which provide for a division of the profits are of common occurrence in the business world.
* * *

"It is true that there is an agreement here to share the profits, but on the other hand there is no agreement to share the losses, which is the ordinary test of a partnership. We know of no reason why a person who has a house, or a farm, or any other character of property which he is desirous of leasing, shall not be allowed to make his own terms as to what the payment shall consist of, whether, in the case of a farm, it shall be for one-half of the gross amount of grain raised, or for one-half of the amount of grain raised after the expense of putting in and harvesting the crop are deducted, or for a certain number of bushels of grain without regard to the amount raised, or for a certain specified sum of money. In each instance the amount agreed upon is intended as a payment for the use of the premises; and in the case at bar it seems that nothing more is imported into this contract than is generally found in contracts of lease."

In the case of *Parker v. Fergus*, 43 Ill 437, the court, in construing a contract similar to the one involved here, said:

"Over this entire country we see that farmers lease their lands for agricultural purposes, and agree to receive a third or other portion of the products of the soil and the labor of the tenant as a payment of the rent. Again, it not unfrequently occurs that the owner of the soil furnishes the land, the teams, implements and the

seed; whilst another performs the labor, and they divide the product according to the terms of their agreement, and no one ever imagined that in either class of such cases the parties became in any sense copartners."

In the case of *Shrum, Adm'r, v. Simpson*, supra, the court, in construing a similar contract, said:

"There are obvious reasons for holding that farm contracts, or agricultural agreements, by which the owner of lands contracts with another that such lands shall be occupied and cultivated by the latter, each party furnishing a certain proportion of the seed, implements, and stock, and that the products shall be divided at the end of a given term, or sold and the proceeds divided, shall not be construed as creating a partnership between the parties. Such agreements are common in this country, are usually very informal in their character, often resting in parol as in the present case. In the absence of stipulations or evidence clearly manifesting a contrary purpose, it will not be presumed that the parties to such an agreement intend to assume the important and intricate responsibilities of partners, or to incur the inconveniences and dangers frequently incident to that relation."

To the same effect, see the following cases: *Cedarberg v. Guernsey*, 12 S. D. 77, 80 N. W. 159; *Musser v. Brink*, 68 Mo. 242; *Dixon v. Nicolls*, 39 Ill. 372, 89 Am. Dec. 312; *Alwood v. Ruckman*, 21 Ill. 200; *Bowers v. Graves & Vinton Co.*, 8 S. D. 385, 66 N. W. 931; *Day v. Stevens*, 88 N. C. 83, 43 Am. Rep. 732; *Reeves v. Hannan*, 65 N. J. Law, 249, 48 Atl. 1018; *Quackenbush v. Sawyer*, 54 Cal. 430; *Warner v. Abbey*, 112 Mass. 355; *Chapman v. Eames*, 67 Me. 452.

The cases relied upon by the defendants to show that this contract created, at least in part, a joint adventure, are, in our judgment, very different in their facts from the case at bar.

The case of *Wetmore v. Crouch*, 150 Mo. 671, 51 S. W. 738, cited by defendants, was an instance where the plaintiff advanced to the defendant \$250 to be invested for their joint interest in options on certain real estate. If the venture was a failure, the defendant was to return one-half of the money advanced; otherwise, the profits were to be divided between the parties. Under these facts it would appear to be unquestioned that a partnership or joint enterprise relationship was created.

The case of *Baker v. Kever*, 130 Ga. 257, 60 S. E. 551, cited by defendants, did not determine whether the contract there being inquired into created a partnership, joint adventure, or other character of relation.

In the case of *Bedolla v. Williams*, 15 Cal. App. 738, 115 Pac. 747, cited by defendants, the court expressly found it unnecessary to determine whether the agreement constituted a partnership or a joint adventure.

In the case of *Zech v. Bell*, 94 Wash. 344, 162 Pac. 363, the facts were that it was

agreed between the parties that the appellant should obtain a contract to do certain work and he would pay certain of the bills, and the respondent should do the work; and that the profits should be divided. The court held that the agreement created a joint adventure.

In the case of *Bane v. Dow*, 80 Wash. 631, 142 Pac. 23, the respondents, who were brokers living in New York City, controlled certain importing business. They entered into a contract with appellants by the terms of which they directed this business to be turned over to appellants, and, after certain deductions, there was to be an equal division of the returns. The court held that the agreement constituted a joint adventure.

The facts in each of these cases are vastly different from the facts in the case at bar; in truth, the distinctions, to our mind, are so plain and palpable that they serve well to show the difference between an ordinary lease contract and a joint adventure.

[2] It should be kept in mind that only Neece brothers were the tenants, and that they only had the right of possession. They did not assign to defendants their lease, nor right to possession by virtue thereof. Defendants were never the lessees, nor assignees, of the lease, and therefore could never have been entitled to possession against the objections of the plaintiffs. Nor, for that matter, could they have become the lawful assignees of the lease, because that instrument expressly provided against any assignment. The right to have Neece brothers use their equipment on plaintiffs' lands did not give defendants themselves any right to possession of those lands. They were in the same position Strachan was after he had sold the upper place to plaintiffs, retaining all the rest of the leased property; and certainly Strachan would not have been in position to legally hold possession of the land he had sold. When the plaintiffs purchased the upper farm, they became the landlords as to that farm, and there is no reason why they might not make an agreement with the tenant for the annulment of the lease. It may be that under the terms of the lease Neece brothers were bound to use defendants' farming equipment in operating the plaintiffs' lands, during the term of the original lease. If so, then it would seem that the Neece brothers have violated their agreement with the defendants and would be liable to the defendants in damages. In any event, we hold that the plaintiffs were in the actual possession of their land, and that they were ousted by the defendants, and that they are entitled to possession as against the defendants; and therefore the judgment under review must be affirmed.

It is so ordered.

HOLCOMB, C. J., and FULLERTON, PARKER, and MOUNT, JJ., concur.

(108 Wash. 390)

STATE ex rel. McMILLAN v. MILLER,
County Auditor. (No. 15368.)

(Supreme Court of Washington. Oct. 8, 1919.)

1. LIMITATION OF ACTIONS \S 28(1)—THREE-YEAR STATUTE APPLIES TO OBLIGATION OF COUNTY TO PAY COMMISSIONER'S SALARY FOR SERVICES.

The obligation of a county, under Rem. Code 1915, \S 4037, to pay a county commissioner for services rendered by him as such, becomes contractual in its nature on the rendition of such services, so that the three-year statute of limitations (section 159) governs as to the time within which he is required to seek recovery.

2. LIMITATION OF ACTIONS \S 49(2)—ACCRUAL OF CAUSE OF ACTION FOR SALARY OF COUNTY COMMISSIONER.

Under Rem. Code 1915, \S 4075, on the first Monday of each month a right of action accrued to a county commissioner entitling him to seek relief in the courts to recover his salary, fixed by section 4037, earned during the previous month, so that the statute of limitation began to run against him on such dates.

Department 2.

Appeal from Superior Court, Whatcom County; Ed. E. Hardin, Judge.

Mandamus by the State of Washington, on the relation of J. B. McMillan, against James A. Miller, as Auditor of Whatcom County. From the judgment, relator and defendant both appeal. Affirmed.

Walter B. Whitcomb, of Bellingham, for appellant.

Loomis Baldrey and Frank W. Radley, both of Bellingham, for respondent.

PARKER, J. The relator, McMillan, commenced this action in the superior court for Whatcom county seeking a writ of mandate to compel the auditor of that county to issue to him a warrant in compliance with an order of allowance made by the board of county commissioners for a balance of \$3,050 claimed to be due him for services rendered as county commissioner during the period of approximately four years from January, 1915, to October, 1918, inclusive. The superior court awarded recovery to McMillan in the sum of \$2,400 and caused to be issued its writ of mandate directing the county auditor to issue a warrant accordingly. The court rested its judgment upon the theory that all but \$2,400 of McMillan's claim was, at the time of its allowance by the board and at the time of the commencement of this action, barred by the three-year statute of limitations. From this disposition of the cause McMillan has appealed, contending that no part of his claim was barred at the time of its allowance by the board and the commencement of this action. The auditor

has also appealed, contending that the two-year statute of limitation is controlling in this case, and that all of that portion of McMillan's claim accruing more than two years prior to its allowance by the board and commencement of this action is barred.

The controlling facts are not in dispute and may be summarized as follows: From January 11, 1915, until the commencement of this action in the superior court on December 3, 1918, McMillan was a duly elected, qualified, and acting commissioner of Whatcom county. That county was at all the times in question a county of the fifth class, and it is here conceded by counsel on both sides that McMillan was entitled to receive for his services as such commissioner compensation payable by the county at the rate of \$1,800 per year as provided by section 4037, Rem. Code. For services rendered by McMillan as commissioner during each of the months from January, 1915, to October, 1918, he was, between the 1st and 7th days of each of the following months, respectively—and we assume on the first Mondays thereof—paid for such services upon a per diem basis sums averaging \$83.33 for each of such previous month's services. During his three years' service from November, 1915, to October, 1918, inclusive, he was so paid for eleven months' services in each of those years \$85 per month and for one month's service in each of those years \$65 per month, which, it will be noticed, resulted in his receiving \$1,000 for services rendered in each of those three years, being \$800 less than he was in law entitled to in each of those years. He was paid in substantially the same manner as to times and amounts of payments for the portion of the period here in question, from January to October, inclusive, in the year 1915. McMillan was so paid for his services as commissioner because of what is here conceded to be a mistake of law on the part of the county officers, including himself, that a county commissioner of Whatcom county was entitled to receive compensation at the rate of \$5 per day for services actually rendered and in no event to exceed \$1,000 in any one year. On December 2, 1918, McMillan filed with the board of county commissioners his claim for a balance of \$3,050, claimed to be due him for services rendered by him as commissioner for the whole period of approximately four years here in question. The claim being allowed by the board and the auditor having refused to issue a warrant in payment thereof as ordered by the board, this action was commenced by McMillan on December 3, 1918.

The only provisions of our statutes of limitation which could have any application here are, referring to sections of Rem. Code, the following:

"Sec. 155. * * * Actions can only be commenced within the periods herein prescrib-

ed after the cause of action shall have accrued. * * *

"Sec. 159. Within three years, * * * (3) An action upon a contract or liability, express or implied, which is not in writing, and does not arise out of any written instrument. * * *

"Sec. 165. * * * An action for relief not hereinbefore provided for shall be commenced within two years after the cause of action shall have accrued."

We shall first determine whether the two-year statute or the three-year statute is controlling as to the limit of time within which McMillan was required to seek recovery in court of his compensation following the accrual of his cause or causes of action therefor. This question arises upon the contention here made on behalf of the auditor that the trial court erred to the prejudice of the county in awarding McMillan the whole of the unpaid portion of his compensation at \$800 per year for the three-year period from November, 1915, to October, 1918, inclusive. This contention is rested upon the theory that the obligation on the part of the county to pay McMillan compensation for his services as commissioner, even after the rendering of such services, is not contractual in its nature, either express or implied, and that therefore the two-year statute is controlling. Assuming, then, for argument's sake, that the words "contract or liability, express or implied," found in the three-year statute above quoted, refers exclusively to contractual liabilities, our problem is reduced in its last analysis to the question of whether or not the obligation of the county to pay McMillan for his services, after their rendition, became contractual in its nature. Plainly, if such be the nature of the obligation the three-year statute is controlling in this case, while if the obligation is not contractual in its nature the two-year statute is controlling. Counsel for the auditor invoke the general rule that the election or appointment of a public officer does not create any contractual relationship between such officer and the state, county, or municipality under which he holds his office. While this is a well-established rule of law by all of the authorities in so far as they have come to our notice, it seems to be equally well established by no less an authority than the Supreme Court of the United States that upon the rendition of services by a public officer, for which services compensation has been, prior to the rendition thereof, fixed by or in pursuance of law and so fixed remains unchanged during the whole of the period during which such services are rendered, there does arise an implied obligation of a contractual nature on the part of such state, county, or municipality to pay for such services at the rate of compensation so fixed, in the sense that such obligation cannot be impaired without violating the guaranty of section 10, art. 1,

of the Constitution of the United States that "no state shall * * * pass any * * * law impairing the obligation of contracts. * * *"

In the case of *State of Louisiana ex rel. Fisk v. Police Jury*, 116 U. S. 131, 6 Sup. Ct. 329, 29 L. Ed. 587, the Supreme Court of the United States, having under consideration the claimed right of Fisk, a district attorney of the state, to have levied a tax by the police jury (which was the parish tax-levying body corresponding to our county commissioners) to pay a judgment rendered in his favor in the state court for compensation due him from the parish, to which he was entitled under the laws of the state in force at the time of the rendition of his services, which obligation on the part of the parish was in effect impaired by a subsequent amendment to the Constitution of the state in that the tax-levying powers of the police jury were so impaired as to in effect prevent raising sufficient funds, as it was claimed, to pay such judgment; and the courts of the state for that reason having denied to Fisk the relief prayed for as against the police jury and the parish, Justice Miller, speaking for the Supreme Court of the United States—the cause being in that court on writ of error to the Supreme Court of the State of Louisiana—said:

"In answer to the argument that, as applied to plaintiff's case, the constitutional provision impaired the obligation of his contract, the Supreme Court decided that his employment as attorney for the parish did not constitute a contract, either in reference to his regular salary or to his compensation by fees. And this question is the only one discussed in the opinion, and on that ground the decision rested.

"It seems to us that the Supreme Court confounded two very different things in their discussion of this question.

"We do not assert the proposition that a person elected to an office for a definite term has any such contract with the government or with the appointing body as to prevent the Legislature or other proper authority from abolishing the office or diminishing its duration or removing him from office. So, though when appointed the law has provided a fixed compensation for his services, there is no contract which forbids the Legislature or other proper authority to change the rate of compensation for salary or services after the change is made, though this may include a part of the term of the office then unexpired. *Butler v. Pennsylvania*, 10 How. 402 (51 U. S., Bk. 13 L. Ed. 472).

"But, after the services have been rendered, under a law, resolution, or ordinance which fixes the rate of compensation, there arises an implied contract to pay for those services at that rate. This contract is a completed contract. Its obligation is perfect, and rests on the remedies which the law then gives for its enforcement. The vice of the argument of the Supreme Court of Louisiana is in limiting the protecting power of the con-

stitutional provision against impairing the obligation of contracts to express contracts, to specific agreements, and in rejecting that much larger class in which one party having delivered property, paid money, rendered service, or suffered loss at the request of or for the use of another, the law completes the contract by implying an obligation on the part of the latter to make compensation. This obligation can no more be impaired by a law of the state than that arising on a promissory note.

"The case of Fisk was of this character. His appointment as district attorney was lawful and was a request made to him by the proper authority to render the services demanded of that office. He did render these services for the parish, and the obligation of the police jury to pay for them was complete. Not only were the services requested and rendered, and the obligation to pay for them perfect, but the measure of compensation was also fixed by the previous order of the police jury. There was here wanting no element of a contract. The judgment in the court for the recovery of this compensation concluded all these questions. *Hall v. Wisconsin*, 103 U. S. 10 (Bk. 28 L. Ed. 305); *Newton v. Com'rs*, 100 U. S. 559 (Bk. 25 L. Ed. 711).

"The provision of the Constitution restricting the limit of taxation, so far as it was in conflict with the act of 1871, and as applied to the contract of plaintiff, impaired its obligation by destroying the remedy pro tanto.

"It is apparent that, if the officers whose duty it is to assess the taxes of this parish were to perform that duty as it is governed by the law of 1871, the plaintiff would get his money. If not by a first year's levy, then by the next. But the constitutional provision has repealed that law, and stands in the way of enforcing the obligation of plaintiff's contract as that obligation stood at the time the contract was made.

"It is well settled that a provision in a state Constitution may be a law impairing the obligation of a contract as well as one found in an ordinary statute. We are of opinion therefore that, as it regards plaintiff's case, this restrictive provision of the Constitution of 1880 does impair the obligation of a contract. *Von Hoffman v. Quincy*, 4 Wall. 535 (71 U. S., Bk. 18 L. Ed. 403); *Nelson v. St. Martin's Parish*, 111 U. S. 716 [4 Sup. Ct. 648] (Bk. 28 L. Ed. 574).

"The judgments of the Supreme Court of Louisiana are reversed, and the cases are remanded to that court for further proceedings not inconsistent with this opinion."

That decision was not dissented from by any of the justices, and we think has not since its rendition been in the least impaired as an authoritative declaration that upon the rendition of services by a public officer under such circumstances the obligation to pay him therefor becomes contractual in its nature. Counsel for the auditor relies upon the later decision of the United States Supreme Court in *Morley v. Lake Shore & Michigan Southern R. Co.*, 146 U. S. 162, 13 Sup. Ct. 54, 36 L. Ed. 925, as in effect modifying its views so expressed in the above-

quoted language. That case, however, involved only the question of whether or not the obligation to pay a statutory prescribed rate of interest on judgments rendered in a state court was contractual in its nature, in the sense that such obligation could not be impaired by a change of the statute after the rendition of such judgment, as to future accruing interest thereon. It was held that such rate could be so changed without impairing any contractual obligation, because such obligation was purely statutory and not contractual. We do not think that decision evidences any change of view of the Supreme Court of the United States as to the contractual nature of an obligation arising in favor of an officer to pay him for services, upon the rendition of such services, as expressed in the above-quoted language from the Fisk Case. We note that the decision in the Morley Case was dissented from by three of the justices. The following decisions all seem to recognize that the obligation to pay an officer for services rendered, there being a legally fixed compensation while such services are being rendered, is an implied contractual obligation which arises upon the rendering of the services, though also recognizing the general rule that there does not arise any contractual relation of any nature between the officer and the state, county, or municipality which he serves, by virtue of the mere fact of his appointment or election: *County of Lancaster v. Brinthal*, 29 Pa. 38; *Smith v. Mayor, etc.*, of N. Y., 37 N. Y. 518; *City of Hoboken v. Gear*, 27 N. J. Law, 265, 278; *Locke v. City of Central*, 4 Colo. 65, 34 Am. Rep. 66.

In the last-cited case, quoting from the New Jersey case, it is said:

"An appointment to a public office, therefore, either by the government or by a municipal corporation, under a law fixing the compensation and the term of its continuance, is neither a contract between the public and the officer that the service shall continue during the designated term, nor that the salary shall not be changed during the term of office. It is, at most, a contract that while the party continues to perform the duties of the office he shall receive the compensation which may from time to time be provided by law."

There can be found expressions in the text-books and decisions, and even in our own decisions of *Bartholomew v. Springdale*, 91 Wash. 408, 157 Pac. 1090, Ann. Cas. 1918B, 432, and *Rhodes v. Tacoma*, 97 Wash. 341, 166 Pac. 647, seemingly out of harmony with this view of the law; but we think, when critically read, such expressions will have been found to have been used in a very general sense without reference to or thought of the particular problem with which we are here confronted. As to such expressions used in our own decisions we think none of them were in such connection with facts under

consideration as to become *stare decisis* and controlling in our present inquiry.

Counsel for the auditor calls our attention to and places reliance upon our decision in *Douglas County v. Grant County*, 98 Wash. 355, 167 Pac. 928, wherein we held that the obligations of each county to the other touching their property rights and debt obligations, upon the creation of Grant county from a portion of the territory of Douglas county, were not contractual but purely statutory in their nature, being prescribed and measured by the terms of the act of the Legislature creating Grant county from a portion of the territory of Douglas county; and hence that the two-year statute of limitation controlled in so far as either county had the right to resort to the courts to enforce settlement of its property rights and debt obligations as between themselves. We do not think that decision is controlling in this case, since the division of Douglas county and the creation of Grant county was not a matter of contract in any sense, on the part of either, nor could one become legally liable to the other upon the claim involved in that action save by virtue of the statute creating Grant county from a portion of the territory of Douglas county.

[1] We now feel constrained to hold, in the light of the decision of the Supreme Court of the United States above quoted from, notwithstanding expressions in the authorities and even in our own decisions seemingly somewhat out of harmony therewith, that the obligation on the part of Whatcom county to pay McMillan for services rendered by him as county commissioner became contractual in its nature upon the rendition of such services, and that therefore the three-year statute governs as to the time within which he was required to seek recovery in the superior court upon his cause or causes of action for compensation for his services.

[2] When did the statute start to run as against McMillan? While section 4037, Rem. Code, fixes the compensation of county commissioners at \$1,800 per annum for counties of the class to which Whatcom county belongs, in section 4075, Rem. Code, we read:

"The salaries of such officers named in this act as are entitled to salaries shall be paid monthly out of the county treasury, and from the funds hereinbefore provided, and it shall be the duty of the county auditor, on the first Monday of each and every month, to draw his warrant upon the county treasurer in favor of

each of said officers for the amount of salary due him, under the provisions of this act, for the preceding month: Provided, the county commissioners shall have entered an order on the record journal empowering him so to do."

This language, we think, renders it plain that there accrued to McMillan upon the first Monday of each month the right to receive a warrant in payment for his previous month's services. It is true this section authorizes the county auditor to issue such warrant only upon order of the county commissioners; but it is plain, we think, that, if the county commissioners neglected to make such an order so as to authorize the issuance of such a warrant on that day, he would be entitled to seek relief in the courts compelling them to make such order, as well as to compel the auditor to issue warrant in pursuance thereof. In other words, it was upon the first Monday of each month that his right of action accrued entitling him to seek relief in the courts to recover his salary earned during the previous month. It is elementary law, as stated in 17 R. C. L. 749, that "• • • a cause of action accrues the moment the right to commence an action comes into existence."

We make these observations in response to the contention that the statute did not commence to run until the end of each year because the salary is referred to in section 4037, Rem. Code, as being "eighteen hundred dollars per annum." We conclude that a cause of action accrued to McMillan on the first Monday of each month for compensation for his previous month's services, and that section 4037, Rem. Code, only controls the rate of compensation.

Since it appears that McMillan's causes of action for each month's salary for services rendered during the three-year period from November, 1915, to October, 1918, inclusive, accrued within three years preceding the commencement of this action, and there is still due him from the county for such services the sum of \$2,400, and the balance of his claim is barred by the three-year statute, we conclude that the judgment of the superior court awarding him recovery in that sum must be affirmed. Since both parties have appealed and neither have been successful here, neither will be awarded costs in this court.

HOLCOMB, C. J., and FULLERTON, BRIDGES, and MOUNT, JJ., concur.

(67 Colo. 311)

SOUTHERN SURETY CO. v. CHRIS IRVING PLUMBING & HEATING CO.
(No. 9340.)

(Supreme Court of Colorado. July 7, 1919.
Rehearing Denied Oct. 6, 1919.)

1. PRINCIPAL AND SURETY ⇨129(1)—PROVISION FOR ACTION IN FIXED TIME AND NOTICE OF DEFAULT NOT WAIVED.

Waiver is always a question of intention, to be proved either by express declarations or by acts and omissions from which it can be inferred; and hence the mere fact that a surety on the bond of a subcontractor, in order to avoid litigation, offered to make payment to the general contractor, is no waiver of the provisions of the bond requiring suit to be brought within time limited, and requiring notice of default to be given the surety.

2. PRINCIPAL AND SURETY ⇨149—EXCUSE FOR FAILURE TO SUE IN FIXED TIME INSUFFICIENT.

Where a bond signed by the surety of a subcontractor required suit to be begun within a fixed time, *held*, that allegations and proof as to the general contractor's knowledge of claims against the subcontractor, etc., did not excuse the general contractor for its failure to sue within the time fixed.

3. PRINCIPAL AND SURETY ⇨123(3)—FAILURE TO NOTIFY SURETY OF DEFAULT DEFENSE TO ACTION ON BOND.

Where the bond given by a subcontractor required notice to the surety of the subcontractor's default within 30 days, and authorized the surety to complete the work, failure to give the required notice is a defense to an action on the bond.

Department 1.

Error to District Court, City and County of Denver; John I. Mullins, Judge.

Action by the Chris Irving Plumbing & Heating Company against the Southern Surety Company. Judgment for plaintiff, and defendant brings error. Reversed.

West & Strickland, R. Harrison Field, and V. V. Montgomery, Jr., all of Denver, for plaintiff in error.

Geo. F. Dunklee and Edward V. Dunklee, both of Denver, for defendant in error.

TELLER, J. The plaintiff in error was surety on a bond running to the defendant in error to secure the due performance of a contract between said plumbing company and one Wilhelm, a subcontractor for a part of the work to be done by said obligee upon the federal building in the city of Denver. Wilhelm having, as the plumbing company contends, failed to comply with the terms of said contract, to the damage of said obligee, it brought suit on the bond, and had judgment for the amount it claimed to have paid

out on said contract above the stipulated sum.

The bond contained a provision by which the obligee was required to notify the surety in case of the principal's default, such notice to be given promptly upon knowledge acquired of such default, and within 30 days in any event. It provided, also, that in case of such default the surety should have the "right to assume and complete or procure the completion of said contract," and that the surety should not be liable to any action on the bond instituted later than December 14, 1915. This action was begun in March, 1917. The date of the bond was June 6, 1914. The record does not contain a copy of the contract secured by the bond.

A demurrer to the complaint on the ground that the suit was barred, because brought subsequent to the date limited in the bond for actions thereon, and further that the complaint failed to allege the giving of notice of the matters requiring notice to be given, was overruled. Defendant in error, to meet these objections, depends upon an alleged waiver of the conditions mentioned. However, neither the complaint nor the evidence sustains that contention.

[1] In the complaint it is alleged that an agent of the surety company was sent to Denver for the purpose of ascertaining and adjusting the amounts due the various creditors of Wilhelm under said contract, and that said agent did—

"on about the 1st day of December, A. D. 1916, compromise, adjust, settle, and agree with plaintiff below and the various creditors that there were outstanding and unpaid accounts due from said Wilhelm to the various creditors in the amount of \$2,080.47."

It is also alleged:

"That this plaintiff was unable to institute any suit, action, or other proceeding on said bond on or before December 14, 1915, as provided in said bond, for the reason that this plaintiff had no knowledge at or previous to said time that any of the said claims herein existed, or would be made, against this plaintiff; that this plaintiff had no knowledge as to any claim of any breach of the conditions of said bond, or as to whether there would be any liability of the surety company on said bond, until after December 14, 1915; and that this plaintiff had no knowledge as to whether or not said claims, as hereinbefore specified, were legal claims and demands until the same were audited, adjusted, and consented to by this plaintiff and the defendant surety company, on or about the 1st day of December, A. D. 1916, as hereinbefore pleaded."

The evidence goes no farther than these allegations, and falls far short of establishing either a waiver of the conditions or a promise by the plaintiff in error to pay anything on the account. The evidence shows, simply, that the surety company, in order to

avoid litigation, assisted the plumbing company to secure reductions on the accounts, and offered \$400 as a contribution to the payment thereof, which offer was rejected.

Waiver, unlike estoppel, is always a question of intention, to be proved either by express declarations or by acts, or omissions, from which it may be inferred. There is no evidence of intention to waive any of the conditions of the bond.

[2] Neither are the allegations as to plaintiff's knowledge of claims against Wilhelm an excuse for not beginning the action within the time limited therefor. Wilhelm was a subcontractor of the plaintiff, and it might reasonably be required to ascertain the state of his account with materialmen and his employes.

[3] No excuse is offered for the failure to notify the surety, and permit it to complete the work under the contract. That is not a mere technical violation of the bond; it is a substantial wrong. Possibly the surety might have completed the work at less expense than was incurred for that purpose. Having deprived the surety of that right, secured by the agreement, defendant in error is in no position to demand reimbursement for the funds it paid out to complete the contract.

There are other errors assigned, which appear to be good; but, since the plaintiff has no right of action, they need not be discussed.

The judgment is reversed.

GARRIGUES, C. J., and BURKE, J., concur.

(87 Colo. 315)

CITY AND COUNTY OF DENVER v.
BOWEN et al. (No. 9196.)

(Supreme Court of Colorado. July 7, 1919. On Rehearing Oct. 6, 1919.)

1. PLEADING \S 11—ULTIMATE FACTS ONLY TO BE PLEADED.

Only ultimate facts, and not evidentiary facts, are to be pleaded.

2. PLEADING \S 11—HOW ULTIMATE FACTS DETERMINED.

The principal, if not the only, way to determine what is an ultimate fact required to be pleaded, is by precedent.

3. CONTRACTS \S 333(1)—METHOD OF PLEADING.

The way to plead a contract of defendant is to allege that defendant made it.

4. MUNICIPAL CORPORATIONS \S 254—AUTHORITY OF PARK COMMISSION TO MAKE CONTRACT SUED ON NEED NOT BE PLEADED.

Complaint, alleging that defendant city through its park commission made a certain contract, need not plead the commission's au-

thority, nor other matters of evidence requisite to a valid contract.

5. CONTRACTS \S 332(3)—PERFORMANCE OF CONDITIONS PRECEDENT MUST BE PLEADED.

Fulfillment of conditions precedent expressed in contract sued on must be pleaded.

6. CUSTOMS AND USAGES \S 13—AGREEMENT OF CITY TO FURNISH IN PARK "USUAL AND CUSTOMARY" MUSIC CONSTRUED.

The words "usual and customary," in provision of contract granting exclusive ice cream privileges at pavilions and boating privileges on lake in city park, that city will furnish the usual and customary music, both as to amount and quality, do not refer to usage or custom in the technical legal sense, but to the ordinary and usual practice of the city in the park, and require the music to be at the same places as before.

7. CONTRACTS \S 143—MUST BE REASONABLY CONSTRUED.

A contract, like a law, must be reasonably construed to fulfill its purpose.

8. DAMAGES \S 40(3)—FOR LOSS OF BUSINESS RECOVERABLE.

That the extent of loss of business as an element of damages cannot be exactly determined does not prevent recovery on account thereof.

9. MUNICIPAL CORPORATIONS \S 721(3)—CONTRACT FOR CONCESSIONS IN PARK AND FOR REGULATION OF BUSINESS CONSTRUED.

Provision of contract granting ice cream and boating privileges in city park, that the park commission may make orders, rules, and regulations concerning the conduct and management of the privileges and business of the concessionaires under the contract, refers only to such business, and does not include any regulation which will take away the music, which the city agreed to furnish as usual.

10. MUNICIPAL CORPORATIONS \S 721(3)—CONCESSIONS IN PARK WITHIN POWER OF PARK COMMISSION.

Provision of contract of city, through park commission, granting ice cream and boating privileges in park, that city should furnish music as usual, is not beyond the power of the commission, as surrendering the regulation of the park; management of the park not being a government function.

On Rehearing.

11. APPEAL AND ERROR \S 301—COMPLAINT NOT QUESTIONED IN MOTION FOR NEW TRIAL NOT REVIEWABLE.

Under Supreme Court Rule 19 of 1914 (148 Pac. xviii), as well as under Rule 8 of 1917 (161 Pac. vii), the sufficiency of the complaint, not having been questioned in motion for new trial, cannot be considered on appeal.

12. PLEADING \S 403(3)—OMISSION IN COMPLAINT CURED BY ADMISSION IN ANSWER.

Admission in answer of defendant city, that she "entered into" the contract in question is one of ultimate fact, and cures want of allegation in the complaint, if there should be one,

of anything necessary to sanction or validate the contract.

13. PLEADING \Rightarrow 312 — EXECUTION OF CONTRACT NOT SHOWING SIGNATURE ADMITTED IN ANSWER.

That copy of contract sued on set forth in answer of defendant city does not show signature of the mayor cannot overcome the admission in answer of the ultimate fact that defendant "entered" into the contract.

Department 2.

Error to District Court, City and County of Denver; Charles C. Butler, Judge.

Action by Thomas H. Bowen and another against the City and County of Denver. Judgment for plaintiffs, and defendant brings error. Affirmed.

James A. Marsh, Thomas H. Gibson, and William B. Kennedy, all of Denver, for plaintiff in error.

Henry McAllister, Jr., and George E. Tralles, both of Denver, for defendants in error.

DENISON, J. The defendants in error recovered a judgment against the city in a suit brought by them upon a contract, and the city, defendant below, brings the suit here on error. The complaint alleged:

That under date of April 29, 1914, the city, through its park commission, entered into an agreement with the plaintiffs, in writing, whereby the city granted to the plaintiffs the right to sell ice cream, etc., at the two pavilions in the city park from April 29, 1914, until February 28, 1916, and the exclusive right to boating privileges and to rent boats on the large lake in the city park from June 1, 1914, to February 28, 1916. That for years prior to the contract the defendant regularly employed bands of musicians to give concerts in the city park, and they were regularly given in a band stand near the edge of the larger lake, close to the larger pavilion, and furnished customers for the privileges granted. That said contract contained the following:

"It is understood and agreed that the party of the first part will furnish the usual and customary music, both as to amount and quality."

That during the term of the grant, although plaintiffs paid to the city the full amount which the contract required, \$13,000, the city furnished much less music than had been usual and customary. That in consequence the plaintiffs lost patronage. They claimed damages for loss of profits.

The record, as laid before this court, does not contain the evidence nor the bill of exceptions, if there was one, and the principal points argued by the plaintiff in error are that the complaint does not state facts sufficient to constitute a cause of action and that

the court erred in giving and refusing certain instructions.

[1] As to the sufficiency of the complaint no question was raised in the motion for a new trial; consequently, under Rule 8 (161 Pac. vii), we cannot consider that point. This rule is a wise one, intended to compel parties to litigate all points in the lower court first. The present case comes within its purpose, and we are the more willing to enforce it herein because we believe that the complaint does state a cause of action. This court has reiterated again and again that ultimate facts and not evidence must be alleged. *Cuenin v. Halbouer*, 32 Colo. 51, 53, 54, 74 Pac. 885; *Alden, Impl., etc., v. Carpenter*, 7 Colo. 87, 91-93, 1 Pac. 904; *Payne v. Williams*, 62 Colo. 86, 160 Pac. 196; *Sylvia v. Sylvia*, 11 Colo. 319, 17 Pac. 912; *Hallack, etc., L. Co. v. Blake*, 4 Colo. App. 486, 36 Pac. 554; *Mott v. Baxter*, 29 Colo. 420, 68 Pac. 220; *Saxonia, etc., v. Cook*, 7 Colo. 569, 4 Pac. 1111; *Cordilla v. Pueblo*, 34 Colo. 296, 82 Pac. 594; *Levy v. N. C. O. Ry.*, 81 Or. 673, 160 Pac. 808, L. R. A. 1917B, 564; *Pike v. Sutton*, 21 Colo. 84, 39 Pac. 1084.

[2, 3] The principal and perhaps the only way to determine what is ultimate fact is by precedent, and the way to allege a contract, as shown by all approved precedents, is to allege that the defendant made it. Upon trial, proof of all things requisite or precedent to its execution must be made. *Gelpcke v. Dubuque*, 1 Wall. 221, 17 L. Ed. 519; *Rochester v. Shaw*, 100 Ind. 268; *Levy v. N. C. O. Ry.*, 81 Or. 673, 160 Pac. 808, L. R. A. 1917B, 564; *McDermott v. Grimm*, 4 Colo. App. 39, 43, 44, 34 Pac. 909.

[4] The principal case cited against this point is *Colorado Springs v. Coray*, 25 Colo. App. 460, 469, 139 Pac. 1031. That merely holds that, where a city can be held as liable only upon express contract, the complaint must allege an express contract, and the complaint in this case does so. It follows that it was not necessary to allege the authority of the park commission nor other matters of evidence requisite to a valid contract.

[5] What we here say in no way affects the rule that the fulfillment of conditions precedent expressed in the contract itself must be alleged.

We do not further notice the objections to the complaint.

[6, 7] Instruction No. 3 was as follows:

"What was the usual and customary concert season, and what was the usual and customary number of concerts given each week, and whether any of the concerts given by the defendant were given in such places and under such conditions as to defeat in whole or in part or substantially impair the effect which it was contemplated by the contract they should have upon the business of the plaintiffs—are ques-

tions of fact to be determined by the jury from the evidence."

The defendant objected and excepted to this instruction for the reason that it presupposes that the contract contemplates the giving of concerts at some particular place and under particular conditions, and assumes that that was in contemplation of the parties, and there is no evidence to support it.

The particular objection which is now urged is:

"That the jury were left without any instruction whatever as to what would constitute a usage or custom, and under this instruction were left to determine both the essential elements of such a custom or usage and whether or not such a custom or usage existed in this case."

This argument is based upon the idea, which we think is a mistaken one, that the words "usual and customary" in the contract refer to usage or custom in the technical legal sense. It is manifest, in our judgment, that they do not, but that they refer to the ordinary and usual practice of the city in the city park, not to any "custom" strictly so called, which has the force of law, nor to any local usage of the community which under proper conditions has the force of local law, nor even to such community habits, sometimes called usages, as are considered part of any contract made in the community. *Scholtz v. N. W. Mutual Life Ins. Co.*, 100 Fed. 573, 40 C. C. A. 558.

By the clause in question the city merely said, "We will furnish music as we have been doing heretofore," and the court was right, we think, in holding that they could not give stone for bread by giving the same quantity and quality of music somewhere else. A contract, like a law, must be reasonably construed to fulfill its purpose.

[8] In their reply brief counsel for plaintiff in error discuss the question of damages and claim that the loss of business by the plaintiffs was too indefinite and uncertain to be a proper measure of damages. We do not think so. Loss of business is a very common element of damage in many kinds of cases, and the fact that such loss cannot be exactly determined is no reason why the wrong should go unredressed or the wrongdoer escape entirely at the expense of his victim.

[9, 10] The contract contained the following:

"It is further agreed between the parties hereto that the park commission may make orders, rules and regulations concerning the conduct and management of the privileges and business by the parties of the second part under this agreement, * * * and that all such orders, rules and regulations shall be considered and deemed as a part of this agreement."

The defendants offered to show that the park commission, after the execution of the

contract, had entered an order requiring the band to play at other places than the city park on certain days and not to play at the city park, which was the cause of the alleged damage. They claimed that this order was a good defense, first by reason of the paragraph above quoted and also on the ground that it was beyond the powers of the park commission to make any contract by which they surrendered the regulation of the park or any part thereof. As to the first ground, the paragraph does not sustain the point; it refers only to regulation of the business of the plaintiffs, and not to other orders and regulations of the park, and does not include any regulation of the music. As to the second ground, we think the principle invoked relates only to the governmental functions of the city, and not to the management of its property. It is urged that the park is held by the city and the commission in trust, and that its management is therefore within the city's governmental functions. We do not think the conclusion follows. All the property of the city, as well as the parks, is held in trust; yet it is usually held that the city's acts with reference to such property are not governmental.

Judgment affirmed.

GARRIGUES, C. J., and SCOTT, J., concur.

On Rehearing.

DENISON, J. [11] We were wrong in our former opinion in applying Rule 8 of the Rules of 1917 (161 Pac. vii). We should have applied Rule 19 of the Rules of 1914 (148 Pac. xviii). We think, however, the effect of that rule is the same as the present Rule 8.

[12, 13] We still think the complaint states a cause of action. The cases relied on to the contrary in this state are *Canal Co. v. Denver*, 20 Colo. 84, 36 Pac. 844, and *Colorado Springs v. Coray*, 25 Colo. App. 460, 139 Pac. 1031.

We considered these cases carefully in writing our former opinion. In the *Denver Case* it is true a demurrer was sustained to a complaint because it did not show an appropriation previous to the contract, but Mr. Justice Elliott said:

"It is not claimed that the nonexistence of such an appropriation should have been pleaded as a defense."

So counsel and court considered the whole matter as if the appropriation had not been made, which was no doubt the fact. What the decision would have been if it had been claimed that the want of appropriation should have been pleaded in defense we do not know, but the court cites *People v. May*, 9 Colo. 80, 10 Pac. 641, in which the lack of a condition prescribed by statute for a valid

contract was pleaded as a defense after demurrer to the complaint had been overruled.

The case of *Frick v. Los Angeles*, 115 Cal. 512, 47 Pac. 250, was in much the same condition.

The statement of the writer of the opinion in *Colorado Springs v. Coray*, 25 Colo. App. 460, 470, 139 Pac. 1031, 1035:

"If it was incumbent on plaintiffs to prove a prior appropriation, it follows, as a matter of course, that it was necessary for them to allege it"

—is wrong. The proposition is true of ultimate facts only, and it was not necessary to that decision, because the law required an express contract, and that suit was upon an implied one.

In *Gelpcke v. Dubuque*, 1 Wall. 221, 17 L. Ed. 519, the United States Supreme Court held that precedent sanctions will be presumed and that the contrary must be pleaded in defense.

But the city admitted in the answer that she "entered into" the contract in question. This admits the ultimate fact and cures the want of allegation in the complaint of anything necessary to sanction or validate the contract, if such were necessary. The fact that the copy of the contract set forth in the answer does not show the signature of the mayor cannot overcome the admission of the ultimate fact that the defendant "entered into" the contract. If the city wished to make the defense that the mayor did not sign, she should have denied that she entered into the contract.

We did not overlook the point that the contract was bad for uncertainty, but we did not and do not consider it well taken. We seldom mention in opinion all the points made in argument.

The conduct of the city, shown by the record, is that of which any honest private citizen would be ashamed. She has taken the plaintiffs' money, \$13,000, violated the plain terms of her contract in such a way as to make the fulfillment of it on their part a loss instead of a profit to them, and, retaining the \$13,000, defends their action for reparation on the ground that the contract which she prepared, elaborately signed, and presented to them as valid, is not binding on her because she herself neglected to do things that she ought to have done to make it so. Counsel employed to defend this case are not to be blamed for defending it in every way they legally can; but the conduct of the city can be morally justified only on the supposition that the record does not show the whole truth and can be explained only upon the theory that, in the great volume of the city's business, moral considerations are sometimes unavoidably lost sight of.

Rehearing denied.

(67 Colo. 350)

HENDRIE & BOLTHOFF MFG. & SUPPLY CO. v. CENTENNIAL COAL CO.
(No. 9283.)

(Supreme Court of Colorado. June 2, 1919.
Rehearing Denied Oct. 6, 1919.)

1. MORTGAGES \S 163(3)—POSTPONEMENT OF MECHANIC'S LIEN TO LIEN OF PRIOR TRUST DEED.

As to real estate affected by a deed of trust and a mechanic's lien statement subsequently filed, the mechanic's lien is postponed to the lien of the trust deed.

2. MORTGAGES \S 130—DEED OF TRUST CONVEYING LAND IN SECTION DESPITE CLERICAL MISTAKE.

Deed of trust from a fuel company to a coal company, covering coal lands with water rights, etc., held to convey land in a certain section despite the mistaken use in a paragraph of the word "excepting" instead of "conveying," which, not being misleading, could be treated as surplusage.

3. MORTGAGES \S 171(4) — RECORD ERRONEOUSLY DESCRIBING LAND AS CONSTRUCTIVE NOTICE.

The description of land covered by a deed of trust having been apparently erroneous in excepting land in a certain section, the record of the deed was constructive notice to a mechanic's lienor of the land intended to be described.

4. MORTGAGES \S 171(4)—UNUSUAL WORDING OF DEED SUFFICIENT TO CHARGE MECHANIC'S LIENOR WITH NOTICE.

Where deed of trust, instead of using the word "conveying" in a paragraph, used the word "excepting" as to certain land, such use under the circumstances was notice, if exciting the attention of and calling for inquiry by a mechanic's lienor examining the record.

Department 3.

Error to District Court, Boulder County;
Robert G. Strong, Judge.

Consolidated actions between the Hendrie & Bolthoff Manufacturing & Supply Company and the Centennial Coal Company. To review judgment for the coal company, the manufacturing and supply company brings error. Affirmed.

Wm. W. Grant and Ernest Morris, both of Denver, for plaintiff in error.

Lilyard & Simpson, of Denver, for defendant in error.

ALLEN, J. This is an action resulting from, and tried upon and after, the consolidation of two causes. The first was a suit brought by the Hendrie & Bolthoff Manufacturing & Supply Company to foreclose a mechanic's lien on the property of the American Fuel Company. The second was a suit by the Centennial Coal Company to reform and foreclosure its deed of trust upon the same property.

The controversy is between the Hendrie Company, above named, as claimant under the mechanic's lien, and the Centennial Coal Company, as the holder of the deed of trust. Each of these two contending parties claims that its respective lien is prior and superior to the lien held by the other, so far as the same affects the land described in the mechanic's lien statement as being in section 17, township 1 south, range 69 west, in Boulder county, Colo.

The trial court upheld the claim and contention of the Centennial Coal Company, finding the mechanic's lien subordinate to the lien of the trust deed. The Hendrie & Bolthoff Manufacturing & Supply Company, holder of the mechanic's lien, brings the cause here for review.

[1] The deed of trust, involved in this case, was executed, acknowledged, and recorded long prior to the time of the filing of the mechanic's lien statement, and as to the real estate affected by both instruments the mechanic's lien is postponed to the lien of the trust deed. 27 Cyc. 286.

[2] The contention of the plaintiff in error is, in effect, that the deed of trust, as originally drawn, failed to cover or to convey any land in section 17, above mentioned, and that therefore the mechanic's lien as to such land was not subject to, nor affected by, the trust deed. The validity of this contention is the only question that need be determined upon this review, and its consideration must, of course, require an examination of the recitals and descriptions contained in the deed of trust.

Preceding the granting clause, in the deed of trust, it is provided that, until certain contingencies occur, the grantor is to have possession of and "mine the properties" conveyed. Further on, the property incumbered is referred to as "said mine and mining properties" and "mines," and it is agreed that the grantor shall pay to, or for the use of, the beneficiary, 20 cents per ton for all coal mined and sold.

Immediately following the granting clause in the trust deed, as the same is set forth in the bill of exceptions, are three paragraphs naming and describing certain properties. The first describes the land conveyed as "the southwest quarter (S. W. $\frac{1}{4}$) of section sixteen (16)" in a given township and range, together with all water rights belonging to such land, with certain exceptions. The second paragraph enumerates further exceptions of parts of the property conveyed in the first. No other section, and no property in any other than section 16, is mentioned in these two paragraphs.

The controversy in the instant case, and the hereinbefore mentioned contention of the plaintiff in error, arises as the result of the use of the word "excepting" at the beginning of the third paragraph. This paragraph re-

lates to property contained in section 17, and reads as follows:

"Also excepting, the east half ($E\frac{1}{2}$) of the southeast one-quarter ($SE\frac{1}{4}$) and the southwest one quarter ($SW\frac{1}{4}$) of the southeast quarter ($SE\frac{1}{4}$), section seventeen (17) township one (1) south, range sixty-nine (69) west of the 6th P. M., excepting a strip of land through the southeast quarter ($SE\frac{1}{4}$) said section seventeen (17) as a right of way for the South Boulder and Rock Creek Ditch, as same is now located across said land, with the right to operate said ditch and use the land on line of said ditch for repairing and enlarging, heretofore deeded by Thomas Autrey in an instrument recorded in book 86 at page 339 of the public records in the office of the county clerk and recorder of said Boulder county, also all water rights belonging to the above described land, being all of the real estate conveyed by the Centennial Coal Company to the grantor herein."

There are other recitals in the deed of trust which could be noted in this connection; but a consideration of them would not affect the result, and enough has been shown for the purposes of this opinion.

It is apparent, after considering the whole instrument and particularly the parts of the same which are above set forth, that it is intended, in the third paragraph of the trust deed following the granting clause therein, to convey, and not to except from any conveyance, a part of section 17, and that the word "excepting," found at the beginning of the paragraph, was inserted by mistake and should be disregarded. The word in question does not mislead, and should be treated as surplusage.

Several reasons may be found, from the language of the trust deed, to make the foregoing conclusion imperative. The first is that no conveyance of any land in section 17 was previously made or mentioned, and no occasion or reason existed for making an exception since nothing had been previously described to which such exception could relate. Again, if no land in section 17 had been conveyed, it would be an absurdity to designate any part of such section as being excepted from the conveyance. It will be noted that the paragraph in question, above quoted, after describing a portion of section 17, excepts therefrom a certain right of way "located across said land." The words "said land," whether considered grammatically or with reference to the context, can refer only to the previously described parts of section 17, and indicate that such parts are conveyed since no reason or occasion would exist for excepting a right of way from a part of section 17 unless that part were being conveyed.

[3] For the reasons above indicated, we are of the opinion that the deed of trust, as above considered and without reformation, fairly shows, when read in its entirety, that it conveys "the east half of the southeast

one-quarter," etc., of section 17, and that the word "excepting," preceding the description, was inserted by mistake and should be disregarded as surplusage. The plaintiff in error, claimant under the mechanic's lien statement, had constructive notice of the fact that the deed of trust did convey a part of section 17, under the rule which is briefly stated in section 490, Jones on Mortgages, as follows:

"When a description in a deed or mortgage is erroneous, and it is apparent what the error is, the record is constructive notice of the deed or mortgage of the lot intended to be described."

In 27 Cyc. 1209, concerning the record of a mortgage containing an erroneous description of property, it is said that—

"If it is apparent from the face of the record that there is a mistake or misdescription, which is capable of being corrected from other parts of the same instrument, or other details of the same description, it operates as constructive notice" to subsequent purchasers or lienors of the property mortgaged.

[4] If for any reason it can be said that the error, above mentioned, is not clearly apparent, nevertheless the use of the term "excepting," in that instance, is clearly unusual, and is such a circumstance as would induce inquiry and lead to the fact that the term is surplusage and that the trust deed conveys land in section 17. The rule applicable in this connection, and resulting in the conclusion above stated, is expressed in a quotation found in *Woodruff v. Williams*, 35 Colo. 28, 44, 85 Pac. 90; 95 (5 L. R. A. [N. S.] 986), as follows:

"It is a well-established principle that whatever is notice enough to excite attention, and put the party upon his guard, and call for inquiry, is notice of everything to which such inquiry might have led. When a person has sufficient information to lead him to a fact, he shall be deemed conversant of it."

If the description of the property in a mortgage or deed of trust "is ambiguous or incomplete, it is sufficient to put such persons on inquiry." 27 Cyc. 1209. This principle has been recognized in *Perkins v. Adams*, 16 Colo. App. 96, 63 Pac. 792, where the court said:

"A purchaser of land, or one asserting an interest in or claim upon it, is presumed to have notice of everything which the record discloses concerning the title; and if in a deed which

constitutes a link in a chain of title there is a recital, or an inference, or a word, which is not self-explanatory, but which indicates the existence of some condition by which the title may be affected, he is bound to follow up the clue by investigation; and he will be charged with knowledge of the facts to which it points, whether he makes the investigation or not. No doctrine is more thoroughly established than this, that what is enough to put a purchaser on inquiry is equivalent to actual notice, and that, when he has information sufficient to lead him to a fact, he will be presumed to know it."

The use of the word "excepting" was, under the circumstances hereinbefore mentioned, notice enough to excite attention and call for inquiry. In pursuing the inquiry concerning what property was conveyed by the deed of trust, it was the duty of the plaintiff in error to examine the entire instrument. In doing so it would be found that the description of the property conveyed concludes with the expression, "being all of the real estate conveyed by the Centennial Coal Company to the grantor herein." The instrument thus referred to should be considered and examined, and when done in this case it would be found, as shown by the bill of exceptions, that the deed referred to conveys parts of section 17 in exactly the same language as does the deed of trust, except that it omits the word "excepting" at the beginning of the description. Another circumstance, among others, which can be noted, is that, where the deed of trust refers to "mines" or to "mining properties," no section or section number is mentioned, which leads to the inference that the mines are located in both section 16 and section 17.

The deed of trust in question was reformed by the trial court so as to eliminate the word "excepting," hereinbefore mentioned. The reformation or correction of the description of the property conveyed in the deed of trust could not have been to the injury of the plaintiff in error, since, in view of what has been stated in this opinion, the deed of trust would have priority over the mechanic's lien even without reformation; and, this being the case, it becomes unnecessary to discuss other propositions argued in the brief of plaintiff in error. We find no reversible error in the record.

The judgment is affirmed.

Affirmed.

GARRIGUES, C. J., and BAILEY, J., concur.

(67 Colo. 292)

KOCH v. WRIGHT. (No. 9306.)

(Supreme Court of Colorado. June 2, 1919.
Rehearing Denied Oct. 6, 1919.)

1. MALICIOUS PROSECUTION §56 — BURDEN OF PROVING PROBABLE CAUSE AND MALICE ON PLAINTIFF.

Plaintiff had the burden of proving want of probable cause and actual malice on the part of the defendant.

2. MALICIOUS PROSECUTION §31—EVIDENCE INSUFFICIENT TO SHOW MALICE AND WANTONNESS.

In an action for the malicious prosecution of plaintiff for perjury in falsely swearing that voters' names had been signed to a referendum petition, defendant's failure to examine parts of the petition and verify the figures on a card copied therefrom, whereby he would have found that the card's showing that plaintiff circulated the petition with the false entry was a mistake, was insufficient to justify the conclusion that his charge of perjury was malicious, and his negligence was not so gross as to amount to recklessness or wantonness, or to indicate willful disregard of plaintiff's rights.

3. MALICIOUS PROSECUTION §72(4) — INSTRUCTION THAT MALICE MAY BE INFERRED FROM WANT OF PROBABLE CAUSE DEFECTIVE.

In an action for malicious prosecution, an instruction "that malice may be inferred from the fact of prosecution without probable cause" should not be given without instructing the jury in regard to the circumstances which would justify such an inference.

4. MALICIOUS PROSECUTION §71(3)—WHETHER FACTS NOT IN DISPUTE IMPUTE MALICE QUESTION FOR COURT.

In an action for malicious prosecution, where the facts are not in dispute, whether they warrant an inference of malice is a question for the court.

Department 1.

Error to District Court, City and County of Denver; J. E. Rizer, Judge.

Action by Ella M. Wright against W. L. Koch and others. A motion for nonsuit was sustained as to all the defendants except W. L. Koch, against whom plaintiff obtained judgment, to review which defendant Koch brings error. Reversed.

Halsted L. Ritter, of Denver, for plaintiff in error.

E. N. Burdick, Carle Whitehead, and Albert L. Vogl, all of Denver, for defendant in error.

TELLER, J. The plaintiff in error seeks to reverse a judgment obtained against him by defendant in error in an action for malicious prosecution. The parties will be here designated as they were in the trial court.

The plaintiff, with others, had been active in securing signatures to a petition to refer an act relating to the practice of medicine,

passed by the Twentieth General Assembly; and the defendant was employed by an association of persons who opposed the referring of said act, to investigate the genuineness of the signatures on said petition. Said association had, prior to defendant's employment, caused several thousands of the names on the petition to be copied on index cards, on each of which, in addition to the name, there were numerals indicating the number of the sheet, the line thereon upon which the name was written, and the number given by the association for the purpose of the investigation to that portion of the petition of which said sheet formed a part. These cards were taken out by the investigators, who indorsed thereon the result of their inquiries as to the signatures.

Dr. Clarke, who had general charge of this investigation, had collected a considerable number of these cards, on which the reports showed that the persons whose names they bore had not signed the petition. One of these cards bore the name "J. J. Connors," with the figures "5—1—11," and a memorandum, "Did not sign. James Connors." During the time of defendant's employment in this work, he learned that his name and that of his wife appeared on the petition, though neither had signed it.

Defendant, about the time the investigation was completed, and the petition found to be insufficient because it contained less genuine signatures than the law required, called upon the attorney of said association, and requested that he accompany defendant to the office of the district attorney to lay before that officer the fact of said forgery of the name of defendant and his wife. Defendant, having given to the district attorney the facts as to his own case, was asked by that officer whether or not there were other cases of forged signatures on the petition, and, on defendant's replying that there were others, the district attorney suggested that the other cases be brought to him for the purpose of prosecution.

Defendant then went to the office of Dr. Clark, told him what had been said by the district attorney, and asked for the cards showing forged signatures. From them he picked out the card above mentioned, which bore the name of Connors, with the figures which gave the sheet bearing Connors' name as a part of petition No. 5. Defendant had heard Connors deny the genuineness of his signature when he testified on the hearing before the secretary of state. The association had a list of circulators on which plaintiff appeared as circulator of petition No. 5.

Upon statements made by defendant, the district attorney prepared an information charging plaintiff with perjury in the making of the affidavit to the genuineness of the sig-

nature of Connors, which information was sworn to by defendant. Plaintiff was arrested and released on bond. Some time afterward defendant learned that there was a mistake in the list of circulators, and that plaintiff did not circulate said sheet. Thereupon he wrote the district attorney, advising him that a mistake had been made, and requested that the prosecution of plaintiff be dropped, which was accordingly done.

This action was then begun against defendant and the several members of said association. A motion for nonsuit was sustained as to all the defendants except Koch. The verdict and judgment were for \$2,000.

[1] It should be further stated that defendant was not acquainted with plaintiff, and that before making the complaint he verified his recollection that Connors had denied his signature in the hearing before the secretary of state by examining the records of that hearing. The burden was upon the plaintiff to prove want of probable cause and actual malice on the part of the defendant.

[2, 3] The plaintiff, to sustain the finding of want of probable cause, relies upon the failure of the defendant to examine the parts of the petition and verify the figures on the list of circulators, which, by mistake, showed that the plaintiff circulated Petition 5. To sustain the finding of malice, involved in the verdict for plaintiff, she relies upon the finding of want of probable cause.

Instruction No. 2 told the jury "that malice may be inferred from the fact of prosecution without probable cause," without advising them under what circumstances they might draw such inference. While it is often said, and it has been said by this court, that malice may be inferred from want of probable cause, that clearly does not mean that it may be in every case inferred because it is found that the prosecution was begun without probable cause. The jury should be instructed as to the circumstances which justify such an inference.

The rule is better stated in 26 Cyc. p. 52, to the effect that malice may be inferred from the circumstances which establish want of probable cause, but is not a necessary inference therefrom. This fact appears from the necessity of proving both want of probable cause and malice to make a case.

In defense, facts which are insufficient to show probable cause may be shown to meet the charge of malice. While good faith is not equivalent to probable cause, it is sufficient justification as against the charge of malice in these cases. Probable cause is determined by reference to a common standard of conduct. Malice is to be determined by reference to the mind and motive of defendant. *Barron v. Mason*, 31 Vt. 189. In *Sharpe v. Johnston*, 59 Mo. 575, the court said:

"Malice * * * need not be proved by direct and positive testimony, but may be infer-

red from the facts which go to establish the want of probable cause; and this is all that is meant when it is said that malice may be inferred from the want of probable cause."

Malice may not be implied, as in slander and libel, where it is the ordinary basis of the slanderous or libelous statement, and where the implication as a matter of law is in accord with public policy, which frowns upon such statements. In cases of malicious prosecution the law will sanction no rule which makes it dangerous for a citizen, acting in good faith, to set the criminal law in motion where he believes a crime has been committed. In *Brown v. Willoughby*, 5 Colo. 1, this court said:

"In this action, if the want of probable cause be shown, the proof of actual malice is also required to sustain it. Here the law allows no presumption of malice, as it does in an action of slander. Actual malice may be proved by the acts and declarations of the party, or it may be inferred by the jury from the want of probable cause. The charge must be shown to be willfully false. *Levy v. Brennan*, 39 Cal. 489; *Humphries v. Parker*, 52 Me. 507. Where the evidence shows that accused was wholly innocent of the charge, and that there was no probable cause for the accusation, an action for malicious prosecution cannot be maintained, in the absence of malice, which may be traceable to a spirit of hatred, revenge, or other sinister or improper motive, denoting bad faith on part of the prosecutor. *Stone v. Crocker*, 24 Pick. 87; 3 Phillips, Ev. 572."

From the foregoing statements of the law it appears that the failure of defendant to make the inquiry which counsel assert he should have made is not sufficient to prove malice. There is no fact in evidence tending to show, much less to prove, that defendant willfully made a false charge against plaintiff. He visited the district attorney's office, as any good citizen ought to do, to report a case of perjury of which he had knowledge. His complaint against the defendant was due to a request by the district attorney that defendant report other offenses of the kind he had mentioned.

To justify the conclusion that his charge was willfully false, his negligence in not ascertaining the facts must have been gross, amounting to such reckless and wanton action as indicates a willful disregard of plaintiff's rights. Clearly such is not the case. Defendant displayed no unreasonable credulity in accepting as correct the list of circulators which the association was using. Possibly a very cautious person would have made further investigation on the point, but failure to do so does not sustain the burden of proving malice.

[4] When the facts are not in dispute, as in this case, whether they warrant an inference of malice is a question for the court. *Sharpe v. Johnston*, 78 Mo. 660. We are of the opin-

ion that the evidence is wholly insufficient to prove that defendant was guilty of malice in instituting the prosecution of plaintiff.

The judgment is accordingly reversed.

GARRIGUES, C. J., and BURKE, J., concur.

(67 Colo. 441)

PEOPLE ex rel. WALKER v. HIGGINS.
(No. 9607.)

(Supreme Court of Colorado. July 7, 1919.)

1. OFFICERS \Leftrightarrow 69—CIVIL SERVICE STATUTE LIMITED TO STATE EMPLOYÉS.

Const. art. 12, § 13, adopted at the November election, 1918 (see Laws 1919, p. 841), providing that all persons holding positions in the classified civil service shall hold office until removed pursuant to law, limits its civil service provisions to officers and employes of the state.

2. OFFICERS \Leftrightarrow 69—WATER COMMISSIONER A "STATE OFFICER" WITHIN CIVIL SERVICE LAW.

The water commissioner is a peace officer, whose duties concern the whole state, and he is a part of the state's system for the distribution of water, and is controlled by state's authority, and is neither a county nor a municipal officer, and is therefore a "state officer," within the meaning of Const. art. 12, § 13, adopted at the November election, 1918 (see Laws 1919, p. 341), relating to state officers under civil service.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, State Officer.]

3. STATUTES \Leftrightarrow 219—EXECUTIVE CONSTRUCTION NOT CONTROLLING WHERE NO VESTED RIGHTS ARE AFFECTED.

While executive construction of previous statutes is always entitled to great weight, yet it is not of controlling force, where the case is not extreme, and no vested rights would be destroyed.

Garrigues, C. J., and Burke and Allen, JJ., dissenting in part.

En banc.

Original proceeding in nature of quo warranto by the People of the State of Colorado, on the relation of Alex Walker, against J. P. Higgins. On demurrer to the petition. Demurrer overruled.

Victor E. Keyes, Atty. Gen., George A. Carlson, of Denver, W. O. Peterson, of Pueblo, and Norton Montgomery, of Denver, for petitioner.

Milton Smith, Charles R. Brock, W. H. Ferguson, and Floyd F. Walpole, all of Denver, for respondent.

DENISON, J. This is an original proceeding in the nature of quo warranto. The respondent is the incumbent of the office of wa-

ter commissioner of water district No. 2. His term of office expired May 6, 1919. The relator has been appointed by his excellency, the present Governor, to the same position. The respondent refuses to surrender the office, and claims that under section 13 of article 12 of the Constitution of Colorado, adopted at the November election, 1918 (see Laws 1919, p. 841), he is entitled to retain it.

The relator demurs to the respondent's answer, which sets up this claim, and the question is whether the claim is valid. So much of said section as is necessary to consider is as follows:

"The classified civil service of the state shall comprise all appointive public officers and employes and the places which they hold, except the following: Judges of courts of record and one stenographer of each judge, one clerk for each court of record, persons appointed to perform judicial functions, receivers, jurors, members of boards or commissions appointed by the Governor and serving without pay, members of the State Industrial Commission, of the Public Utilities Commission, and of the State Civil Service Commission, the Governor's private secretary and three confidential employes of his office, appointees to fill vacancies in elective offices, one deputy of each elective officer, the position involving the duties incident at present to the position of that deputy of the secretary of state known as deputy commissioner of labor and the incumbent thereof, officers and teachers in educational institutions not reformatory or charitable in character, all attorneys at law serving as such, and the officers and employes of the General Assembly."

And the following:

"All persons holding positions in the classified service as herein defined when this section takes effect shall retain their positions until removed under the provisions of the laws enacted in pursuance hereof."

[1] It is argued for respondent—

(1) That the literal terms of the section include the water commissioner, because he is an "appointive public officer"; and that is true, but we believe that the words "civil service of the state" would ordinarily be understood to include only officers of the state, and we must give them that meaning.

(2) That the exceptions indicate that other officers than state officers are included, but these exceptions can be explained by the supposition that the attempt was made to make it clear that deputy clerks of courts of record and instructors in reformatory and charitable institutions, etc., were included. We must conclude, therefore, that the civil service of the state embraces officers and employes of the state only.

[2] Is a water commissioner an officer of the state? The statute provides that the water commissioner shall be appointed by the Governor from names recommended by the county commissioners of the county or coun-

ties which comprise the territory of the district. The office is therefore an appointive office. It is not within any of the exceptions. The question then is: Is the office of water commissioner within the "civil service of the state"?

The arguments in favor are as follows: (1) That he is appointed by the Governor. (2) That he is appointed directly by authority of the laws of the state. (3) That he is controlled entirely by state officials, his superiors. (4) That the office is a part of the system of the state for executing the irrigation laws of the state. (5) That his duty is to execute the state laws, including laws for the preservation of the peace.

On the other hand, it is claimed that the office is not a state office because: (1) The water commissioner is really appointed by the county commissioners. (2) That his jurisdiction is not coextensive with the state. (3) His duties are purely local and of local concern. (4) He is paid by the locality, not by the state. (5) Under all former civil service laws he has been appointed by the Governor, without regard to those laws.

Nearly every one of the points made by either side has been held or stated to be of weight, and some of controlling force, in determining whether an office was a state office; but the authorities are in hopeless confusion upon the definition of a state office. The decision is made to depend, now on one point and now on another, and the results are various and inconsistent. For example, the Missouri Supreme Court holds that a constable is a state officer. *State v. McKee*, 69 Mo. 508. And this case said that a sheriff and clerk of court of record are also state officers, because the law which created the office is of state extent; that the deputy sheriff of the city and county of St. Louis is not a state officer (*State v. Bus*, 135 Mo. 325, 36 S. W. 636, 33 L. R. A. 616), within the meaning of the section of their Constitution which prohibits a representative to the Legislature from taking office, because that section clearly classifies the offices "by territory and jurisdiction." The state officers are those whose jurisdiction extends throughout the state. *State v. Spencer*, 91 Mo. 206, 3 S. W. 410; *State v. Dillon*, 90 Mo. 229, 2 S. W. 417. Yet in *State v. Mason*, 153 Mo. 43, 54 S. W. 524, it was held that police commissioners of St. Louis were state officers, and it was said that policemen were also.

In Michigan it is held that the mayor of Detroit, who is made a conservator of the peace, holds office "under the state," and it is there made to appear that, if he is appointed directly by state authority, that has some weight in determining whether he is such. *Attorney General v. Detroit*, 112 Mich. 145, 70 N. W. 450, 37 L. R. A. 211. Yet it is held that a state treasurer is not an office

er "in this state." *State v. Wilmington*, 3 Har. (Del.) 312.

In New York the assessor and tax collector of a town are not municipal officers or agents of the town in the conduct of their offices, because for such purpose the town is not a corporation but a—

"political division, organized for the convenient exercise of portions of the political power of the state. * * * The functions * * * of the * * * officers" in these respects are "administrative, and not in any sense corporate functions or duties." *Lorillard v. Monroe*, 11 N. Y. 394, 62 Am. Dec. 120.

Their duties in no respect concern the strictly corporate interests of the town.

In New Hampshire it is held that a representative in the Legislature is a state officer. *Morrill v. Haines*, 2 N. H. 246, 249; *Ricker's Petition*, 66 N. H. 207, 29 Atl. 559, 24 L. R. A. 740. But in Colorado it is said that he is not. *In re Speakership*, 15 Colo. 520, 25 Pac. 707, 11 L. R. A. 241.

The confusion of these authorities might be demonstrated further, but it would be useless. It is enough to say that, while they are doubtless right under the laws of their respective states, as authorities they do not aid us, nor do they give us much aid by their reasoning, for there is hardly one point upon which any case is based that in some other case is not said to be either immaterial or insufficient. It is our duty, however, to give respectful and careful attention to the Colorado cases.

In the case of *People v. Curley*, 5 Colo. 412, the question was whether the respondent lawfully held the office of police judge of Leadville. The charter of Leadville provided for a police judge, but the Legislature had made no attempt to fix his power. The city had passed an ordinance giving him the powers of a justice of the peace. It was held that this could not be done, and he was ousted; and this was done upon the theory and for the reason that "the administration of justice, the preservation of the public peace, and the protection of the rights of the citizen, although confided to local agencies, are essentially matters of public concern," and the court quotes with approval from *People v. Huribut*, 24 Mich. 44, 9 Am. Rep. 103, and from *Burch v. Hardwicke*, 30 Grat. (Va.) 24, 32 Am. Rep. 640, and from *Dillon on Munic. Corp.* §§ 33, 34, and 773, to the effect that the conservation of the peace is a state function and a matter of state concern.

By the statute creating the office of water commissioner that officer is given power to arrest and take before a magistrate any one interfering with him in his duties or disobeying his orders. This is essentially a police power for the preservation of the peace. The main purpose of our statutes concerning the distribution of water is the preservation of

the peace. *White v. Highline Canal Co.*, 22 Colo. 191, 197, 43 Pac. 1028, 31 L. R. A. 828; *Lamson v. Valles*, 27 Colo. 201, 204, 61 Pac. 231. *Roberson v. People*, 40 Colo. 124, 90 Pac. 79, is cited by respondent as holding that a water commissioner is "a police officer of the state." The writer does not think the case so holds. The question before the court was whether one interfering with a water commissioner who was attempting to enforce the water decree was guilty of contempt of court, and the statement referred to was made in the attempt of the judge who wrote the opinion to show that the water commissioner was not an officer of the court interference with whom would constitute contempt. And that is all that is meant by what he said. Nevertheless, if the water commissioner is a peace officer, as that opinion says he is and as the statute unquestionably makes him, then under the case of *People v. Curley*, 5 Colo. 412, *People v. Hurlbut*, 24 Mich. 44, *Attorney General v. Detroit*, 112 Mich. 145, 70 N. W. 450, 37 L. R. A. 211, *Burch v. Hardwicke*, 30 Grat. (Va.) 24, 82 Am. Rep. 640, and many other cases, his duties and functions concern the whole state, as is said in the last-cited case; and if his duties and functions concern the whole state, he is a state officer within the civil service of the state.

In such case it does not matter that his activities are confined to a small part of the state. That was true of the police judge of Leadville, and in a less degree is true of an irrigation division engineer, an office which we have recently held to be within the terms of this section of the Constitution. *People v. Chew*, 179 Pac. 812. Nor does it matter that his peace powers are confined to matters relating to the distribution of water; he is a peace officer nevertheless. It is true that in *Re Speakership*, 15 Colo. 520, 25 Pac. 707, 11 L. R. A. 241, *Elliott, J.*, said that a clerk of a court of record was not a state officer, but he made no reference to *People v. Curley*, and although the clerk of a district court is an officer engaged "in the administration of justice" under the laws of the state, as stated in *People v. Curley*, and therefore Judge Elliott's dictum is inconsistent with *People v. Curley*, yet it cannot be regarded as overruling the principles there stated.

Since, therefore, he is a peace officer of the state, with duties concerning the whole state, he is under *People v. Curley*, a state officer. Then, too, the point is a very strong one that the water commissioner is a part of the irrigation system of the state, part of the system provided by the state for the distribution of water, and his duties are in the administration of that system, which is not

created or controlled by any municipality or quasi municipality, but wholly by the state. These three points—that he is a peace officer whose duties concern the whole state, that he is a part of the state system for distribution of water, and that he is controlled only by state authority—in reason and force seem to us to outweigh all other points either for or against the proposition that he is a state officer.

An additional reason why the water commissioner must be called a state officer is that he cannot be called either a county officer or a municipal officer. The water district is not a corporate entity nor a quasi corporation. It has no powers whatever. It is not a person and cannot act as such. In this respect it is like a town in New York, within which certain officers are charged with the exercise of portions of the political power of the state. It is a mere geographical division within which the commissioner is given certain powers by the state. *Lorillard v. Monroe*, 11 N. Y. 394, 62 Am. Dec. 120.

What has been said disposes of the points in favor of the relator. The source of the appointment does not control, but if it did the appointment is by the state executive. The state had nothing to do with the appointment of the police judge of Leadville in *People v. Curley*, 5 Colo. 412. The coextent of jurisdiction with the state does not control. *Id.*

The commissioner's duties are not purely local, or of local concern, because he is a peace officer. *People v. Curley*, supra; *Roberson v. People*, 40 Colo. 119, 90 Pac. 79. Moreover his duties greatly concern all the water users within his water division, and for this reason water divisions and division engineers were created. *Comstock v. Ft. Morgan Co.*, 60 Colo. 101, 109-112, 151 Pac. 929. The source of payment does not control. The police judge was not paid by the state. *People v. Curley*, supra.

[3] This leaves the only point in relator's favor the executive construction of previous statutes. While this is always entitled to great weight, yet it has never, unless in the most extreme case, where vested rights would be destroyed, been of controlling force. There is no such situation here.

The demurrer should be overruled.

BURKE, J. (dissenting). I dissent from the conclusion that the office of water commissioner is a state office. I join in the holding that the civil service of the state embraces offices and employes of the state only.

I am authorized to say that Chief Justice GARRIGUES and Mr. Justice ALLEN concur in these views.

(67 Colo. 344)

CITY OF TRINIDAD v. TRINIDAD WATERWORKS CO. et al. (No. 9197.)(Supreme Court of Colorado. June 2, 1919.
Rehearing Denied Oct. 6, 1919.)**WATERS AND WATER COURSES §=183(5)—
RIGHTS OF WATER COMPANY UNDER CITY'S
PROMISE TO PAY BONDS AS PART OF PRICE.**

Where the promise of a city acquiring the plant of a water company to pay the company's outstanding bonds was accepted to that extent as a payment on the price, the company is not entitled, as against the city, to possession of seven of the city's bonds held by a bank in escrow for exchange for bonds of the water company, all except five of which have been delivered for cancellation; the seven bonds not being part of the price.

Error to District Court, Las Animas County; A. Watson McHendrie, Judge.

Action by the City of Trinidad, a municipal corporation, against the Trinidad Waterworks Company, a corporation, and the First National Bank of Trinidad, Colo., a corporation. To review a judgment for the Waterworks Company, plaintiff brings error. Reversed, and cause remanded.

Henry Hunter, of Trinidad, and Dana, Blount & Silverstein, of Denver, for plaintiff in error.

Jesse G. Northcutt and Forrest C. Northcutt, both of Denver, and Henry W. Coll, of Riverside, for defendants in error.

BAILEY, J. Plaintiff in error, plaintiff below, the city of Trinidad, a municipal corporation, hereinafter called the city, brought suit to recover from the First National Bank of Trinidad, one of the defendants below, and a defendant in error here, seven city bonds of \$1,000.00 each, held by the latter in escrow for the purpose of exchange for bonds of the Trinidad Waterworks Company, hereinafter called the company, which company, claiming to own the bonds in dispute was thereafter made a party defendant to this suit by stipulation. Findings and decree were for the company, and the city brings the cause here for review.

The bonds on deposit are part of an issue of \$335,000.00 put out by the city for the purchase from the company of the water system which then did, and ever since has, furnished the city its domestic water supply. These bonds were placed with the bank in September, 1897, agreeable to the terms of a contract of purchase and sale of such water system between the city and the defendant company. That contract provides, among other things, that the bonds of the company theretofore issued against its water plant, were to be exchanged for bonds of the city. All of the water bonds, except five thereof for \$1,000.00 each, were delivered up, ex-

changed and canceled. The five bonds in question with interest thereon are still outstanding and are a subsisting lien upon the waterworks system, so purchased by the city.

The contention of the company is that the seven bonds in the hands of the bank are a part of the purchase price of the water plant and as such belong to it and that the company is under no obligation to locate the five missing bonds or surrender them to the city before it is entitled to receive the balance of the agreed purchase price. It is contended by the city, on the other hand, in view of the lapse of time since such bonds were placed in escrow, that they should now be returned for the reason that the city alone is responsible for the payment of the water company bonds, whenever presented for payment, and that in accordance with the terms of its contract with the water company it has discharged its obligation to the latter in full. It is also urged that in any event the company, having failed to renew its charter, is legally dead, which fact when it was made a party defendant was not known to the city, and since it has in fact no longer a legal existence, may not maintain this action. In our view, however, it is unnecessary to pass upon the right of the company to now litigate the matter in dispute.

The case will be determined upon the provisions of the contract between the city and the company. In March, 1897, the parties agreed upon the price to be paid for the water system, that the payment therefor in part at least was to be made by redemption and cancellation of outstanding bonds of the company, which were and are a first lien upon the plant; the contract further provides, if at the time the contract was completed there were any of the water company bonds outstanding, and not deposited with the First National Bank of Trinidad for exchange, as to such bonds, as follows:

"It is further agreed by the Trinidad Waterworks Company that any amount which might be paid by the City of Trinidad for the purpose of discharging the bonds, so deposited, and securing their cancellation, shall be considered and accepted by said company as payment to that extent upon the purchase price of the property herein proposed to be conveyed, and that said city may withhold from the purchase price an amount equal to the principal and interest to April 1, 1897, of any bonds which may not be so deposited prior to the time of final settlement by the city for said property as herein provided for, and the payment of such bonds shall be assumed by the city, and the amount thus withheld and assumed, to be considered by the company as payment to that extent upon the purchase price of said property."

It is manifest, from the foregoing provision, that the city assumed and agreed to pay the then existing and outstanding bonded indebtedness of the company, and the com-

pany accepted such assumption of obligation by the city as payment of so much of the agreed purchase price of the water plant as was represented by such outstanding bonds. The legal effect of the assumption of an existing indebtedness on the one side and an acceptance of the promise to pay on the other, as part of the purchase price, is laid down in 1 C. J. 567, in the following terms:

"It is too well settled to admit of doubt that, if the promise or agreement itself, and not the performance thereof, is accepted in satisfaction of the demand, and the agreement is based upon a sufficient consideration, the demand is extinguished and cannot be the foundation of an action, and it makes no difference whether the original demand was in tort or contract. Under these circumstances there is a valid accord and satisfaction, even though the promise or agreement is not performed. The sole remedy of either party in case of nonperformance is by action for breach of the new agreement, the right to insist on the original indebtedness being extinguished."

See also *Whitsett v. Clayton*, 5 Colo. 476.

It appears that the water company bonds in question have been lost, or at least have not been presented for payment during the more than twenty years period which has elapsed since the execution of the contract. The bonds are payable to bearer, and by their provisions liability thereon is absolute, certainly at least at all times prior to the running of the statute of limitation, and according to the terms of the contract the city is bound for their payment. For the protection of the city the contract expressly and specifically provides that it may withhold payment to the water company of so much of the purchase price as is covered by the water bonds outstanding and accrued interest thereon at the date of final settlement, the payment of which the city has assumed. It was under this explicit provision that the bonds were deposited with the bank. The water company has received in full what it agreed, according to the terms of the contract with the city, to take for its plant, a part of which was the assumption of, and the agreement by the city to pay, any outstanding bonds of that company not deposited with the bank prior to the final settlement by the city for the water plant, as provided in the contract. It therefore is immaterial in this action whether the company is a live corporation

or whether its legal existence was terminated by the expiration of its charter. It has already been paid the agreed purchase price for its plant, and obviously has no further interest in the subject matter of this suit. There is no ambiguity in the contract upon this point, as is plainly shown by the express provision contained in the excerpt therefrom quoted above. The promise upon the part of the city to pay such outstanding water bonds of the company was accepted to that extent by the company as a payment upon the agreed purchase price for the property. The city is still liable for such payment, and is ready and willing to discharge its obligation in this behalf whenever called upon to do so. No other construction of the effect of the agreement of purchase and sale, between the city and the water company upon the point here involved is either legally or logically possible.

The cases relied upon by the company are not in point, particularly *Burbank v. Roots*, 4 Colo. App. 197, 45 Pac. 275. All of the cases cited by the water company to support its contentions are ones in which the vendor of real property was permitted to bring action against the purchaser for nonpayment of an incumbrance which the purchaser assumed and agreed to pay, and are distinguishable from the case at bar in that in those cases the purchaser failed and refused to discharge the incumbrance. In this case there has been no default upon the part of the city in the performance of its agreement, or denial of liability.

It is manifest, therefore, that the interest of the company in the bonds in question long since came to an end. This conclusion disposes of all other issues involved, and further discussion or consideration of the cause is unnecessary.

The judgment of the trial court is reversed and the cause remanded with instructions to enter a judgment for the city directing an unconditional delivery to it by the bank of the city bonds above described held by it in escrow for the purpose hereinbefore indicated.

Judgment reversed and cause remanded with instructions.

GARRIGUES, C. J., and ALLEN, J., concur.

(67 Colo. 184)

FERGUSON et al. v. FARMERS' STATE BANK OF HAXTUN. (No. 9637.)

(Supreme Court of Colorado. Oct. 6, 1919.)

JUDGMENT ¶68(1)—VACATION OF JUDGMENT BY CONFESSION ON SHOWING OF DEFENSE ON MERITS.

Judgment confessed under power of attorney should be vacated, and defense allowed to a jury; application being seasonable, and supporting affidavit making a prima facie case of defense on the merits, notwithstanding counter affidavits.

Department 1.

Error to District Court, Phillips County; L. C. Stephenson, Judge.

Action by the Farmers' State Bank of Haxtun against Robert B. Ferguson and another. Motion to set aside judgment by confession was overruled, and defendants bring error and apply for supersedeas. Reversed, with directions.

Munson & Munson, of Sterling, and W. D. Kelsey, of Holyoke, for plaintiffs in error.

Avery T. Searle, of Haxtun, for defendant in error.

TELLER, J. Defendant in error took judgment by confession under warrants of attorney attached to two promissory notes executed by the plaintiffs in error and assigned by the payee to defendant in error. Judgment was entered on a cognovit some 15 months after the delivery of the notes and 3 months after they were due. Plaintiffs in error seasonably filed a motion to set aside the judgment, and supported it with affidavits alleging that the notes were obtained by misrepresentation and fraud and without consideration, of all of which the defendant in error had full knowledge. A counter affidavit was filed by the bank, denying knowledge of any defects in the note or in payee's title. The motion was overruled, and the cause is before us on application for a supersedeas.

The motion to vacate the judgment should have been sustained. The general rule is that where, in such a case, it is made to appear by affidavit that the judgment debtor has a meritorious defense, the court should set aside the judgment and allow the defense to be made in a trial to a jury. The issue as to the bank's knowledge ought not to be tried by the court on such motion. *Dionne v. Matzenbaugh*, 49 Ill. App. 527, *Lake v. Cook*, 15 Ill. 353. In *Richards v. First National Bank*, 59 Colo. 403, 148 Pac. 912, this court held that a judgment confessed under power of attorney will be vacated, and a defense allowed, where application is made in apt time, and the affidavit in support there-

of makes out a prima facie case of a defense upon the merits, and this notwithstanding counter affidavits are filed denying the matters alleged as a defense.

The judgment is reversed, with directions for the trial of the cause on its merits.

GARRIGUES, C. J., and BURKE, J., concur.

(67 Colo. 333)

CARDENAS v. VALDEZ. (No. 9689.)

(Supreme Court of Colorado. Oct. 6, 1919.)

ELECTIONS ¶305(7)—COURT'S FINDINGS IN CONTESTS SUPPORTED BY SUBSTANTIAL EVIDENCE AFFIRMED.

In election contest trial, court's findings on questions of fact, when supported by substantial evidence, will not be disturbed on appeal.

Department 2.

Error to Huerfano County Court; Joseph H. Patterson, Judge.

Election contest proceeding by J. B. N. Valdez against J. D. J. Cardenas. Judgment for contestant, and defendant brings error and applies for a supersedeas. Supersedeas denied, and judgment affirmed.

W. O. Peterson, of Pueblo, for plaintiff in error.

John L. East and Harvey Starbuck, both of Walsenburg, for defendant in error.

ALLEN, J. At an election for electing a secretary of school district No. 5 in Huerfano county, held in that district on May 5, 1919, J. D. J. Cardenas, the plaintiff in error, and J. B. N. Valdez, the defendant in error, were candidates for the office, and were the only persons voted for at the election. At the close of the school district election in question, the judges of the election canvassed the result, and found and declared that Cardenas received 54 votes, and Valdez 51 votes. Valdez thereafter duly instituted contest proceedings in the county court. Upon trial the court found in favor of Valdez, and adjudged him to have been elected to the office. Cardenas brings the cause here for review, and in the assignments of error complains of certain findings of fact of the trial court. The cause is before us upon an application for a supersedeas, and the sole question presented in the argument is the conclusiveness of the findings complained of.

In conformity to the issues made by the pleadings, the trial court found that the following named voters, to wit, Rafino Casias, Carl Martin, Mrs. Carl Martin, and Querino Martinez (all of whom, it is admitted, voted

for Cardenas), were not legally qualified electors and were not entitled to vote at the election; and also that the vote cast by one Maclovio Martinez, which vote was in favor of Cardenas, was illegally cast and should not be counted. This finding would reduce the vote for Cardenas from 54 to 49 votes.

The court also found that Juan T. Martinez and Rosenda Martinez, who had not been permitted to vote at the election, were legally qualified electors and would have voted for Valdez if they had been allowed to vote; and also that one Pionono Archuleta, who voted for Valdez, was a duly qualified voter and entitled to vote at the election. As a result of the finding as to Juan T. Martinez and Rosenda Martinez, the vote for Valdez was increased from 51 votes, as found by the election judges, to 53 votes.

The plaintiff in error contends, in effect, that under the undisputed facts the trial court should have found, as a matter of law, that Juan Martinez, Rosenda Martinez, and Pionono Archuleta, were not residents of the school district in which the election was held, and therefore not entitled to vote at the election. We find, however, that as to each of these voters there was substantial evidence to the effect that such person was a resident of the school district, and therefore this court will not disturb the trial court's finding that such persons were "legally qualified voters * * * and entitled to vote at said election." *Huffaker v. Edgington*, 30 Idaho, 179, 163 Pac. 793. The appellate court will not determine doubtful questions of fact in contested election cases. 15 Cyc. 437. The conclusion above reached leaves undisturbed the court's finding that the number of votes that should be counted for Valdez is 53.

We are also of the opinion that the evidence is sufficient to uphold the trial court's finding that Rafino Caslas was not a legally qualified elector at the election, and that the vote cast by Maclovio Martinez "was illegally cast, and should not be counted." This finding reduced the vote for Cardenas from 54, as found by the election judges, to 52.

In view of our conclusions, hereinabove stated, it becomes unnecessary to consider the trial court's findings as to the residence or qualifications of Carl Martin, Mrs. Carl Martin, and Querino Martinez, for the votes of these persons, if counted for Cardenas, would not bring his total vote above 52, which is still less than the number of votes given to Valdez by the undisturbed and unreversed findings of the trial court.

The application for a supersedeas is denied, and the judgment is affirmed.

Affirmed.

GARRIGUES, C. J., and BAILEY, J., concur.

(87 Colo. 290)

FRIKKER v. MORRISON. (No. 9456.)

(Supreme Court of Colorado. Oct. 6, 1919.)

1. JUSTICES OF THE PEACE §188(1)—JURISDICTION OF DISTRICT COURT IN VENDOR'S ACTION FOR FORCIBLE DETAINER TO FORECLOSE CONTRACT.

Under Rev. St. 1908, § 2808, district court had jurisdiction to foreclose contract to purchase in vendor's action in forcible detainer against defaulting purchaser on case being certified from justice court; the district court in such case having right to try case as if originally begun in such court.

2. APPEAL AND ERROR §892(3)—DEFENDANT ESTOPPED TO COMPLAIN CASE TRIED ON THEORY OF HIS ANSWER.

Defendant, who has alleged in answer that his relation to plaintiff was that of mortgagor to mortgagee, cannot complain that case was tried on that theory.

Department 1.

Error to District Court, City and County of Denver; John H. Denison, Judge.

Action by William F. Morrison against Dora A. Frikker. Judgment for plaintiff, and defendant brings error. Affirmed.

George B. Campbell, of Denver, for plaintiff in error.

F. D. Taggart and S. S. Abbott, both of Denver, for defendant in error.

TELLER, J. Defendant in error began an action in forcible detainer in a justice court, which was afterwards certified to and tried by the district court.

The complaint alleged ownership of certain real estate in the plaintiff, a contract of sale of it to one Dillow, and a contract of sale by Dillow to the defendant, demand of possession, refusal, etc.

The answer alleged ownership in defendant, and alleged that plaintiff was simply a mortgagee of the premises.

Plaintiff had judgment for possession, the decree providing that the real estate be sold to foreclose the right of defendant under her contract with Dillow, with a prescribed period for redemption.

It should be added that Dillow's contract with plaintiff had been canceled because of the failure of Dillow to make the payments required, but this cancellation did not take place until after defendant had purchased such rights as Dillow had by his contract of purchase.

[1] The judgment is attacked on the ground that the court had no jurisdiction to foreclose the contracts of purchase in an action begun in the justice court. Illinois cases are cited to that effect, but they are not in point, since our statute (section 2808, R. S. 1908) provides that, when cases are so certified, they shall be tried in all respects as if

originally begun in the court to which they have been certified.

[2] In any event, defendant, by answer having alleged that the relation between plaintiff and defendant was that of mortgagee and mortgagor, is hardly in position to complain that the cause was tried on his announced theory.

Plaintiff in error was given more than was required by the strict rules of practice, in that she had allowed her a period of redemption.

Finding no error in the judgment, it is affirmed.

GARRIGUES, C. J., and BURKE, J., concur.

(67 Colo. 452)

SMITH et al. v. PEOPLE. (No. 9471.)

(Supreme Court of Colorado. Oct. 6, 1919.)

1. PLEADING \S 214(1) — ADMISSIONS BY DEMURRING TO ANSWER.

A general demurrer to the answer admits allegations thereof.

2. BAIL \S 75—SURETY NOT LIABLE ON INSANITY OF PRINCIPAL AND CONFINEMENT IN ANOTHER STATE.

Sureties on a criminal recognizance were not liable for failure to produce principal, where principal was insane and in custody in another state, since such failure was through no fault of the sureties or the principal, and since production of insane principal would have served no good purpose, inasmuch as trial could not have proceeded.

Department 1.

Error to District Court, Chaffee County; James L. Cooper, Judge.

Action by the People of the State of Colorado against James T. Smith and another, sureties on a criminal recognizance, to recover the penalty. Judgment against the defendants, and they bring error. Reversed, with directions.

John A. Rush and Foster Cline, both of Denver, for plaintiffs in error.

T. Lee Witcher, of Canon City, and A. R. Miller, of Salida, for the People.

TELLER, J. Plaintiffs in error were sureties on a criminal recognizance given for the appearance of one Minnie De Lage, who was charged with a felony. On the return day of the recognizance the defendant did not appear, and the bond was therefore forfeited, and a scire facias issued, requiring the sureties to show cause why judgment for the penalty named should not be rendered against them. To this they answered, alleging that the accused was insane on the return day and was still insane; that she was in the custody of the sheriff of a county

in Texas, under a criminal charge; and that there was then pending in Texas a proceeding to determine the question of her sanity. A general demurrer to the answer was sustained, and judgment entered for \$1,000 against said sureties. They bring the case here on error.

[1] The demurrer admits the allegations of the answer, including the allegation that the accused was insane on the return day and when the answer was filed, and was in the custody of the law in Texas. There is therefore presented the question whether or not the sureties are relieved from their obligation to produce their principal in the recognizance by the fact that she is insane and in the custody of another state. It is plain that the purpose of a recognizance is merely to insure the presence for trial of a person accused of a bailable offense. The enriching of the public treasury is no part of the object at which the proceeding is aimed.

[2] There is no reason for penalizing the sureties when it appears that they are unable, by no fault of their own or of their principal, to perform the condition of the bond. Moreover, to produce for trial an insane person would serve no good purpose, as the trial could not proceed. These considerations have been many times recognized by the courts, which have set aside forfeitures and vacated judgments on bail bonds when the principal has been prevented by death, sickness, or insanity from appearing as required by the bond. Such cases come within the rule which relieves from the obligation of a contract rendered impossible of performance by an act of God.

"Ordinarily insanity of the principal is a good defense for nonperformance of the obligation of the bond." 2 R. C. L. p. 55, par. 67.

In *Chase v. People*, 2 Colo. 481, this court held that, when a principal in a recognizance was on the return day prevented by sickness from appearing, such sickness not being the result of fault or misconduct on his part, a judgment of forfeiture should be set aside, when the facts were made to appear. In that case it was held that the costs should be paid by the sureties. In *Scully v. Kirkpatrick*, 79 Pa. 324, 21 Am. Rep. 62, a number of cases are cited to the effect that sickness and insanity, as well as death, excuse performance of the condition of a recognizance. The rule is well settled, and has our entire approval. It may be that, on a hearing upon an issue made as to the alleged insanity, it will appear that the accused is not or was not insane.

The judgment will be reversed on payment of costs by the plaintiffs in error, and such further proceedings may be had in the cause as are consistent with the views hereinbefore expressed.

GARRIGUES, C. J., and BURKE, J., concur.

(67 Colo. 288)

DENVER & R. G. R. CO. v. CITY OF COLORADO SPRINGS. (No. 9026.)

(Supreme Court of Colorado. Oct. 6, 1919.)

1. MUNICIPAL CORPORATIONS ⇨116—SPECIFIC ORDINANCE CONFLICTING WITH GENERAL ORDINANCE EFFECTIVE WITHOUT REPEALING CLAUSE.

Notwithstanding charter provision that no ordinance shall be amended or repealed except by ordinance, provisions of a specific ordinance, in conflict with an earlier general ordinance requiring reference of ordinances to a commission, must be given effect, though there be no repealing clause.

2. PLEADING ⇨8(6)—ALLEGATION THAT ORDINANCE WAS REGULARLY PASSED SUFFICIENT.

It is enough for the complaint to allege that the city council duly, regularly, and legally passed an ordinance, set out, without alleging the facts showing due passage.

Error to District Court, El Paso County; John E. Little, Judge.

Action by the City of Colorado Springs against the Denver & Rio Grande Railroad Company. Judgment for petitioner, and defendant brings error. Affirmed.

E. N. Clark and G. A. Luxford, both of Denver, for plaintiff in error.

J. L. Bennett, City Atty., of Colorado Springs, for defendant in error.

TELLER, J. The defendant in error began an action in the district court of El Paso county to condemn a tract of land for the extension of a street across the right of way of the plaintiff in error. The complaint alleged that the city council of said city had "duly, regularly, and legally passed an ordinance" for the purpose above named, and set out the ordinance in full; also that the ordinance was in full force and effect, described the land to be taken, and the nature of the proposed improvement, and prayed for the appointment of commissioners, etc. The answer denied the sufficiency of the complaint, and presented several defenses, only one of which is insisted upon in the brief.

A hearing was had on the complaint and answer; the objections were overruled, and commissioners appointed, who, in due time, made report. Objections to the report having been overruled, judgment was entered for the petitioner. The cause is now before us on error.

[1] Plaintiff in error urges that the ordinance directing the extension of the street is void, because it had not been referred to the city planning commission, as required by an earlier ordinance (No. 900) still in force.

Attention is called to a provision of the chapter of the charter of said city which reads as follows:

"Amendment or repeal.—No ordinance or section thereof shall be amended or repealed except by ordinance adopted in the manner provided in this charter."

It is insisted that the ordinance in question could not, under the above charter provision, repeal the ordinance which required a reference to the planning commission. But such is not the fact. The provision in question has no application here, because the alleged repeal is by ordinance. Ordinance No. 900 is general in its scope, while the extension ordinance is specific and later. It must be held, therefore, that, where its provisions are in conflict with the earlier and general ordinance, such provisions must be given effect. *Dunton v. People*, 38 Colo. 128, 87 Pac. 540. The rule is the same, whether there be a repealing clause or not. *Sugar City v. Commissioners*, 57 Colo. 432, 140 Pac. 809.

[2] It is further objected that the complaint is insufficient, because it does not set out all the facts necessary to give the court jurisdiction, in that the facts showing the due passage of the ordinance are not alleged. Such allegations are unnecessary. *Los Angeles v. Waldron*, 65 Cal. 283, 3 Pac. 890; 28 Cyc. 394.

The complaint was sufficient, and there appears to be no error in the proceedings.

The judgment is therefore affirmed.

GARRIGUES, C. J., and BURKE, J., concur.

(67 Colo. 307)

ATCHISON, T. & S. F. RY. CO. v. COLORADO ALFALFA MILL & POWER CO.
(No. 9372.)

(Supreme Court of Colorado. Oct. 6, 1919.)

1. CUSTOMS AND USAGES ⇨17—PROVISION IN BILLS OF LADING MAY BE ALTERED BY CUSTOM.

A provision in a bill of lading, that the carrier shall not be liable for property left on certain kinds of sidings until the cars are attached to trains, may be altered by custom and usage.

2. CUSTOMS AND USAGES ⇨19(1) — SHIPPER HAS BURDEN OF PROOF TO SHOW STIPULATION IN BILL OF LADING CHANGED BY CUSTOM.

In an action against a carrier to recover for the loss of property left on siding, the burden was upon the plaintiff to show that a stipulation in the bill of lading, to the effect that the carrier should not be liable for property on such a siding, had been altered by custom and usage, and the extent of the modification.

8. CARRIERS ⇐113—LIABILITY DEPENDING ON DELIVERY AND ACCEPTANCE OF SHIPMENT.

Delivery and acceptance are essential to impose upon a railway company the duties and obligations of a common carrier.

4. CARRIERS ⇐113—PLACING LOADED CAR ON SIDING NOT ACCEPTANCE OF GOODS BY CARRIER.

In an action against a carrier for loss of property by fire while standing on a siding, the mere placing of the car upon the siding was not delivery to or acceptance by the carrier of such car, although the carrier had given the shipper blank bills of lading to be filled out, which bills of lading were signed by the freight conductor when notified, or when he saw that loaded cars were standing on the siding.

Department 1.

Error to District Court, Otero County;
J. E. Rizer, Judge.

Action by the Colorado Alfalfa Mill & Power Company against the Atchison, Topeka & Santa Fé Railway Company. Judgment for plaintiff, and defendant brings error. Reversed, with directions.

Defendant in error was plaintiff and plaintiff in error was defendant in the district court, and they are hereinafter so designated. Plaintiff had an alfalfa meal mill at Roberta, Colo., and for some months had made shipments therefrom over defendant's railway. These shipments amounted generally to one or two cars daily, though sometimes as many as four cars were shipped, and occasionally, for several days, none at all. Roberta is about three miles from Swink, and both stations are on defendant's railway. An agent is employed at Swink, but none at Roberta. Roberta is on a branch line, and shipments to and from that point are handled by the agent at Swink. In the early course of this business cars were loaded and moved to Swink, where bills of lading were made out and delivered. The bills used contained the following provision:

"Property destined to or taken from a station, wharf, or landing at which there is no regularly appointed agent shall be entirely at risk of owner after unloaded from cars or vessels, or until loaded into cars or vessels, and when received from or delivered on private, or other sidings, wharves, or landings shall be at owner's risk until the cars are attached to and after they are detached from trains."

Saturday, January 30, 1915, two empty cars were placed on the siding adjacent to the mill; one of these was loaded by plaintiff and removed by defendant. Plaintiff finished loading the other about 5:30 p. m. at a time when the local train should have been supposed to have returned to Swink for the day. No train was operated on the branch on Sunday. No notice of any kind was given defendant that the car was ready

for shipment. During the night following this car of meal was destroyed by fire of unknown origin. Plaintiff brought suit to recover the value thereof, \$239.40. Jury was waived, and upon trial to the court plaintiff obtained judgment. From that judgment defendant prosecutes this writ. Plaintiff contends that at the time of the destruction of the meal in question it had been delivered to and was in the possession of the railway company. Defendant maintains the contrary. This is the sole question necessary for our determination.

Henry T. Rogers and George A. H. Fraser, both of Denver, and C. C. Hearnberger, of La Junta, for plaintiff in error.

Sabin, Haskins & Sabin, of La Junta, for defendant in error.

BURKE J. (after stating the facts as above). [1, 2] Such was the proven character of the track upon which the car stood at the time of the fire that, were the contract between the parties solely evidenced by the bill of lading, plaintiff could not recover. Such contract, however, may be altered by custom and usage. *M. & E. Ry. Co. v. Kolb*, 73 Ala. 396, 49 Am. Rep. 54. That it had been so altered in the present case is admitted. The burden of proving the extent of that modification devolved upon plaintiff. It must prove what custom and usage had been adopted by the parties as constituting delivery in lieu of the attachment of the cars to defendant's train.

In response to this requirement plaintiff produced evidence that: (1) The defendant, by its agent at Swink, delivered to G. I. Boyd, plaintiff's assistant manager, blank bills of lading, a seal book, and car seals. (2) Defendant, when required by plaintiff, placed empty cars for its use upon the siding in question. (3) When loaded by plaintiff, its agents sealed the cars, made a record in the book mentioned, and filled out a bill of lading, except the signature by defendant. (4) Cars so loaded, sealed, recorded, and billed were removed by the railway company, either upon notice by telephone to the agent at Swink or when so found by the railway company's train crews. (5) When so removed, such crews first learned from plaintiff's agents that the cars were ready for shipment; bill of lading was presented to the conductor, who signed same for defendant and delivered copy thereof to its agent at Swink.

[3] It affirmatively appears from the evidence that no car was ever removed from this siding until notice by telephone to the agent at Swink that the car was loaded and ready, or until such notice was given orally to the train crew by plaintiff's agents, or until bill of lading had been signed and copy thereof passed into the hands of defendant's agent,

the conductor. Such notice and signing of bill of lading were an essential part of the custom and usage constituting the contract, or supplanting that portion of the contract requiring the attachment of the cars to defendant's train to constitute delivery. Delivery and acceptance were essential to impose upon the railway company the duties and obligations of a common carrier. Hutchison, Carriers (3d Ed.) vol. 1, § 105.

[4] There is no proof thereof as to the car in question; hence a fatal defect in the evidence of delivery. In addition to this, there is no evidence of any notice to the company that more than the car already loaded and taken would be ready for shipment on the 30th. The car in question was loaded and sealed after the local had gone. No crew would be where it could reasonably be expected to learn of the loading of this car until the following Monday. There was no actual delivery and acceptance of the car in question; nothing which could be construed, either under the law, or the bill of lading, or the established custom and usage, as such delivery and acceptance.

At the time of the fire the car was therefore in possession of plaintiff, and the judgment is accordingly reversed, with directions to the court below to enter judgment herein for defendant.

GARRIGUES, C. J., and TELLER, J., concur.

(67 Colo. 297)

JOSLYN v. PEOPLE. (No. 9566.)

(Supreme Court of Colorado. June 2, 1919.
Rehearing Denied Oct. 6, 1919.)

1. CONTEMPT §52—WITNESSES §21—REFUSAL TO TESTIFY IN JUDICIAL INVESTIGATION CRIMINAL CONTEMPT.

Refusal to testify, in judicial investigation for purpose of investigating charges made against sheriff and the drawing of the grand jury, was a direct criminal contempt, which might be punished summarily.

2. CONTEMPT §14—MISCONDUCT OF OFFICER IN SELECTION OF JURORS CONSTITUTES CRIMINAL CONTEMPT.

An officer charged with the duty of selecting and summoning jurors, who excludes all those acquainted with counsel for the defense solely upon that ground, is guilty of a gross contempt of court, and the same is true if the officer were guilty of a similar violation of duty in summoning grand jurors.

3. CONTEMPT §14—CONSPIRACY OF GRAND JURORS TO VIOLATE OATH CONSTITUTES CONTEMPT.

If grand juror, before taking oath that he will present no person through malice, hatred, or ill will, under Rev. St. 1908, § 3699, has entered into an agreement or conspiracy to violate

it, and, as a grand juror, is engaged in consummating that agreement or conspiracy, he is in contempt, and may be punished.

4. GRAND JURY §15—DISQUALIFICATION OF JUROR NOT RENDERING INDICTMENT INVALID.

Generally neither bias nor prejudice of grand juror, nor his interest in a prosecution other than a direct pecuniary interest, nor the fact that he has formed or expressed an opinion, will so disqualify him as to render invalid indictments returned by the grand jury.

5. WITNESSES §292, 294—WHEN INTEREST IN CIVIL LITIGATION MATTER OF PRIVILEGE.

A witness may not refuse to testify, because testimony may influence civil litigation in which he is interested, or because he considers the matter inquired about as his private, confidential, and personal business.

6. CONTEMPT §30—POWER OF COURT TO INVESTIGATE CHARGES AS TO MISCONDUCT IN SELECTION OF GRAND JURY.

Where newspaper published article attacking sheriff and his selection of grand jurors, court, on petition of foreman of grand jury, may hold judicial investigation to ascertain truth or falsity of charges; gross contempt of court having been committed either by the sheriff and some of the grand jurors, or by the publication of the article, or both, and the primary object of such investigation being to purge grand jury of corrupt members, if any.

7. CONTEMPT §41½—COURT INVESTIGATE ON NEWSPAPER ATTACK ON SELECTION OF GRAND JURORS.

Where newspaper published article attacking sheriff's method of impaneling grand jury, and foreman of grand jury petitioned court to investigate truth thereof, it was court's duty to institute a judicial inquiry.

Department 1.

Error to District Court, El Paso County; J. W. Sheafor, Judge.

E. H. Joslyn was adjudged in contempt, and he brings error and applies for supersedeas. Supersedeas denied, and judgment affirmed.

January 13, 1919, in the district court of El Paso county, a grand jury theretofore in session filed its report and was discharged. One of the matters undisposed of, for lack of time, was the investigation of the department of public safety of the city of Colorado Springs. February 27, 1919, another grand jury was impaneled, and among other things given it in charge was the completion of this investigation. On March 7, 1919, while this grand jury was sitting, there appeared in a certain newspaper, the Labor News, published in the city of Colorado Springs, the following article:

"Curious Coincidences.

"Isn't it a curious coincidence that the leaders of the county Republicans should boast, aft-

er their victory last fall, 'We will now proceed to clean out the City Hall? Isn't it a curious coincidence that a Republican sheriff, when drawing a grand jury to investigate a city department presided over by a Democrat, should happen to find so many jurors who had made their boasts of what they would do to that department if they had the chance? Isn't it a curious coincidence that all of the jurors save one belong to one party? And isn't it a curious coincidence that when this lone Democrat was discovered that a way was discovered to have him resign? Isn't it a curious coincidence that justice should be called blind when she has such a keen vision as that?"

March 22, 1919, there was filed in the district court of El Paso county, "In the Matter of Grand Jury, January Term, 1919," a petition, signed by the foreman of the grand jury, setting up the article above quoted, showing to the court that it constituted "a direct charge as to the competency of members of the grand jury," and asking that an investigation be immediately had by the court "to determine the truth or falsity of the charges made as aforesaid, in order that any members of said grand jury who may be found disqualified to act may be removed therefrom." This petition further prayed that plaintiff in error, as the reputed editor and owner of the newspaper, be summoned as a witness and examined concerning the charges made in the article in question.

This petition was presented to the court, and a subpoena ordered issued for the said Joslyn, returnable at 2 p. m. on said date. In response thereto Joslyn appeared in person and by counsel, who objected to the calling of the witness to testify and to the hearing. This objection was overruled, and exception saved. Thereupon the witness testified that he was the owner of the Labor News; that he was acquainted with the article in question; that he understood the department referred to therein was the department of public safety of the city of Colorado Springs; that he knew nothing which would disqualify any member of the grand jury from acting; that he knew of none of them having made a boast such as was referred to in the article. He was then asked if he wrote the article, to which his counsel objected, saying:

"He should first be warned by the court, or somebody, if it might in any manner tend to incriminate him."

The court replied that the objection would have to come from Mr. Joslyn. The question was re-read and the witness answered:

"I decline to answer that question, for the reason it is private, confidential, and personal business."

After some further colloquy between court and counsel, a continuance was granted until 2 p. m. March 24th following, when the wit-

ness again appeared in person and by Mr. Kriger and Mr. Kinsley, his counsel. The proceedings of March 22d were read, argument had, and authorities cited. Thereupon Mr. Kinsley stated that the—

"witness refuses to take the stand, and refuses to answer any further questions in the proceeding, for the reason that the court is without jurisdiction, and the order commanding him to take the stand and answer further questions is and would be void."

In answer to the court's inquiry of the witness if he still declined to answer the questions, he said:

"My counsel has made the statement for me which I indorse. On advice of my counsel, I refuse to take the stand and answer questions."

Thereupon the witness was adjudged in contempt, and sentenced to be imprisoned in the county jail until he answered the questions submitted to him, "or until the further order of the court."

From this judgment the witness brings error. A stay of execution was granted, and the matter is now before us on application for supersedeas.

Samuel H. Kinsley and J. W. Kriger, both of Colorado Springs, for plaintiff in error.

Victor E. Keyes, Atty. Gen., and William R. Ramsey, Asst. Atty. Gen. (Willis L. Strachan, of Colorado Springs, of counsel), for the People.

BURKE, J. (after stating the facts as above). Two contentions are made in behalf of plaintiff in error: First, that the judgment is defective in form; second, that the court exceeded its jurisdiction.

[1] It is unnecessary to dwell long on the first of these, that the judgment was defective in form. This was a refusal to testify in a judicial investigation of general public concern; hence a direct criminal contempt, which might be punished summarily. *Lindsey v. People* (No. 8831) 181 Pac. 531, decided by this court April 7, 1919 (not yet officially reported). In such cases the purpose of reciting the facts in the judgment itself is that they may be so fully set forth in the record as to enable the defendant to have the cause reviewed. It is enough to say that this order of commitment, which is made a part of the record and is now before us, sufficiently sets forth such facts.

The question of the jurisdiction of the court depends upon the meaning of the article in question, and its relation to, and probable effect upon, the grand jury and its work. The meaning of the article is not to be determined from what any one says about it. It speaks for itself. Stripped of all self-evident camouflage, it is a simple statement that the drawing of the grand jury

was a piece of chicanery; that the sheriff who drew it violated his oath of office and selected its members for an ulterior purpose; that he intentionally selected men who had not only prejudged the particular matter referred to them by the court, but had prejudged it solely from the standpoint of partisan politics; that they were making no pretention of passing upon its merits, but had openly boasted their determination to do the contrary; that they had entered upon their duties with a fixed intention of violating their oath of office in the discharge thereof; and that, so far as this particular investigation was concerned, the whole proceeding was a farce and a judicial outrage. We think such is the plain purport of this article and the intention of its author. That it was calculated to bring discredit upon the grand jury and its work, and contempt upon the court of which it was an important part, cannot be doubted.

Section 3700, Revised Statutes of Colorado 1908, provides as follows:

"In any case where a grand juror has been sworn and it becomes necessary to investigate his conduct with reference to any charge, * * * the district attorney shall briefly set forth such fact in writing to the district judge, who shall excuse such juror from further attendance. * * *"

From this it is contended that the sole duty of the court in the present case was to act thereunder. If so, this would have required a discharge of all of the grand jurors, as the charge was made against all. A similar charge might then have been made against their successors, and it would thus be in the power of one whose conduct was being investigated by a grand jury to effectually block such investigation. This section relates only to a charge pending before the grand jury for investigation. It has no relation to a charge as to the competency of grand jurors as such.

[2] An officer charged with the duty of selecting and summoning jurors, who excludes all those acquainted with counsel for the defense solely upon that ground, is guilty of a gross contempt of court, and should be severely dealt with. *Harjo v. U. S.*, 1 Okl. Cr. 590, 98 Pac. 1021, 20 L. R. A. (N. S.) 1013. The same is true if the officer were guilty of a similar violation of duty in summoning grand jurors.

[3] Each grand juror is required to take an oath that he "will present no person through malice, hatred or ill will." Section 3699, Revised Statutes of Colorado 1908. If before taking such oath he has entered into an agreement or conspiracy to violate it, and as a grand juror he is engaged in consummating that agreement or conspiracy, he is clearly in contempt, and may be punished. *U. S. v. Kilpatrick* (D. C.) 16 Fed. 785.

[4] The general rule is that neither the

bias nor prejudice of a grand juror, nor his interest in a prosecution (other than a direct pecuniary interest), nor the fact that he has formed, or expressed an opinion, will so disqualify him as to render invalid indictments returned by the grand jury. 20 Cyc. 1300; *U. S. v. Belvin* (C. C.) 46 Fed. 381; *Com. v. Woodward*, 157 Mass. 516, 32 N. E. 939, 34 Am. St. Rep. 302; *Rolland v. Com.*, 82 Pa. 306, 22 Am. Rep. 758. But we know of no authority which goes so far as to hold that this would be true where jurors had determined, through malice or bribery, to violate their oaths. It is the difference between honest error, to which all men are subject, and that willful corruption which distinguishes the malefactor.

It should be borne in mind that plaintiff in error was not adjudged guilty of contempt for any aspersions cast upon the grand jurors, or upon the sheriff, but for his refusal to answer as a witness in an investigation being conducted by the court to determine the truth of a charge, publicly made, that the grand jury, an important part of the machinery of the court, had been turned into an engine of oppression.

[5] A witness may not refuse to testify because such testimony may influence civil litigation in which he is interested. *Radinsky v. People*, 180 Pac. 88. For the same reason he may not refuse to testify because he considers the matter inquired about as his "private, confidential, and personal business."

[6] It was perfectly clear in the present case that a gross contempt of court had been committed, either by the sheriff and some of the grand jurors, or by the publication of the article in question, or both. It is equally clear, and not denied, that that contempt could have been tried and the guilty parties punished in a direct proceeding against them, or any of them, for that purpose. The question here to be determined is:

"Might the court, upon having the matter called to its attention, proceed first to determine the probable truth thereof, and call and examine witnesses for that purpose?"

The primary object of such an investigation was to purge the grand jury of corrupt members, if any such there were. That object was of more vital importance in the administration of justice than the mere punishment of those who had already offended.

"It is manifest that, if the jury is insulted and treated with contempt, the court must protect them, for they can render no judgment and are powerless to protect themselves." *State v. Shepherd*, 177 Mo. 205-228, 76 S. W. 79-86, 99 Am. St. Rep. 624.

So with a grand jury. Suppose the attack had been printed anonymously and widely circulated in the community, and was thus brought to the attention of the court, and, while neither author nor publisher were

known, witnesses were at hand who could advise the court of their identity. The grand jury could not summon and examine them, because, being powerless to punish the contempt, they were without jurisdiction to investigate it. But can it be said that the court, which had the duty to protect the grand jury, was also powerless, because, forsooth, the identity of the offender, though easily ascertainable, had not been disclosed?

In an early California case an attorney for one whose conduct was under investigation by a grand jury addressed a letter to the grand jurors, reflecting upon their conduct and integrity, and denouncing them for permitting themselves to be corruptly used by a person of wealth for the purpose of finding indictments to gratify his private malice and oppress and crush his adversary. The offense in that case was less serious than the one here under investigation. That was a mere private letter, which might only come to the attention of one or more of the grand jurors. This was as public in its nature as it was possible for the offender to make it. There the matter arose upon a review of a judgment in contempt against the writer of the letter. The court said:

"If the invectives against the person named in the letter, and others, who are accused of having been hired by him to aid and abet him in his design, were founded upon facts, and the petitioner, as an attorney of the court, had suggested them to the court in a regular way, it is not to be doubted that upon such a suggestion judicial inquiry would have been instituted, and that, if there were adduced any evidence at all to sustain the suggestion, prompt action would have been taken to vindicate the law, maintain the respect due to the court, and to protect the court and the grand jury under its supervision and legal control against persons implicated in the attempt to commit, or in the commission of, such criminal acts. * * * And such criminal acts are also punishable as contempts of court, for they taint with suspicion the proceedings which they touch, embarrass, hinder, and delay courts in the exercise of their functions, and, if suffered to pass unrebuked and unpunished by the court whose proceedings are tainted by them, they result in a paralysis of judicial confidence. To prevent, arrest, and punish for such offenses, whether committed or attempted to be committed by or upon any grand juror, is therefore the duty of every court in which such a jury may be sitting in the discharge of its duties; and if guilt should be found to attach to members of the grand jury, the jury should be promptly discharged, and the matters against the members thereof should be referred to another grand jury. * * * It is of the highest importance that jurors and judicial officers should be protected and preserved, not only from all improper influences, but even from the suspicion of such influences. * * * A grand jury should never forget that it sits as the great inquest between the state and the citizen, to make accusations only upon sufficient evidence of guilt, and to protect the citizen against unfound-

ed accusation, whether from the government, from partisan passion, or private malice. But the letter was * * * aimless for any purpose, except to exasperate the jurors, by the aspersions upon their official conduct which it contained, or to deter them from performing their duties by the threats of public clamor which it expressed, or to create a distrust and a want of confidence in any action which might be taken as the result of their investigation, and thus to embarrass the court itself in the administration of justice. That such a communication to a jury sitting in or in connection with a court, of which it is a component part, and while engaged in the exercise of its functions, is a punishable contempt of court, does not admit of doubt. 'Any publication, whether by parties or strangers, which concerns a case pending in court, and has a tendency to prejudice the public concerning the merits, or which reflects on the tribunal or its proceedings, or on the parties, the jurors, the witnesses, or the counsel, may be visited as a contempt.' Bish. Crim. Law, § 216. It would be strange if, under a government of law, it were otherwise." (Italics are ours.) In re Tyler, 64 Cal. 434, 1 Pac. 884.

[7] In the instant case the foreman of the grand jury suggested that matter to the court. Upon that suggestion the court did institute a judicial inquiry, as was his duty, and if guilt had been found to attach to the jurors, or any of them, he would doubtless have promptly discharged such jurors, as was also his duty.

Any grand jury foreman, who, cognizant of such a publication and acquainted with the duties of his position, should fail to call it to the attention of the presiding judge, would be unfit to be further trusted with his important functions. Any judge who, having such a matter properly called to his attention, should fail to investigate it, and, if found true, discharge the unworthy jurors and direct the institution of proceedings for their punishment and the punishment of the sheriff, or, if found untrue, direct the institution of proceedings for the punishment of their traducers and the protection of the good name and dignity of his court (unless he were powerless to do so), would be unfit to hold judicial office. The simple reason is that if these things were true, or were publicly charged and believed to be true, indictments returned by such grand jury would be mere scraps of paper. Good citizens acting as petit jurors would refuse to convict thereon, and the court itself would be brought into that contempt and detestation in the community which it richly deserved, and rendered impotent for anything but evil.

The fact that the communication, upon which the inquiry was based, may have prayed action which, in the first instance, would have been improper, by no means nullified the investigation or ousted the court of jurisdiction. This was not a proceeding to pun-

ish the author or publisher of "Curious Coincidences," nor to adjudge them in contempt for libelling the sheriff. It was an investigation to determine whether a grand jury, then sitting, was composed of upright and law-abiding citizens, honestly endeavoring to keep their oaths and act as "a great inquest between the state and the citizens," making accusations "only upon sufficient evidence of guilt," and protecting "the citizen against unfounded accusations, whether from the government, partisan passion, or private malice," or whether that grand jury was an aggregation of political tricksters, brazenly sitting in the halls of justice in the garb of public functionaries and juggling with the liberties and reputations of men.

For the reasons given, the supersedeas is denied, and the judgment affirmed.

GARRIGUES, C. J., and TELLER, J.,
concur.

(67 Colo. 322)

LUCERO et al. v. COLORADO LIFE INS.
CO. et al. (No. 9305.)

(Supreme Court of Colorado. Oct. 6, 1919.)

1. CORPORATIONS ⇨80(10) — RESCISSION OF
SUBSCRIPTION TO STOCK AFTER TWO YEARS
DENIED.

One subscribing and giving a note for stock in a corporation must, if he desires to rescind the purchase on the ground of fraud, act promptly, and a delay of two years was too great to permit rescission, especially in view of the fact that the corporation during the delay had become insolvent and its estate was in process of administration by a receiver.

2. CORPORATIONS ⇨80(12) — IN ACTION FOR
RESCISSION OF SUBSCRIPTION TO STOCK, AL-
LEGATION THAT DEFENDANT AND RECEIVER
WERE NEGLIGENT IMMATERIAL.

In an action to rescind a purchase of stock and to cancel a note given therefor on the ground of fraud, allegations that defendant and a receiver appointed to take charge of its affairs were negligent in failing to collect certain notes due the corporation were immaterial.

3. INSURANCE ⇨33—NOTE GIVEN FOR SUB-
SCRIPTION TO STOCK OF INSURANCE COMPANY
PROPERTY OF INSURANCE COMMISSIONER.

Under Rev. St. 1908, § 8117, a note given for stock in a proposed insurance company cannot become the property of the company until \$100,000 has been deposited with the commissioner of insurance, and the subscription price of the stock is the property of the commissioners and not of the company, the company or a receiver appointed to take charge of its affairs having no interest therein, except as cestuis que trustent, and such is true of a subscription note made directly to the company, the company being no more than the agent of the commissioners.

4. APPEAL AND ERROR ⇨1119—IN SUIT TO
CANCEL NOTE FOR SUBSCRIPTION TO INSUR-
ANCE COMPANY INSURANCE COMMISSIONER IS
NECESSARY PARTY.

In an action to cancel a note given for stock in a proposed insurance company in which \$100,000 had not been deposited with the commissioners of insurance as required by Rev. St. 1908, § 3117, the Supreme Court on appeal cannot, where the commissioners have not been made parties to the action, direct what shall be done on reversing a judgment in favor of the proposed corporation; the commissioners being entitled to a hearing in the matter.

5. INSURANCE ⇨33—TRANSFER OF NOTE FOR
SUBSCRIPTION TO INSURANCE COMPANY IN
HANDS OF INSURANCE COMMISSIONER EN-
JOINED.

In an action to cancel a note given for stock in an insurance corporation which failed to deposit \$100,000 with the commissioner of insurance as required by Rev. St. 1908, § 8117, the court may not cancel the note, where the commissioners are not made parties to the action, but the plaintiff is entitled to be protected by injunction against a transfer of the note by the insurance company to an innocent purchaser.

Department 2.

Error to District Court, Rio Grande Coun-
ty; A. Watson McHendrie, Judge.

Suit by Eustachio Lucero and another against the Colorado Life Insurance Company and William G. Plested, receiver of such company. Decree for defendants, and the plaintiffs bring error. Reversed and remanded, with directions.

Albert L. Moses, of Alamosa, for plaintiffs
in error.

Forrest C. Northcutt and Jesse G. North-
cutt, both of Denver, for defendants in error.

DENISON, J. The plaintiffs brought suit in the district court of Las Animas county against the Colorado Life Insurance Company and Plested, receiver thereof, stating two causes of action, and praying the court to ascertain the exact sum due the receiver on a certain note of \$12,000, and that upon the payment of such sum the receiver cancel and surrender the note and the mortgage securing the same.

The first cause was based upon alleged fraud in procuring the note, and the charge was that misrepresentation had been made as to the affairs of the defendant company, stock in which constituted the consideration for one-half the note. The second cause of action was upon neglect or wrongful conduct of the corporation itself and the receiver in failing to collect certain notes due the corporation. The case was tried to the court. Upon the evidence on the first cause of action the court found there was no fraud. As to the second cause of action, the court

held the facts alleged to be immaterial, excluded testimony concerning the same, and entered a decree for the defendants.

The testimony for the plaintiffs showed that in April, 1912, agents of the corporation persuaded the plaintiffs to subscribe for 2,000 shares of stock in the company at \$3 per share and to borrow of the company \$6,000 and in consideration therefor to give their note for \$12,000 dated April 25, 1912, payable 10 years after date, secured by mortgage of even date, on a large amount of ranch land in Costilla county.

[1] The company never did any insurance business. The money, proceeds of the stock which was sold, was wasted, if not worse, and the company shortly became insolvent. No part was paid of the \$100,000 required by statute to be paid to the commissioner of insurance. The plaintiffs had notice of the condition of affairs at least as early as April, 1913. On the 28th of September, 1913, the receiver was appointed. The plaintiffs took no action, but paid interest to the receiver until September 30, 1915, when they brought this suit. They seek, in effect, to rescind their purchase of stock. If they were to rescind it, it was their duty to act promptly, especially in view of the fact that the company during their delay had become insolvent and its estate was in process of administration by a receiver. *Brown v. Gordon-Tiger Co.*, 44 Colo. 311, 322, 97 Pac. 1042; *Central Life Association v. Mulford*, 45 Colo. 240, 244, 100 Pac. 423.

Their delay was too great to permit rescission.

[2] The court's holding concerning the second cause of action we think is correct.

[3-5] However, we think that portion of the note the consideration for which was stock in the proposed company never became, and could not become, the property of the company until \$100,000 had been deposited with the commissioner of insurance as required by section 3117, R. S. 1908. In *Greiger v. Salzer*, 165 Pac. 240, this court held that the commissioners appointed under that statute were charged with the express duty as trustees to collect the subscription price of stock, preserve it, pay \$100,000 of it to the commissioner of insurance, and turn the rest over to the company when the company began business; but that, if they failed to pay the \$100,000 over to the commissioner of insurance, the proposed company could never become a company to do business, and in such case the commissioners must pay back to the subscribers all the money they had received from them. It follows from this, and indeed the opinion in *Greiger v. Salzer* expressly says, that the subscription price of stock is the property of the commissioners and not of the company; and it further follows that the receiver has no interest in that part of this note the consideration of which was

stock, and—since it is the price of stock in a proposed company which has never come into existence—it must be returned to the purchasers. We cannot, however, direct that that order be made, because the commissioners are not parties hereto, but we think that the plaintiffs should be protected by injunction against the transfer of this note to any innocent purchaser. In this case that is all the relief that can be given them. When the note matures, if the commissioners attempt to collect their half of it, the defense justified by the case of *Greiger v. Salzer* can be set up with other defenses, if any. If it becomes necessary to clear plaintiffs' title, some proceeding can be begun against the commissioners.

We do not overlook the fact that the note is made directly to the company; but, under *Greiger v. Salzer*, the company must be regarded as no more than the agent of the commissioners.

The judgment is reversed, with directions to issue the injunction, above suggested, forthwith, and to proceed in accordance with this opinion.

GARRIGUES, C. J., and SCOTT, J., concur.

On Petition for Rehearing.

DENISON, J. The defendants in error move for a rehearing upon the ground that the decision of the court is upon a cause of action or a theory of the case not raised or suggested in the court below.

We do not think the point is well taken. We have merely suggested relief not contemplated below. The facts shown in the complaint and in the proofs compel the conclusion that the funds provided by subscription were the property of the commissioners appointed under the statute. It is these facts that determine the relief to be granted. *Drake v. Bank*, 44 Colo. 49, 96 Pac. 999. We think, however, that the defendants in error are right in their claim that the company and the receiver have, as cestui qui trustent, an interest in the note, and we do not wish to deprive them of the power of protecting that interest. Neither do we wish, nor did we intend by our former opinion, to deprive the plaintiffs of the right to make the commissioners parties to this proceeding. They may do so and may amend their complaint for that purpose and in other respects, if they desire, and the defendants in error may do likewise.

The defendants in error request us, if we do not grant the rehearing, to make certain directions as to what should be done by the court below. We cannot do this, because, in order "to a complete determination of the controversy," the commissioners must be brought in, and they have a right to be heard upon the questions which it is suggested we

should determine now, including the question whether one dollar per share or the whole purchase price of the stock or how much should be deducted from the note. The injunction, required in our former opinion, should be until the amount justly due on the note is determined and until the further order of the court.

The decree is reversed, and the cause remanded for proceedings not inconsistent with these opinions, and, to the extent here indicated, the former opinion is modified.

On motion for rehearing, rehearing denied and opinion modified.

(87 Colo. 185)

CONDIT v. MERRITT PRINTING & STATIONERY CO. (No. 9583.)

(Supreme Court of Colorado. Oct. 6, 1919.)

1. CORPORATIONS §325—PERSONAL LIABILITY OF OFFICERS FOR WORK DONE.

Where printers knew that work was being done for corporation, and that secretary, when presented with bills therefor, directed that they be made to the corporation, and where such bills were from time to time paid by the corporation's checks, the secretary cannot be held liable, in the absence of evidence that he agreed to become personally responsible for the account, although the work was charged to him on the books of the printers.

2. PRINCIPAL AND AGENT §181—INTENT TO BIND PRINCIPAL WHEN ACT WITHIN AGENT'S AUTHORITY.

When the agency is known, and the act is within the agent's authority, the presumption is that the intention is to bind the principal, and not the agent.

Error to County Court, City and County of Denver; Ira O. Rothgerber, Judge.

Action by the Merritt Printing & Stationery Company against E. C. Condit. Judgment for plaintiff, and defendant brings error, and applies for a supersedeas. Judgment reversed, and cause remanded, with directions.

Charles A. Murray, of Denver, for plaintiff in error.

Geo. B. Campbell, of Denver, for defendant in error.

TELLER, J. The defendant in error had judgment in an action on a balance on account for printing, which account extended over a term of years. Plaintiff in error was the secretary and treasurer of a mining company, and it is not disputed that the printing was all done for the company. The testimony of the president of the defendant in error was that he knew the work was done for the mining company, and he admitted that, when bills for certain work were pre-

sented to Condit in his name, the latter directed that they be made to the mining company. The exhibits are so made out; that is, to the company. It is also established that the bills were paid, from time to time, by the company's checks.

[1] Under this state of facts, in the absence of any evidence that Condit agreed to become personally responsible for the account, he cannot be held liable. This court has said:

"In general, when a person acts and contracts avowedly as the agent of another, who is known as his principal, his acts and contracts, within the scope of his authority, are considered the acts and contracts of the principal, and involve no personal liability on the part of the agent." *Frambach v. Frank*, 33 Colo. 529, 81 Pac. 247.

[2] When the agency is known, and the act is within the agent's authority, the presumption is that the intention is to bind the principal, and not the agent. Although it be true that the work was charged to Condit on the books of the printing company, he would not be bound thereby under the facts of this case. Merritt knew that Condit was acting for the mining company, and that the work was for it, and, that being so, he could by no process of bookkeeping make the agent liable without his consent.

The judgment is reversed, and the cause remanded for further proceedings in harmony herewith.

GARRIGUES, O. J., and BURKE, J.,
concur.

(87 Colo. 187)

YOUNGQUIST et al. v. INDUSTRIAL COMMISSION OF COLORADO et al. (No. 9460.)

(Supreme Court of Colorado. Oct. 6, 1919.)

MASTER AND SERVANT §418(6)—ON APPEAL UNDER WORKMEN'S COMPENSATION ACT, FINDINGS OF FACT SUPPORTED BY SUBSTANTIAL EVIDENCE CONCLUSIVE.

Where the state Industrial Commission, in a proceeding under Workmen's Compensation Act, found as a fact that a servant did not come to his death by reason of an injury received in the course of his employment, and the district court sustained such finding, the Supreme Court, in reviewing the proceedings on writ of error, cannot interfere with such finding, if it is supported by credible and substantial evidence.

En Banc.

Error to District Court, City and County of Denver; Julian H. Moore, Judge.

Proceeding by Sophie Youngquist and another, under the Workmen's Compensation Act, to obtain compensation for the death of

Andree Youngquist, opposed by Rowley Clark, doing business as the Clark Brick Company, the employer, and the London Guarantee & Accident Company, Limited. From a judgment, affirming and confirming an award of the Industrial Commission, denying compensation, applicants bring error. Affirmed.

Andree Youngquist (husband of Sophie Youngquist and father of Fredolph Youngquist) was employed on July 19, 1917, by the defendant brick company, and on that date was injured by falling brick at the company's place of business in Denver, Colo. A day or two after the injury he returned to work, and continued in the employ of the company for three weeks, at the end of which time he was taken to his bed with an illness from which he died one week later. The widow, for herself and minor child, filed with the defendant Industrial Commission her claim, under the Workmen's Compensation Act. Chapter 179, p. 515, Laws of 1915. Hearing was had thereon, and January 11, 1918, said claim was denied. A petition for rehearing was filed, which was denied February 26, 1918, and the findings and decree of January 11, 1918, upheld and established as the final decision of the commission. March 20, 1918, plaintiffs in error filed in the district court their complaint to review the action of said commission and set aside its findings. June 4, 1918, the cause came on for trial in the district court, a jury was waived, and the evidence theretofore submitted to the commission was introduced as the sole evidence before the court, which gave judgment, affirming and confirming the award of the commission. From this judgment the plaintiffs bring error.

H. W. Spangler and Nathaniel Halpern, both of Denver, for plaintiffs in error.

Leslie E. Hubbard, Atty. Gen., John L. Schweigart, Asst. Atty. Gen., and William E. Hutton, of Denver, for defendants in error.

BURKE, J. (after stating the facts as above). The only question of importance in this case was:

"Did the deceased come to his death by reason of the injury above mentioned, or was the cause of death independent thereof?"

The commission found the latter. The district court sustained the finding, and, if it was supported by "credible and substantial evidence," that judgment must stand. *Industrial Commission v. Johnson*, 172 Pac. 422.

"This court may consider only the legal question of whether there is evidence to support the findings." *Passini v. Industrial Commission*, 171 Pac. 869.

A careful examination of the evidence in the case before us discloses a conflict on the

question of the cause of the death of the deceased, but that there is "credible and substantial evidence" which supports the findings of the commission cannot be doubted. The judgment is therefore affirmed.

SCOTT, J., not participating.

(67 Colo. 336)

BIJOU IRR. DIST. v. WELDON VALLEY DITCH CO. et al. (No. 9272.)

(Supreme Court of Colorado. June 2, 1919. Rehearing Denied Oct. 6, 1919.)

1. WATERS AND WATER COURSES \S 152(5)—NONUSER OF WATER RIGHT PRIOR TO ADJUDICATION INSUFFICIENT TO ESTABLISH ABANDONMENT.

In action to secure a decree of abandonment of a part of a water right given defendant in adjudication proceeding, part of complaint alleging that defendant's ditch was constructed for the irrigation of 500 acres of land, that it had a carrying capacity of not more than 12 cubic feet per second, and that it had never been enlarged, standing alone, would be subject to a general demurrer; nonuser prior to adjudication decree not establishing abandonment.

2. WATERS AND WATER COURSES \S 152(5)—SUFFICIENCY OF COMPLAINT TO STATE A CAUSE OF ACTION FOR ABANDONMENT OF WATER RIGHT.

In action to secure a decree of abandonment of a part of a water right, complaint held to state a cause of action.

3. COURTS \S 475(9)—DISTRICT COURT CAN DETERMINE ABANDONMENT, THOUGH IT DID NOT ENTER ADJUDICATION DECREE.

That judgment adjudicating that a part or the whole of a priority has been abandoned makes it necessary for water officials to act under a new decree as well as under the original decree does not militate materially against the right of the district court of a county in which the ditch is situated to determine the issue of abandonment, though it was not the court which entered the adjudication decree.

4. COURTS \S 475(9) — ABANDONMENT SUIT NEED NOT BE BROUGHT IN COURT ENTERING ADJUDICATION DECREE.

In view of Rev. St. 1908, §§ 3229, 3284, 3285, an abandonment suit need not be brought in every case in the court which entered the adjudication decree.

5. WATERS AND WATER COURSES \S 152(11)—ADJUDICATION DECREES NOT RES JUDICATA IN ACTION TO DECREE ABANDONMENT.

Decree adjudicating water rights is not res judicata in subsequent action to secure a decree of abandonment of a part of a water right thereby given; the abandonment suit being predicated on matters subsequent to the general adjudication decree.

6. WATERS AND WATER COURSES ¶152(2)—ABANDONMENT SUIT NOT BARRED IN FOUR YEARS AFTER ADJUDICATION DECREE.

Action to secure a decree of abandonment of a part of a water right given in original adjudication proceeding was not barred by four-year statute of limitations, though brought more than four years after original proceeding; the abandonment suit being predicated on matters subsequent to the original decree.

7. JUDGMENT ¶713(1)—CONCLUSIVENESS.

Questions litigated in one action may not be again litigated by same parties in another action.

8. JUDGMENT ¶956(2) — EVIDENCE ADMISSIBLE TO SHOW MATTERS ADJUDICATED IN FORMER ACTION.

Whether questions involved in present action were litigated in a former action between the same parties may be shown by extrinsic evidence, under proper allegations in the plea, if such fact does not appear from the record.

9. JUDGMENT ¶713(2) — CONCLUSIVE AS TO MATTERS THAT MIGHT HAVE BEEN LITIGATED.

Where subsequent action is upon the same claim or demand as prior action between same parties, the judgment in the prior action is a bar, not only as to matters offered and received to sustain or decide the claim, but as to other admissible matters which might have been offered for that purpose.

10. JUDGMENT ¶735—CONCLUSIVE, IN ACTION ON DIFFERENT DEMAND, ON ISSUES ON WHICH VERDICT WAS RENDERED.

Where prior action between same parties was on a different demand, the judgment operates as an estoppel only as to those matters in issue or points controverted on the determination of which a finding or verdict was rendered.

11. JUDGMENT ¶956(1) — PRESUMPTIVELY CONCLUSIVE WHERE MATTER WAS CONTROVERTED BY PLEADINGS.

In ascertaining whether matter involved in prior action is conclusive in subsequent action, it will be conclusively presumed to have been litigated in prior action, where the matter was controverted by the pleadings.

12. JUDGMENT ¶725(3)—CONCLUSIVENESS AS TO WATER RIGHTS IN SUBSEQUENT ABANDONMENT SUIT.

Where suit to change point of diversion involved issue of whether certain defendants therein had been using water abandoned by certain ditch, decree adverse to such defendants, being necessarily a finding that water had not been abandoned, is conclusive in subsequent action by such defendants for decree of abandonment of a part of such water right.

Bailey, J., dissenting.

En Banc.

Error to District Court, Weld County; Robert G. Strong, Judge.

Action by the Weldon Valley Ditch Company and others against the Bijou Irrigation District and others. Judgment for plaintiffs,

and defendant named brings error. Reversed, with directions.

James W. McCreery and Donald C. McCreery, both of Greeley, and Robert M. Work, of Monmouth, Ill., for plaintiff in error.

Goudy, Twitchell & Burkhardt and H. R. Kaus, all of Denver, and Joseph C. Ewing of Greeley, for defendants in error.

TELLER, J. The defendants in error were plaintiffs below in an action in the district court of Weld county against plaintiff in error and others to secure a decree of abandonment of a part of a water right in water district No. 2. The right in question was given to one Plumb, one of the defendants below, in 1883, in an original adjudication proceeding in the district court of Arapahoe county, now the district court of the city and county of Denver. In 1909 a decree was entered in said court allowing a change in the point of diversion of 40 cubic feet of said priority, which had theretofore been purchased by the plaintiff in error. Upon a trial to the court it was adjudged that Plumb had abandoned all but 25 feet of the priority of 64.4 cubic feet per second of time originally decreed to the Highland ditch owned by him.

The complaint in this case alleges that said ditch was constructed for the irrigation of about 500 acres of land, that it had a carrying capacity of not more than 12 cubic feet per second, and that it had never been enlarged. Plaintiff in error contends that these allegations make the action one to modify the decree of 1883, and hence the district court of Weld county is without jurisdiction of the cause.

[1, 2] If these were the only allegations bearing upon the question of use, the complaint would be subject to a general demurrer under our ruling in *O'Brien v. King*, 41 Colo. 487, 92 Pac. 945, where we held that abandonment could not be established by evidence only of nonuser prior to the adjudication decree. But in subsequent paragraphs of the complaint there are allegations of non-user and failure to divert more than 12 cubic feet of water per second from the date of the decree to the beginning of the suit, thus stating a cause of action for abandonment.

Counsel say that an abandonment decree is a new warrant to the water officials, with the result that they must look to two decrees, instead of the adjudication decree alone, for their instructions as to the distribution of water. From this fact the conclusion is drawn that the suit must be brought in the court where the priorities were adjudicated. It does not appear that this court has directly ruled upon that question, none of the cases cited on this point

requiring its determination. We have, therefore, to consider the correctness of the conclusion thus urged upon us.

The case of *Weiland v. Catlin Co.*, 61 Colo. 125, 156 Pac. 596, upon which counsel rely, presented an entirely different state of facts, as there an attempt was made by decree of the district court of Otero county to compel a distribution of water according to that court's construction of an adjudication decree entered in Bent county. So far as the effect upon the original adjudication decree is concerned, there is no similarity between an abandonment suit and a suit to compel water officials to change their method of distributing water. The latter, necessarily based upon a charge that said method is not correct, assumes either that the original decree is wrong or that the officials are not properly interpreting it. This calls for a revision of the decree, or a construction of its provisions.

[3] An abandonment suit, on the contrary, assumes the ownership of a priority, with no question as to the decree evidencing it, and is predicated on matters subsequent to the decree. The fact that a judgment that a part, or the whole, of a priority had been abandoned, makes it necessary for water officials to act under a new decree, as well as under the original decree, does not militate against the right of the district court of the county in which the ditch in question is situated to determine the issue if abandonment, though it was not the court which entered the adjudication decree.

If the banks of a ditch in such county were so broken as to allow its water to flow over lands below it, and the water officials continued, in spite of protests, to turn into such ditch the quantity given it by the decree, no one would deny that an injured property owner might sue in the county where the injury was occurring to compel the officials to respect his rights. An injunction thus obtained would, to a certain extent, conflict with the original decree directing the water to be turned into said ditch; but that would be no valid objection to it. Moreover, the water commissioner obtains his directions for the distribution of water not directly from the decree, but from a certificate issued by the clerk of the court specifying the amount of water allowed to each ditch. Sections 3284 and 3285, R. S. 1908. Said commissioner is required to keep a book in which he enters a brief statement of the contents of such certificate.

Decrees changing the point of diversion are filed in the office of the state engineer, whose duty it then becomes to notify subordinate water officials of such change (section 3229, R. S. 1908), and water commissioners must, of course, amend the statements in their books accordingly. It is not apparent why

there should be any more difficulty in correcting such statements in the one case than in the other.

[4] In *Parsons v. Ft. Morgan Co.*, 56 Colo. 146, 136 Pac. 1024, this court affirmed a judgment in an abandonment suit in Morgan county, though the adjudication decree had been entered in Weld county. No question of the jurisdiction of the district court of Morgan county was raised, nor does it appear to have been raised in any other case in this court. We are of the opinion, therefore, that an abandonment suit need not be brought in every case in the court which entered the adjudication decree.

[5, 6] The defense pleaded the judgment in the general adjudication proceedings in 1883 as *res adjudicata* of this action. For the reasons already stated, the plea is not good; nor is the plea of the 4-year statute of limitations.

It is next urged that the issues raised in this cause were litigated in the suit to change the point of diversion of the 40 cubic feet of water, and that, the findings in that cause being against these plaintiffs, they cannot again try the said issues. Error is alleged in the sustaining of a demurrer to this special defense.

This defense alleges that all of the plaintiffs in this action were parties to the suit to change the point of diversion, and that two of these plaintiffs filed an answer in that proceeding. A copy of such answer is set out in full. This defense also alleges that said answer sets forth the same facts to show injury from changing the point of diversion as are set forth in the complaint in this cause to show abandonment, stating them in some detail, that the evidence taken was on the same matters in both cases, and that the said matters and issues were examined and adjudicated in the said suit in the district court of the city and county of Denver, wherein a decree was entered in 1909 against the contention made in the answer in the suit to change the point of diversion. The said answer in that suit denied:

"That said pretended decree still remains, or has ever been, in full or any force or effect, in so far as these respondents' rights are concerned or at all; * * * that said priority so alleged to have been decreed to said Highland ditch by said pretended decree of said water district No. 2 to the amount of 64.4 cubic feet of water per second of time, or any thereof, in excess of 8 cubic feet of water per second of time, has at all times, or at any time, been necessary or could have been beneficially used for the irrigating of lands lying under said Highland ditch; * * * that that amount of water, or any amount of water in excess of 8 cubic feet per second of time, has ever been used for the purposes of irrigating lands under said ditch, or for any other beneficial purposes thereunder, at any time, either before or since the rendition of said pretended decree."

It is also alleged in said answer that the pretended priority to the Highland ditch was excessive, and fraudulently obtained for speculative purposes only; that the ditch never had a capacity to exceed 12 cubic feet of water per second of time, and that only 8 cubic feet of water per second of time have ever been used through it; that all in excess of 8 cubic feet has long since been abandoned and all right thereto has reverted to the public; that to allow this said 40 cubic feet to be diverted into the Bijou Canal would take from the respondents water which they had theretofore enjoyed, and invade and interfere with their vested rights. The answer sets out in great detail the conditions of water in the Platte river, from which the respondents aver the change of the point of diversion would injuriously affect them. The answer in this suit sets out, also, a copy of the findings and decree in the diversion suit, which findings include the following:

"That the said decree of the Highland ditch for 64.4 cubic feet of water per second of time remains in full force and effect; that the said 40 cubic feet per second of time of said appropriation may be lawfully transferred for diversion and use from the said Highland ditch and the headgate thereof to the said Bijou ditch and the lands lying thereunder. And the court doth further find, from the evidence herein, that the vested rights of said respondents and their several ditches and of other appropriators of water from the South Platte river will not be injuriously affected by reason of the said change of the point of diversion and the change of the place of use of the said 40 cubic feet of water per second of time of said appropriation heretofore allowed to the said the Highland ditch as aforesaid."

The decree provided that the said amount and volume of "40 cubic feet of water per second of time of the 64.4 cubic feet per second, allowed as priority No. 21 and heretofore diverted and used by means of the Highland ditch as above set forth, and all the right, title, use, and enjoyment thereof, has been duly acquired by and vested in said petitioner," and that the rights of appropriators of water from said river would not be injuriously affected by said change.

[7-10] It is well settled that questions litigated in one action may not be again litigated by the same parties in another action, and whether or not they were litigated in the first action may be shown by extrinsic evidence, under proper allegations in the plea, if such fact does not appear from the record. There is a recognized difference between the effect of a judgment as a bar or estoppel against the prosecution of a second action upon the same claim or demand and its effect as an estoppel in another action between the same parties upon a different claim or cause of action. In the former case, the judgment is a bar, not only as to matters offered and received to sus-

tain or defeat the claim or demand, but as to other admissible matters which might have been offered for that purpose. Where there is a second action between the same parties, but upon a different demand, the estoppel operates only as to those matters in issue or points controverted upon the determination of which a finding or verdict was rendered. *Cromwell v. County of Sac*, 94 U. S. 351, 24 L. Ed. 195; *Clark v. Knox*, 32 Colo. 342, 76 Pac. 372.

The question here is whether or not in the diversion suit the same facts, relied upon here to show abandonment, were controverted, and examined and passed upon by the court. In 23 Cyc. p. 1306, it is said:

"Matters which follow by necessary and inevitable inference from the judgment—findings or determinations of the court in relation to the subject-matter of the suit which are necessarily implied from its final decision, as being determinations which it must have made in order to justify the judgment as rendered—are equally covered by the estoppel as if they were specifically found in so many words; or, in other words, it is allowable to reason back from the judgment to the basis on which it stands, and, regarding the judgment as a conclusion, and finding it to be one which could have been drawn only from certain premises, the premises are equally *res judicata* with the conclusion itself."

[11] There is a conflict of authority on the question whether such an estoppel includes any issue not directly and technically presented on the face of the pleadings, but it is conceded the rule that if the matter in question is controverted by the pleadings it will be conclusively presumed to have been litigated. The pleadings in this case present squarely the issue raised by the pleadings in the earlier case. The respondents in that case relied upon their having used continuously for years water which had been decreed to the Highland ditch, but not used through it. They plead that fact in opposition to the petition for a change of point of diversion.

Under the rule above stated we may reason back from the judgment, having regard to the pleadings, and, doing so, we must conclude that, when the court found that the change of point of diversion did not injuriously affect the rights of the respondents, it must have found against their contention that they had been using water abandoned by the Highland ditch. This was a finding upon the very allegations now made and relied upon by plaintiffs in this cause to show abandonment. Their only ground for claiming injury from the change was that this 40 feet of water had not been diverted into the Highland ditch at any time during more than 20 years; that during all of that period it had been used by them, and, consequently, to allow its point of diversion to be

changed to a ditch below their headgates would deprive them of it.

That was a perfectly good ground for resisting the change. If respondents could prove the allegations of nonuse by the petitioner's vendor, and the use by the respondents, their claim of injury from the proposed change was made out. They had in such case made full proof of abandonment, together with proof of other matters which were not necessary to be proved in an action for abandonment; but they could not obtain a judgment of abandonment, because of our ruling in *Wadsworth Ditch Co. v. Brown*, 39 Colo. 57, 88 Pac. 1060.

[12] We have several times pointed out that abandonment involves nonuse with an intention not to resume the use of a priority. Nonuse is one of the essential elements of such an action, and in the action for changing the point of diversion it was likewise an essential element of the case. Having had an opportunity to establish the truth of their allegations in the one case, parties cannot properly claim the right to relitigate the same question in another case, where the parties are the same. Even were this not so, since the third defense in this cause—the one above discussed—alleged that the same matters had been litigated in both cases, under the rule above stated, that extrinsic evidence might be heard to establish the identity of the issues tried, the plaintiff in error, defendant below, was entitled to a hearing upon that question. If it could be shown by any competent evidence that the issues were identical, the defense was good. The denial of that right, by sustaining the demurrer, was error for which the judgment must be reversed in any event.

The judgment is accordingly reversed, with directions to dismiss the cause.

ALLEN, J., not participating.
BAILEY, J., dissents.

(67 Colo. 331)

PEOPLE ex rel. CLIFFORD v. MORLEY,
District Judge. (No. 9875.)

(Supreme Court of Colorado. Oct. 6, 1919.)

1. MANDAMUS ⇐24—JURISDICTION OF SUPREME COURT TO COMPEL RECOGNITION OF OFFICER OF DISTRICT COURT.

One who claims to be an officer of district court and is denied recognition as such may bring original proceeding in mandamus in Supreme Court to compel such recognition.

2. OFFICERS ⇐69—BAILIFFS ARE "OFFICERS OF THE COURT," AND NOT "STATE OFFICERS," WITHIN CIVIL SERVICE.

District court bailiffs are "officers of the court," not "state officers," and are not within

terms of civil service amendment to Constitution (article 12, § 13 [see Laws 1919, p. 341]).

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Officer of Court; State Officer.]

En Banc.

Original proceeding in mandamus by the People of the State of Colorado, on the relation of Patrick J. Clifford, against Clarence J. Morley, as Judge of the District Court of the City and County of Denver, State of Colorado. Petition denied, and cause dismissed.

John I. Mullins and James J. Sullivan, both of Denver, for relator.

BURKE, J. The city and county of Denver constitutes the Second judicial district of the state. It has five district judges, each presiding over one of its five divisions. At the time of the adoption of article 12, section 13, of the state Constitution (the civil service amendment [see Laws 1919, p. 341]), there was in each division a court bailiff, appointed by the judge and holding at his pleasure, whose duties were to attend the jury, open and close court, and perform such other services as were required of him by the judge. At that time, and until July 1, 1919, relator was the bailiff in division 2 of said court. At the general election in November, 1918, respondent was elected one of the district judges of the Second judicial district, and upon the organization of the court in January, 1919, was assigned to said division. July 1, 1919, respondent caused to be entered in said court an order removing relator as bailiff of said division.

Relator brings this action for an alternative writ of mandamus requiring respondent to set aside said order and reinstate him in said position, or show cause for his failure to do so, and asking this court to take original jurisdiction for the reason, among others, that this is an action against a judge of the district court, involving the personal prerogatives of such judge and the tenure of one of the principal officers of the court, that while the lawful method of appointment and discharge of such officer remains uncertain, the proper functioning of the courts of the state may be seriously impeded, and the questions involved are therefore public juris.

[1] Whether one who claims to be an officer of the court, and is denied recognition as such, is entitled to invoke the powers of this tribunal by writ of mandamus to compel such recognition, seems to have been settled in the case of *People ex rel. Baxter v. Hallett*, 1 Colo. 352-362. There, the court being equally divided, the writ was denied; but upon the correctness of the procedure there appeared no difference of opinion. Upon this ground alone we assume jurisdiction.

[2] Relator contends that he is an officer of the state, as contemplated by the civil service amendment, which is sufficiently set forth in the opinion of Mr. Justice Denison, speaking for this court, in the case of *People ex rel. Walker v. Higgins* (No. 9607) 184 Pac. 365, decided July 7, 1919; and that case and the case of *People ex rel. Howell v. Curley*, 5 Colo. 412, are the principal authorities upon which he relies to support his contention. In this we hold he is in error. If the bailiff of the district court is a state officer, the bailiff of a federal court is a United States officer. The contrary has been determined. *United States v. Swift*, 139 Fed. 225-227, 71 C. C. A. 351. Court bailiffs are "officers of the court," not "state officers," and are not within the terms of said constitutional amendment.

The petition is denied, and the cause dismissed, at the costs of the relator.

SCOTT, J., not participating.

(67 Colo. 327)

CASTNER et al. v. PEOPLE. (No. 9875.)
(Supreme Court of Colorado. Oct. 6, 1919.)

1. RECEIVING STOLEN GOODS §7(3)—INFORMATION NEED NOT STATE NAME OF PERSON FROM WHOM RECEIVED.

Information charging receiving of stolen goods need not name the person from whom goods were received.

2. CRIMINAL LAW §186—DIRECTION OF VERDICT OF NOT GUILTY SUPPORTS PLEA OF FORMER JEOPARDY.

When the court directs a verdict of not guilty as to one count, such direction is equal to acquittal, and will support a plea of former jeopardy.

3. CRIMINAL LAW §1186(4)—FAILURE TO SHOW VERDICT OF NOT GUILTY AS TO TWO COUNTS AS DIRECTED AMENDABLE.

Where court directed verdict of not guilty as to two of three counts of information, rendition of verdict of guilty, not mentioning such two counts, and court's reception of verdict without requiring it to be amended, so as to comply with his instructions, was not prejudicial to defendants, since failure of record to show acquittal on such counts is omission of a mere formality, which will be corrected on motion.

4. CRIMINAL LAW §670—ADMISSIBILITY OF EVIDENCE OF IMMUNITY FROM PROSECUTION.

A written offer by defendants to show that a witness for the state had been offered immunity from prosecution was properly rejected, on objection that it was not specific, where it did not appear that the offer of immunity was made by any person in authority, or who claimed to be in authority, or who the witness had any reason to presume had any authority.

5. CRIMINAL LAW §371(2)—EVIDENCE OF OTHER OFFENSES ADMISSIBLE TO SHOW METHOD.

In prosecution for receiving stolen goods, evidence of other offenses may be given to establish method, plan, or intent in the disposition of stolen goods.

6. RECEIVING STOLEN GOODS §8(3)—EVIDENCE OF OWNERSHIP OF GOODS SUFFICIENT.

In prosecution for receiving stolen goods, evidence held to show that company from which goods were claimed to have been stolen was in fact the owner.

7. INDICTMENT AND INFORMATION §132(4)—ELECTION BETWEEN COUNTS ALLEGING OWNERSHIP OF STOLEN GOODS IN DIFFERENT PERSONS DENIED.

In prosecution for receiving stolen goods, where information was in three counts, each count alleging ownership of the same goods in different persons, court did not abuse its discretion in refusing to require district attorney to elect on which count of the information he would rely.

8. CRIMINAL LAW §1172(8)—INSTRUCTION THAT EITHER DEFENDANT COULD BE ACQUITTED HARMLESS, WHERE BOTH CONVICTED.

Instruction that either of two defendants jointly informed against could be separately convicted or acquitted, if erroneous, was harmless, where both were convicted.

9. CRIMINAL LAW §806(1)—REPETITION OF DEFINITION OF OFFENSE UNNECESSARY.

Repetition of definition of offense charged is unnecessary, and should be avoided, if possible.

Department 1.

Error to District Court, Garfield County; John T. Shumate, Judge.

Louis Castner and Louis Crofut were convicted of receiving stolen goods, and they bring error. Affirmed.

October 29, 1917, plaintiffs in error (defendants below and hereinafter so designated) were jointly informed against for receiving stolen goods of the value of \$255.36. The information was in four counts, of which the second was dismissed by the court. The first count alleged ownership of the goods in question in the J. S. Brown Mercantile Company; the third, in J. C. Gudgel; the fourth, in Garfield county. The information did not name any person from whom the goods were received.

Defendants had owned the C. & C. market in Glenwood Springs. This they later disposed of, and went into the junk business. Near the town of Glenwood Springs was a state road camp, where convicts were engaged in highway construction. J. C. Gudgel was superintendent of the road camp; W. G. McDonald, a prisoner, was commissary man; C. J. Taylor, a former convict, resided in the vicinity; Joseph Nagin was a junk dealer residing in Leadville.

It was the theory of the people that McDonald, Taylor, and defendants were working under an arrangement by which McDonald, in his capacity as commissary man, but with felonious intent, procured from the agent of the railway goods shipped to the road camp, and delivered them to Taylor or defendants; that most of the goods so received by Taylor were by him delivered to defendants, who in turn disposed of them, in part at least, through Nagin; that defendants received one half the net proceeds, and McDonald and Taylor the other half; that the goods in question came from the J. S. Brown Mercantile Company; that certain of the goods found by the sheriff (under search warrant) in the homes of defendants and in their storeroom, and produced in court, were a portion of this consignment.

The offense is alleged to have been committed on or about September 9, 1917. The cause was tried to a jury which returned a verdict, December 6, 1917, finding the defendants guilty as charged in the first count of the information.

John L. Noonan, of Glenwood Springs, for plaintiffs in error.

Leslie E. Hubbard, Atty. Gen. (J. W. Kelley, of Denver, of counsel), for the People.

BURKE, J. (after stating the facts as above). The principal contentions of defendants, and the only ones necessary for our consideration, are:

[1] 1. That the information did not state the name of the person from whom the goods were received by defendants, and their motion, at the close of the people's evidence, for a directed verdict for his omission, should have been sustained.

The ruling of the trial court to the contrary is supported by the great weight of authority, and is firmly established in this jurisdiction. 34 Cyc. 521; *Curl v. People*, 53 Colo. 578, 582, 127 Pac. 951, Ann. Cas. 1914B, 171.

2. That the verdict is not supported by the evidence.

On the contrary, we are of the opinion that the evidence is ample to support, in every particular, the theory of the prosecution concerning the theft, handling, and disposition of the goods in question.

[2] 3. That, as the jury was instructed, in the event it found defendants guilty on the first count of the information, it should find them not guilty on the third and fourth counts, and as said third and fourth counts were not mentioned in the verdict, its reception by the court was error.

When the court directs a verdict of not guilty as to one count, such direction is equal to acquittal, and will support a plea of former jeopardy. *Roland v. People*, 23 Colo. 283, 47 Pac. 269.

[3] While the court should have required the verdict to be so amended as to comply with the instructions, defendants have sustained no injury by the failure, and cannot be heard to complain. If the record does not show an acquittal on the third and fourth counts, that is the omission of a mere formality, which will be corrected on motion.

[4] 4. That defendants' written offer—to show, as tending to discredit the witness McDonald, that while he was in jail in El Paso county on a felony charge he was offered immunity therein, as well as from prosecution for larceny in Garfield county, if he would tell who was implicated with him in the larceny of the goods in question in the case at bar, whereupon he told, for the first time, the story he had now repeated on the witness stand—was erroneously rejected by the court.

At the time of the offer counsel for the people objected to it on the ground, among others, that it was not sufficiently specific. This was unquestionably good, and the offer was properly excluded. It does not appear that the offer was made by any person in authority, or who claimed to be in authority, or who the witness presumed, or had any reason to presume, had any authority.

[5] 5. That the court erred in admitting evidence of other alleged offenses similar to that for which defendants were prosecuted.

It is well settled in a certain class of cases that evidence of other offenses may be given to establish method, plan, or intent, and that the disposition of stolen goods falls within that class. 16 Corpus Juris, p. 610, § 1195.

[6] 6. That there was not sufficient evidence that the goods in question were owned by the Brown Mercantile Company.

Mr. Hawkins, manager for the Brown Mercantile Company, testified that the company did business with Garfield county; that quotations of goods were made to Gudgel, and goods shipped to him as superintendent; that the company had received no payment; and that bills for the goods were sent to the county commissioners of Garfield county. In view of the further evidence that these goods were obtained from the depot by McDonald with intent to steal them, and delivered by him with that intent to Taylor, we think the proof ample as to the ownership of the goods.

[7] 7. That defendants' motion, made at the close of the people's evidence, to require the district attorney to elect upon which count of the information he would rely, was erroneously overruled by the court.

Counsel for defendants admit in their brief that this motion was addressed to the sound discretion of the court. In view of the fact that the goods mentioned in each count of the information were the same, and the further fact that neither defendants nor their counsel could have been misled thereby, we

see no reason to conclude that the trial court's discretion was improperly exercised.

[8] 8. That defendants, being jointly informed against, could not be separately convicted or acquitted, and hence the court's instruction to the contrary was error.

Be that as it may, the jury having convicted both, neither can be prejudiced.

[9] 9. That instruction No. 10 is erroneous, because all of the elements essential to constitute the offense of receiving stolen property are not mentioned therein.

The omission complained of was proper and necessary. This instruction merely required the jury, in case of a verdict of guilty, to fix the value of the property. It made no pretense of defining the offense with which defendants were charged. That definition was contained in other instructions. Such repetition is not only unnecessary, but always to be avoided, if possible. Brickwood's Sackett, Instructions, vol. 1, § 177.

A careful examination of the entire record in this case fails to disclose any substantial error.

The judgment is accordingly affirmed.

GARRIGUES, C. J., and TELLER, J., concur.

(181 Cal. 315)

PEOPLE v. TOM WOO et al. (Cr. 2247.)
(Supreme Court of California. Oct. 1, 1919.)

1. CRIMINAL LAW §1160 — VERDICT WILL NOT BE SET ASIDE IF SUPPORTED BY SUBSTANTIAL EVIDENCE.

It is the function of the jury in the first instance, and of trial court after verdict, to determine what facts are established by the evidence, and before a verdict, which has been approved by the trial court, can be set aside on appeal, on the ground of insufficiency of evidence, it must clearly appear that there is no substantial evidence to support the conclusion reached.

2. CRIMINAL LAW §562 — EVIDENCE MUST SHOW CRIME COMMITTED BY PERSONS CHARGED.

To sustain a conviction there must be proof that the offense charged was committed, and, second, that it was perpetrated by the person or persons accused.

3. CRIMINAL LAW §1159(2) — ASSUMPTIONS AS TO SUFFICIENCY OF EVIDENCE ON APPEAL.

Where the sufficiency of the evidence to sustain a conviction was attacked on appeal, the appellate court must assume in favor of the verdict the existence of every fact which the jury could have deduced from the evidence, and determine whether such facts are sufficient to support the verdict.

4. CRIMINAL LAW §552(1), 554—EVIDENCE INSUFFICIENT TO SUSTAIN CONVICTION.

Neither mere opportunity to commit a crime nor perjured testimony are sufficient to support

verdict of guilty; nor are false statements of suspicious circumstances sufficient.

5. HOMICIDE §253(1) — EVIDENCE SUFFICIENT TO SUSTAIN CONVICTION OF MURDER IN FIRST DEGREE.

Evidence, when considered as a whole, held sufficient to sustain a conviction of murder in the first degree.

6. CRIMINAL LAW §308—PRESUMPTION OF INNOCENCE IS DISPUTABLE AND MOTIVE TENDS TO OVERTHROW SAME.

There is a presumption of innocence in favor of the person accused of crime, but this presumption is disputable, and may be overcome by other evidence, and the presence of a motive is evidence of guilt tending to rebut the presumption, while the absence of a motive tends to support the presumption of innocence.

7. CRIMINAL LAW §22—EVIDENCE OF MOTIVE NOT ESSENTIAL TO CONVICTION.

While the absence of a motive tends to support the presumption of innocence, proof of motive is not essential to convict of a crime, where the other evidence established its perpetration.

8. WITNESSES §389—DEFENDANTS MAY BE IMPEACHED BY EVIDENCE OF EXTRAJUDICIAL STATEMENTS.

Where the testimony of defendants, who were charged with murder, as to their movements on the afternoon of the crime, was clearly contradictory of extrajudicial statements as to their movements imputed to them, and defendants on cross-examination neither admitted nor denied the statements, it was competent for the prosecution to impeach them by proof of such statements.

9. CRIMINAL LAW §763, 764(13)—INSTRUCTION ON CIRCUMSTANTIAL EVIDENCE NOT OBJECTIONABLE AS ON WEIGHT OF EVIDENCE.

In a prosecution for homicide, where circumstantial evidence was relied on, an instruction that the evidence was legal and competent, and if of such character as to exclude every reasonable hypothesis other than guilt the jury should convict, is not objectionable, as tantamount to telling the jury that the evidence was sufficient.

10. CRIMINAL LAW §763, 764(13) — INSTRUCTION ON CIRCUMSTANTIAL EVIDENCE NOT OBJECTIONABLE AS URGING CONVICTION.

Where the evidence in a homicide case was circumstantial, instructions that because of conditions circumstantial evidence had to be relied upon, that the jury should examine the evidence, and that if the circumstances proved beyond a reasonable doubt led to a conclusion of guilt, and such conclusion pointed to guilt beyond a reasonable doubt, the jury should so find, notwithstanding that testimony of eye-witnesses might be more satisfactory, are not objectionable as exhorting the jury to convict and excusing the evidence.

In Bank.

Appeal from Superior Court, Colusa County; Ernest Weyand, Judge.

Tom Woo and Wong Gow were convicted of murder in the first degree, and from the judgment of conviction and order denying new trial they appeal. Affirmed.

W. H. Carlin, of Marysville, Frank Freeman, of Willows, and Seth Millington, of Colusa, for appellants.

U. S. Webb, Atty. Gen., John H. Riordan and J. Charles Jones, Deputy Attys. Gen., and Alva King, of Colusa, for the People.

LAWLOR, J. The defendants were charged with the murder of one Ah Moy on August 29, 1917, near the town of Grimes, in Colusa county. They were jointly tried and convicted of murder in the first degree, with the punishment fixed at life imprisonment. A motion for a new trial was interposed and denied, whereupon the court pronounced judgment and sentence in accordance with the verdict. The appeal is from the judgment and from the order denying the motion for a new trial.

The judgment and order were reversed by the District Court of Appeal for the Third Appellate District, on the ground of the insufficiency of the evidence to support the verdict. Mr. Presiding Justice Chipman delivered the opinion of the court, which was concurred in by Mr. Justice Hart, who filed a separate opinion. Mr. Justice Burnett, in a separate opinion, dissented. The Attorney General petitioned for a hearing herein, and it was granted, because we were not satisfied that the judgment and order should have been reversed. The opinion of the Presiding Justice fully and fairly states the evidence and we shall therefore adopt that portion thereof and make it a part of this opinion. It reads as follows:

"A public highway runs from the town of Colusa to the town of Grimes, about 13 miles southerly. About one mile north of Grimes, a byroad, called Morris lane, intersects this highway, coming in from the west. On August 29, 1917, between the hours of 5 and 6 o'clock p. m., deceased, Ah Moy, a Chinaman, was shot on his way from Grimes to the Morris ranch, where he had been working as cook for several years. It was his habit after the noonday meal to go to Grimes, about 3 miles distant, on his bicycle to spend the afternoon with his countrymen, returning in time to prepare the evening meal. His course took him along Morris lane, to and along the Colusa-Grimes highway, to the town of Grimes. All that was shown of his movements on the day of his death was that he left the Morris ranch about 1 o'clock p. m., and was found dead in the Morris lane shortly after 6 o'clock p. m., lying in the road about 200 yards from its intersection with said highway. Apparently he had been shot through the head while going west, and fell with his bicycle across the road. There was no evidence of any struggle, or indications of resistance on his part, or of personal conflict between him and his assailant, nor was there evidence indicating robbery. He had been shot, and apparently had

fallen dead from his wheel, and lay where he had fallen without moving, as was testified to by Coroner McNary, who also testified that the wound was not probed and that there was no autopsy; that the course of the bullet was from a point above the left ear and out almost back of the right ear, but he could not say on which side of his head the bullet entered. He spoke of another wound on the left cheek bone, which he discovered after washing the face. This wound was not described, and it did not appear whether or not it was a gunshot wound. He also testified that the face was powder-burned, but he gave no description of the markings. The coroner swore in a jury on the spot from among the assembled neighbors, and after verdict rendered he put the body in a basket and took it to Colusa. This inquest was held at the scene of the homicide about the hour of 10, the night of August 29th.

"Wong Gow, one of the defendants, had lived in and around Colusa for many years. Tom Woo, the other defendant, had formerly lived in and around Oroville, and more recently, for some months, at Colusa. At the time of the homicide they had a lease of some broom corn land across the river from Colusa a mile or two distant. Their claim and their testimony was that about 1 o'clock of the 29th day of August they left the garage in Colusa in an automobile belonging to Tom Woo, and drove across the river on the Colusa bridge and spent the afternoon of that day on the east side of the river, returning to Colusa shortly before 6 o'clock; that they had supper about 6 p. m.; that Wong Gow went to Williams to hire help for harvesting their broom corn, and Tom Woo spent the evening reading the newspapers; that Wong Gow returned the next morning, and, learning that the sheriff wanted him, he went to the office of the latter and was there arrested. Tom Woo had been taken in custody at his sleeping room about 11 o'clock the night of August 29th and was in jail when Wong Gow returned from Williams.

"Witness Lonsden testified that he sold to Tom Woo the automobile he was using; that he, the witness, on the evening of August 29th, had gone to the post office for his mail and some stamps 'and was talking to Mr. Kline'; that it was shortly before 6 o'clock and the post office closed at 6; that he saw Tom Woo driving the car into the garage at that time, and his recollection was that no one was with him in the car.

"Witness Kline testified that he was standing at the post office, 10 or 15 minutes before the office closed on August 29th, talking with Lonsden, and saw Tom Woo driving his car into the garage; that he was acquainted with him, and had sold him the car through Lonsden's agency.

"Two witnesses were called in rebuttal by the prosecution, who testified that the general reputation of Lonsden in the community for truth, honesty, and integrity was bad.

"There was evidence, introduced by the prosecution, that defendants were seen and identified, both as to their persons and the automobile they were driving, at different points along the Colusa-Grimes highway and at different hours after 2 o'clock p. m. of August 29th. Some of the witnesses speak of a third man as one of the party in the automobile at some of the points where they were seen. This third man is not accounted for, and it is not shown that a third

man was with the defendants when they arrived at Colusa. We will endeavor to present the evidence as shown by the record.

"Witness Charles Dunning was hauling hay in the vicinity and north of the Morris lane on the afternoon of August 29th. He testified to having seen the defendants and a third man about 2 o'clock 'in Gene Vann's field' near a grove of trees about a mile north of Morris lane. He testified that an Overland automobile was standing by the roadside near this grove. 'It was an old car—Overland car; the top was loose and shaken down some on the right-hand side.' He returned with a load of hay about 4 o'clock, and saw them again 'pretty near at the same place. One of them was in the machine, and the other was standing near the machine. They didn't seem to be doing anything in particular. There was a third man, who was in or near the grove at the time. I should judge I was about a quarter of a mile from them when I saw them first, and this last time I was about 20 feet from them.' After unloading his hay he returned, passing over the same road, and going after another load of hay. He testified that he saw the defendants sitting in the car in the county road not far from where he first saw them; this was, as he testified, 'about a quarter to 5'; he went on to the Cole place for another load of hay, and returned 'something after 5 o'clock—I don't know the exact time,' and he saw 'the car over in the Cole field, but didn't see the defendants'; it had been moved farther down the road, pretty near the corner that leads to Morris. He was asked to point on the map 'where they had moved down to.' The witness indicated a point he thought '150 yards from that corner. Q. And how long did they remain there in the neighborhood? A. I could not say. I observed them there about 5 or 10 minutes and saw no more of them. Q. Approximately what time was that? A. Something after 5 o'clock—I don't know the exact time.'

"Witness Mahan testified that he left Grimes in an automobile 15 minutes before 5 o'clock p. m., August 29th; that he passed an automobile standing in the Colusa-Grimes road about 300 yards north of the junction of the Morris lane; that he saw two men with the car, one of whom he afterwards identified as Wong Gow; that he was on the first seat, and the other man was working on the engine, whom he could not identify. He saw no third man. Neither of these witnesses had personally known or had ever seen either of the defendants. Both of them testified to having based their identification upon such notice as they took of them passing them on the highway.

"Witness Staap, on the 29th day of August, was residing in the town of Sycamore, which is about 6 miles north of Grimes and 5 miles north of the Morris lane. He testified that he saw the defendants and a third man in an automobile traveling past his residence on the Colusa-Grimes road between 12 and 2 o'clock of that day, in the afternoon, going toward Grimes, and that about 15 minutes before sunset he saw them passing on the road towards Colusa. The sun set on that day at 6:37 p. m. He testified that the automobile in which they were traveling was the same as the one he afterwards identified in the garage at Colusa, which belonged to Tom Woo, 'by the top being smashed in.'

He testified that he was standing in his doorway about 75 or 80 feet from the road; that he had never seen either of the parties before; that there was nothing to attract his attention to them particularly; that the third man was on the back seat, and the two defendants on the front seat; that it was not unusual to see automobiles passing; that the third man was dressed the same as the others, whose clothing he described. He was asked if he could not identify the third man, if he saw him again, as easily as he could the others, and answered he 'could not say as to that'; that the only way he had to identify the machine was by the top—'it was sagged down. Q. Is it not a fact that you have seen many machines about that time—that was similar—had similar tops? A. Yes.' He described the third man as being 'a little taller' than the other two and 'a little more broad-shouldered. Q. Well, isn't it a fact, if you met that man on the street now, you would not recognize him? A. Probably I would not. Q. You had just as good a look at him as at the other two? A. Yes, sir. * * * Q. When was it you made up your mind that they were the same ones in the automobile that day? What caused you to come to that conclusion? A. They looked like the same men that I saw in the car. * * * Is there not a greater similarity between two or three Chinamen than the same number of white men? A. Yes; I think so. Q. Now, Mr. Staap, is it not a fact that you heard of the killing of Ah Moy and remembered seeing three Chinamen pass by your place there twice and come up the road here, and you thought they were the ones in the machine? A. Yes, sir. Q. But at that time—at the preliminary and now—the best you can say would be that you noticed the similarity, and you think they were the same men? A. I think they were the men in the machine that I saw.'

"Witness Heryford testified that he was employed as a jitney driver and lived at Colusa; that on August 29th he left Colusa in a Ford machine about 6 o'clock p. m. 'going to the sugar camp this side of Grimes'; that he met defendants traveling in an Overland machine going north toward Colusa, defendant Wong Gow driving; that he had seen Tom Woo around town for the past six months and 'had seen him driving that machine before,' and that it was his machine, and is the same the sheriff took into custody, and is an exhibit in the case; that where he met defendants was about 3 miles north of Grimes; that there were three men in the machine, 'two on the front seat and one behind'; that he had known Wong Gow for two or three years. On cross-examination he testified that 'it must have been half past 6' when he met defendants, as he left Colusa about 6 and it took him about half an hour to reach the point where he met defendants; that they were traveling at 25 or 30 miles an hour, and he at about the same rate. His attention was called to his testimony at a former trial, at which time he testified that he recognized only one man, Tom Woo, and that two were in the rear seat. 'Q. Did you testify that way at that time? A. Yes, sir. Q. Was that correct? A. I guess it was. * * * Q. Why did you say this time you recognized two men in the machine, and say at the preliminary examination that you recognized one man? A. I forgot, I guess.'

"The foregoing comprises the direct testimony tending to establish the fact that defendants were in the vicinity where the homicide occurred during the afternoon of August 29th. It does not definitely appear at what time deceased met his death. Witness Morris, at whose ranch he worked, testified that he (witness) left his house at about the hour of 4 o'clock on August 29th, going by the Morris lane road; that he saw an automobile in the lane approaching him, but it turned around some distance from him, and proceeded down the lane to the Colusa-Grimes road and turned north; that there were three men in it, but he did not know whether they were Chinamen or white men; that he drove on in his automobile to Grimes, where he remained an hour or more, and about 5 o'clock left Grimes, returning to his home by the same road; that he saw an automobile up the Colusa road, beyond the junction of the Morris lane; it was not moving and there were three men with it; one had got out; the machine was faced north; he thought it might be the same he had seen before, but it was too far away to tell much about it; he went on home, and at 6 o'clock received notice by telephone of Ah Moy's death.

"Witness Simpkins, a laborer on the Morris ranch, left the ranch by automobile, as he testified, by the Morris lane road on his way to Colusa; that about 6 o'clock p. m. he found the body of the deceased in the Morris lane; he walked around the body, saw that the man was dead, and went to Grimes, and notified Morris, and telephoned the coroner at Colusa, went on to Colusa and returned with the coroner to where the body lay.

"Witness Beckley testified that on August 29th he was living at Grimes, 'about three-fourths of a mile in an arrow line from the junction of the Morris lane with the Grimes-Colusa road. On the 29th day of August, 1917, between a quarter to 6 o'clock and 6 o'clock p. m. I heard a couple of gunshots. I was walking, and I heard one shot, and then I took about one step, when I heard another. They were pretty close together. They sounded from up the Morris road.'

"The testimony is next addressed to certain facts and circumstances discovered at and near the place where the body was found. Soon after witness Simpkins discovered the body, it became known in the vicinity, and a number of neighbors came to the scene in automobiles. When Simpkins first was at the place and walked around the body, he saw no tracks that attracted his attention. Later, when he returned with the coroner, he testified, as did others, to a man's track traceable from the body to a point easterly towards the Colusa-Grimes road about '30 steps' distant from the body, and where an automobile coming into the Morris lane had turned around and gone back to the Colusa-Grimes road. These tracks were not traceable beyond where this turn was made, and there were no corresponding or other tracks traceable to the body. Some one of the numerous persons congregated there discovered these tracks and drew a circle around two or three of them to preserve their identity. Witnesses testified to following these tracks from the place where the body had lain to the point where an automobile had turned around, and that these tracks grew wider apart as they approached the

automobile, the inference being that whoever made them quickened his footsteps after leaving the body.

"Sheriff Stanton took into his possession Tom Woo's automobile on the morning of August 30th. He testified that he took it to the scene of the homicide that morning and had it driven along the Morris lane near to the point where the automobile had turned, above referred to; he backed and made a turn as nearly parallel as he could with the tracks found in the road. He was asked how the two sets of tracks compared and answered, 'They are identical.' He also took three measurements of the footprints leading away from where the body of the deceased had lain—one of them a footprint that had 'been circled around,' and two not thus preserved. He found a stick by the roadside, and marked on it the length of the footprint and length and width of the heel. He later took from his feet the shoes Wong Gow was wearing. He was not permitted to answer the question as to how his measurements marked on the stick corresponded with the measurements of the shoes, but the broken pieces of the stick and the shoes were admitted as exhibits. On cross-examination he explained that the dust was an inch or two deep and 'was a dust that would leave a distinct track.' His method of procedure is thus described: 'Q. Then, when you measured the other tracks, you guessed as to whether they were the same or not? A. I measured them about the same, as I recall. I just got the length and width of them—as you have stated, I would have to guess at it, to a certain degree or extent; that is, by pushing it down and then getting it, by laying it where the impression was made. Q. Well, by finding the length of it and taking this here (indicating the stick) you got the first impression? A. Yes, sir. Q. And then laid it on top of the dust and guessed as to what would be the width of the heel of the track? A. Yes; you can get it correctly, if you have to guess. Yes, I guess I did. Q. Oh, did you say the dust, it was much deeper at the point where you made the first impression than the last? A. That would be a guess, too. Q. Now, then, you did the same way in getting the width of the heel? A. Yes, sir. Q. And the length of the heel? A. Yes, sir. Well, I don't know whether I did or not, but I presume—you see, I used my knife there in marking it (indicating a place on the stick). Q. After getting the length of the heel, you would set it down in measuring the full length of the shoe? A. I guess I did that. Q. But you don't recall now just what part of the performance you did do? A. No. Q. In other words, you guessed the best way you could? A. Yes, sir. Q. If dirt fell into the tracks, or if anything moved the dirt, you would still have to make a greater guess, as to length, or how much dirt fell in? A. It might be. Q. And that was true? A. I presume so. Q. It doesn't make very much difference in the width of the shoe to make a difference in the tracks, does it? A. No.' He testified that the footprints he measured were probably 15 steps—45 or 50 feet—from where the body had lain. 'Q. And all tracks between those two points were all obliterated? A. I didn't find any. Q. You were looking for them? A. Yes.' He testified that he did not take Tom Woo's shoes or measure them, 'because he didn't have any on when arrested.'

Referring to Wong Gow's shoes, he testified that he thought he measured them by the stick before he took them off his feet. 'Q. Well, after you took them off, did you take them down and fit them into the tracks? A. No. Q. Why? A. I didn't think it would be possible to get an accurate impression, from the tracks—that the tracks by that time would have been obliterated. Q. They were all right when you made the measurements? A. Yes; but there was a great deal of travel on the road there. It would be of no use. Q. Didn't you try to find out whether it would be of any use or not? A. No.'

"There was no evidence tending to show whence the person came who made these tracks; there were no tracks traceable from any point to the body. There was evidence that on the north side of the Morris lane at that point the weeds next to the fence and near the traveled part of the road were 2 or 3 feet high. We presume the purpose of this evidence was to show that a man might have concealed himself in this cover and have shot the deceased from that point. There was also evidence that the tracks of an automobile similar to those described by Sheriff Stanton were seen some distance west, where an automobile had apparently made a similar turn, as if having gone into and out of the Morris lane. There was evidence that the automobile tracks referred to by the sheriff could be traced easterly and to the junction with the Colusa-Grimes road, where they apparently turned north toward Colusa, but were then obliterated. Several persons witnessed the experiments made by Sheriff Stanton with Tom Woo's automobile. The witnesses did not agree as to the kind and condition of the tires on the machine making the tracks. Witness Ainger testified: 'The two front tires were plain tread, and the two rear tires non-skid.' Witness Clip was asked whether he noted the impressions or markings by the tires of the automobile making this turn. 'Q. What kind were they? A. The left tire had holes in the tire marking the road. Q. Was that the front or rear? A. Hind tire. Q. And how about the right hind tire? A. Well, it left a kind of flat mark—the same as a wagon, only had triangles on it. Q. How about the front tire? A. It was smooth tire.' Witness Miller testified that he noticed particularly the markings on the ground. 'Q. What were they? A. One was an old tire and the other a new. Q. Which was which? A. The left one was a new one and the right was an old one.' Witness Stanton thus described the tires which made the tracks: 'The two front tires were smooth tread; the right hind tire was a Savage grip tire, and was worn pretty smooth. The left hind wheel made a distinct tread; a track like it was practically a new tire.' Our attention has not been called to any description in the record of the tires on the Tom Woo car. It was made an exhibit, and the jury visited the garage where it had been kept. Sheriff Stanton testified that it was in the same condition as when taken into his possession."

[1] 1. The principal question on this appeal is whether the evidence is sufficient to justify the verdict against the appellants. It is the position of their counsel:

"That giving to the testimony introduced on behalf of the prosecution all the weight to which it can be in any way entitled, the case falls

short of proving the guilt of the defendants to that degree of certainty which is required."

In passing upon this question we will not attempt to determine the weight of the evidence, but will decide only whether upon the face of the evidence it can be held that sufficient facts could not have been found by the jury to warrant the inference of guilt. For it is the function of the jury in the first instance, and of the trial court after verdict, to determine what facts are established by the evidence, and before the verdict of the jury, which has been approved by the trial court, can be set aside on appeal upon the ground we are discussing, it must be made clearly to appear that upon no hypothesis whatever is there sufficient substantial evidence to support the conclusion reached in the court below.

[2] The determination of a charge in a criminal case involves proof of two distinct propositions: First, that the offense charged was committed; and, second, that it was perpetrated by the person or persons accused thereof. In this case there can be no doubt of the first proposition, for it is clear that Ah Moy was the victim of a cold-blooded assassination, that the details were worked out beforehand, and that the plan was to strike him down as he, according to his daily habit, made his way along Morris lane to the ranch where he was employed to prepare the evening meal.

[3] Did these defendants commit or participate in the commission of the murder? What facts can we say the jury could have resolved from the evidence in order to justify the inference of guilt? We must assume in favor of the verdict the existence of every fact which the jury could have reasonably deduced from the evidence, and then determine whether such facts are sufficient to support the verdict.

[4,5] Among the more important facts which we must regard as having been found by the jury are the following: That the appellants were seen by several witnesses loitering and waiting in the neighborhood of Morris lane for several hours during the afternoon of August 29th until a short time before the murder took place, and were seen by two witnesses driving along the highway in the Overland at the rate of 25 or 30 miles an hour towards Colusa shortly afterwards; that while on the highway the appellants tried to conceal their identity from the witness Dunning, who passed them four times during the afternoon; that the Overland which figures in the evidence was owned by the defendants, and that it was recognized at different times that afternoon in that vicinity by several witnesses; that the machine which the witness Morris saw about 4 o'clock in Morris lane and the one he observed on the highway at about 5 o'clock were identical, and although Morris' testimony was not

definite, the jury upon the entire evidence may have decided that on each occasion it was occupied by appellants; that the turning back of the machine in Morris lane without any apparent reason could have been regarded by the jury as having been done to avoid meeting Morris, and that it was therefore a suspicious circumstance, as may also have been the incident of the automobile making two trips into Morris lane without continuing west either time beyond the spot where the murder was committed; that, since the record does not show what, if any, tests the jury may have made, in connection with the testimony of Sheriff Stanton and the shoes and measuring stick admitted in evidence, touching the footprints traceable from near where the dead body was found to the automobile tracks we would be going outside of our province if we held that the jury could not have found that they were made by Wong Gow, that the alibi was a fabrication, that the appellants gave perjured testimony, and that they suborned witnesses in the attempted corroboration of their alibi. Apart from the perjured testimony, the jury may have found additional support for the inference of guilt in the manner and conduct of the appellants on the witness stand.

It is insisted that the evidence, considered in the light most favorable to the prosecution, shows only two incriminating circumstances having any tendency whatever to connect the appellants with the murder—that they were seen loitering and waiting in the vicinity all afternoon, and that their alibi was fabricated. This position ignores other incriminating facts, which, as we have pointed out, the jury may have found—the attempt of the appellants to hide their identity, the automobile tracks in Morris lane, showing that the car had been driven in there twice, the footprints, the turning back of the machine at the approach of Morris, and being seen on the highway in the automobile going toward Colusa after the murder.

In our opinion the facts which we have indicated could have been found by the jury are sufficient to sustain the verdict. It is the law that neither mere opportunity to commit a crime nor perjured testimony is sufficient to support a verdict of guilty. Nor are false statements nor suspicious circumstances sufficient. It may be conceded that no one of the facts summarized would, if standing alone, be sufficient to uphold the verdict; but, when all the circumstances which the jury may have resolved from the evidence are considered together, it cannot be held on appeal that they are not sufficient to warrant an inference of guilt.

[8, 7] Appellants contend that the evidence is insufficient, particularly because of the absence of proof of motive. It is true the prosecution did not offer such proof. But, as has been declared in many cases, it is not necessary to establish a motive for the perpetra-

tion of an offense. A presumption of innocence arises in favor of a person accused of crime. This presumption is disputable, and may be overcome by other evidence. The presence of a motive is evidence tending to prove guilt, for the reason that its tendency is to rebut the presumption of innocence. On the other hand, absence of motive tends to support the presumption of innocence. But the presence or absence of motive is essentially a question of fact, and, like any other fact, is not necessary to be proved, if the crime can otherwise be established by sufficient competent evidence. So, in this case, the absence of proof of motive is a fact to be reckoned on the side of innocence; but, if the proof of guilt is nevertheless sufficient to overthrow the presumption of innocence, the appellants must stand convicted, notwithstanding no motive has been shown.

It is proper to state that in some instances the proof was not complete. For instance, the court did not allow Sheriff Stanton to testify as to whether the shoes of Wong Gow corresponded in size to the measurements of the footprints as they were shown on the stick; the coroner testified that there were powder marks on Ah Moy's face, but the point was not pursued further; and, assuming that the footprints of Wong Gow were traced from the place where Ah Moy was killed to the automobile tracks, it was not shown that there were any footprints leading to the dead body. But, in spite of these discrepancies in the proof, we think the jury nevertheless could have found sufficient facts to be satisfied beyond a reasonable doubt that the appellants were guilty of the murder.

The part which the unidentified third man played in the proceedings that afternoon remains a mystery, and we shall not consider whether he was implicated in the crime, or what effect, if any, the evidence on this point may have had on the jury in reaching the verdict.

[8] 2. It is urged that the court erred in allowing the prosecution to impeach the testimony of the appellants over their objection. They testified on direct examination that they left Colusa at about 1 o'clock, and went to the Jap camp, and remained there until about 6 o'clock. On cross-examination, Tom Woo was asked if he did not, on the evening of the 29th of August, after he was arrested and lodged in the county jail, in a conversation with Deputy Sheriff Crayton, no one else being present, state to Mr. Crayton that he (Tom Woo) went to the garage at about 15 minutes to 12 on that day and tried to get his car; that Mr. Martin was working on the car, and that he fixed it up so it would run, "and you left the garage at about 30 minutes past 12 o'clock, and got to the Jap camp at 1 o'clock? Did you make that statement?" To which question the defendant answered: "I could not remember; maybe

I did." Mr. King, the assistant district attorney, asked of the defendant the further question: "Do you remember, in the fore part of September, a few days after you were arrested, there at the county jail, of having a conversation with Mr. Scoggins, Mr. Crayton, and myself? * * * Do you remember having a conversation with those parties named and yourself?" To which he replied: "Yes, sir; I did." Mr. King then asked the further question: "I will ask you, in the fore part of September, where you were detained in the county jail, yourself, Mr. Scoggins, Mr. Stanton, and myself being present, on that occasion and that place, if in the conversation that occurred there, you didn't state that on the 29th day of August you left Colusa and went to the Jap camp, saw Fuyikawa, and had a talk with him with regard to cutting corn? That you went out in the corn field, and had a talk with him in regard to cutting corn at that time? Did you make that statement then and there, at that time?" To which he replied: "Maybe I did." He was then asked: "If you made that statement, was it true?" And he answered: "I could not say; maybe I did, and maybe I didn't. Of course I don't remember now." Again he was asked: "If you made that statement at that time and place, was that statement true or false?" To which he answered: "I could not say." After the defense rested, Sheriff Stanton and the deputy sheriff testified, over the objection of the appellants, that the statements embraced in the foundation testimony were made by Tom Woo. The point to the objection was that Tom Woo had not as a matter of fact denied on cross-examination that he made the statement; that there was in fact no material inconsistency between the statements sought to be proved and the testimony of the appellants at the trial.

Questions of similar import were put to Wong Gow on cross-examination, with substantially the same result; the witness answering four or five times, "I don't remember," and in one instance saying, "Maybe I did." This was supplemented by a statement: "I was in jail. I was all mixed up." Testimony tending to impeach Wong Gow was allowed over similar objections.

The testimony of the defendants as to their movements that afternoon was clearly contradictory of the extrajudicial statements imputed to them. The inquiry was therefore material, and since it is plain from the record that the statements were neither admitted nor denied, the prosecution was entitled to impeach the appellants. 7 Ency. of Evidence, 71.

[8] 3. Appellants complain that the use of the words "legal and competent," as they appear in the following sentence taken from instruction I, is objectionable:

"And I will say to you that the evidence which has been received in this case is legal and competent, and if it is, in your mind, of such a character as to exclude every reasonable theory or hypothesis other than that of defendants' guilt beyond a reasonable doubt, then and in that event it should be given the same weight by you as would direct evidence of the fact alleged."

The position of appellants is thus stated:

"Theoretically, of course, the statement might be defended; but when addressed to a jury of laymen it is trenching upon questions of fact. The mere admission of the testimony in evidence stamps it as competent and legal from a legal standpoint. Then why turn to the jury, and tell them that this flimsy unsubstantial thing called 'circumstantial evidence' as it appears in this case, was 'legal and competent'? To the ordinary jury this was tantamount to saying 'this evidence is sufficient' and you can't get away from it."

We do not think the words "legal and competent" in the sense in which they are employed are objectionable, and clearly they carry no intimation to the jury that the court deemed the evidence, because it was "legal and competent," sufficient to convict. The point to the instruction is that the evidence, circumstantial in its nature, being "legal and competent," that is to say, proper evidence for the jury to consider, if found by the jury to be sufficient "to exclude every reasonable theory or hypothesis other than that of the defendants' guilt beyond a reasonable doubt," it should be accepted and acted upon just as if it were direct evidence having the same probative effect.

[10] It is contended that instructions II, III, and IV are objectionable, in that "they read more like an exhortation, a plea excusing the evidence, and quite nearly beseeching a verdict against the defendants." This criticism is entirely without foundation. Instruction II, after stating that all the evidence was circumstantial, proceeds to explain why, because of the conditions under which crimes are sometimes committed, circumstantial evidence must be relied upon. In instruction III the court directs the jury to carefully examine the evidence, and determine what circumstances have been proved to their satisfaction beyond a reasonable doubt, and then to consider what conclusion as to the guilt or innocence of the defendants should be drawn therefrom, and if such conclusion point to guilt beyond a reasonable doubt they should so find, "notwithstanding the fact that you might be more fully satisfied if you had the testimony of eyewitnesses." The court further instructed the jury that in cases supported by circumstantial evidence, either in whole or in part, as in cases supported by direct testimony, the jury are required only to be satisfied as to guilt beyond a reasonable doubt. Instruction IV is of the same general tenor as the other in-

structions treating of circumstantial and direct evidence. We think none of them is open to the objections made by appellants.

The judgment and order are affirmed.

We concur: ANGELLOTTI, C. J.; SHAW, J.; LENNON, J.; MELVIN, J.; WILBUR, J.; OLNEY, J.

(181 Cal. 332)

MacDERMOT et al. v. GRANT. (S. F. 8420.)

(Supreme Court of California. Oct. 3, 1919.
Rehearing Denied Oct. 28, 1919.)

1. DISMISSAL AND NONSUIT §7(1)—MOTION TO DISMISS AFTER SIGNING OF FINDINGS AND JUDGMENT, BUT BEFORE FILING, GRANTED.

An attempted dismissal of the action by three of the plaintiffs, so far as they were concerned, after the findings and judgment had been signed, but before they had been filed, cannot be given effect under any of the provisions of Code Civ. Proc. §§ 581, 581a, 581b, authorizing dismissal.

2. DISMISSAL AND NONSUIT §7(2)—ON TRIAL BY COURT CASE SUBMITTED WHEN TAKEN UNDER ADVISEMENT.

A case is submitted after the court trying the case without a jury has taken it under advisement at the close of the evidence and argument.

3. DISMISSAL AND NONSUIT §16—CONSENT TO DISMISSAL INEFFECTIVE UNLESS SIGNED BY ATTORNEY OF ASSENTING PARTY.

The written consent to dismissal of the action by plaintiff, referred to in Code Civ. Proc. § 581, subd. 2, is wholly ineffective unless signed by the attorney of record of the consenting party.

4. DISMISSAL AND NONSUIT §15—IN DISCRETION OF TRIAL COURT TO ORDER DISMISSAL.

It is within the discretion of the trial court to order a dismissal in certain cases not expressly indicated in Code Civ. Proc. §§ 581, 581a, and 581b.

5. DISMISSAL AND NONSUIT §15—JUDGMENT FOR ONE PLAINTIFF AFTER MOTION BY OTHERS FOR DISMISSAL.

In an action on a note, the trial court did not abuse its discretion in giving judgment for the whole sum in favor of a plaintiff despite the attempted dismissal of the action by three plaintiffs, so far as they were concerned, after the findings and judgment had been signed, because the note had been satisfied as to their interests; no legal showing thereof being made.

6. JUDGMENT §18(1)—DUTY OF COURT ON INFORMAL SUGGESTION OF PARTIAL SATISFACTION OF NOTE IN SUIT.

On a purely informal suggestion of partial satisfaction of the note in suit, the trial court was not bound on its own motion to direct some sort of an accounting between a plaintiff and defendant as virtual assignee of the rights of other plaintiffs, and to enter judgment against defendant only for the amount due the particular plaintiff who had not been paid.

In Bank.

Appeal from Superior Court, City and County of San Francisco; C. N. Andrews, Judge.

Action by Louis M. MacDermot and others, substituted as parties plaintiff for Louis M. MacDermot and another, as administrator and administratrix of the estate of Flora B. MacDermot, deceased, against William Grant. From judgment for plaintiffs, defendant appeals. Affirmed.

Henry Ach and Henry E. Monroe, both of San Francisco, for appellant.

Goodfellow, Eells, Moore & Orrick, of San Francisco, and Schwartz & Powell and Osterlander, Clark & Carey, all of Oakland, for respondents.

LENNON, J. This is an appeal from a judgment for the plaintiffs following a trial without a jury in an action on a promissory note owned in common by the plaintiffs Louis MacDermot, Flora Proctor, Mary Crawford, and Alfred MacDermot. The three plaintiffs last named attempted to dismiss the action, so far as they were concerned, after the findings and judgment had been signed but before they had been filed. It is the contention of appellant that the court erred in entering judgment in favor of all of the plaintiffs. The judgment was affirmed by the First Division of the District Court of Appeal for the First Appellate District, Mr. Presiding Justice Waste writing the opinion. The affirmance was correct.

[1] The purported dismissal cannot be given effect under any of the provisions of the Code which expressly authorize a dismissal. Code Civ. Proc. §§ 581, 581a, and 581b. The circumstances here presented clearly exclude the application of any of the provisions of the Code sections in question other than those contained in subdivisions 1, 2, and 4 of section 581 of the Code of Civil Procedure.

[2] Subdivision 1 authorizes a dismissal by the plaintiff at any time before the trial. The purported dismissal filed herein was not filed before trial. It is true that in construing a similar section of the Practice Act an early decision defined "trial" as meaning the determination or finding in the case. *Hancock Ditch Co. v. Bradford*, 13 Cal. 637. It is evident, however, from the concluding portion of the opinion in that case that the court construed the words "before trial" as meaning "before submission," and this is the sense in which they have been construed in subsequent cases. *Heinlin v. Castro*, 22 Cal. 100, 102; *Casey v. Jordan*, 68 Cal. 246, 247, 9 Pac. 92, 305; *Westbay v. Gray*, 118 Cal. 660, 48 Pac. 800; *Goldtree v. Spreckels*, 135 Cal. 666, 67 Pac. 1091. A case is submitted after the court, trying the case without a

jury, has taken the case under advisement, at the close of the evidence and argument. *Ætna, etc., Ins. Co. v. Hamilton County*, 79 Fed. 575, 25 C. C. A. 94; *Warner v. Warner*, 83 Kan. 548, 112 Pac. 97; *Lawyers, etc., Pub. Co. v. Gordon*, 173 Mo. 139, 73 S. W. 155; *St. Louis Board of Education v. U. S. Fidelity, etc., Co.*, 155 Mo. App. 109, 134 S. W. 18.

[3] Under the provisions of subdivision 2, an action may be dismissed by either party upon the written consent of the other. Conceding that an action may be thus dismissed at any time before judgment, the fact remains that in the case at bar no effective written consent on the part of appellant to the attempted dismissal by Flora Proctor, Mary Crawford, and Alfred MacDermot was ever filed. It is true that a stipulation was filed consenting to the dismissal and signed by appellant personally and that oral consent was given by appellant's attorney, who was not, however, his attorney of record. But it is well settled that the written consent referred to in the Code provision now under consideration is wholly ineffective unless it is signed by the attorney of record of the consenting party. *Commissioners v. Younger*, 29 Cal. 149, 87 Am. Dec. 164, quoted with approval in *Boca, etc., Co. v. Superior Court*, 150 Cal. 153, 156, 88 Pac. 718.

Subdivision 4 provides for dismissal by the court where the plaintiff abandons the case before final submission. It is unnecessary to discuss the object and scope of this provision, for the reason that the attempted abandonment of the case by the three above-named plaintiffs was, as already noted, made after the final submission of the case.

[4, 5] It is true that it is within the discretion of the trial court to order a dismissal in certain cases not expressly indicated in the Code. *Romero v. Snyder*, 167 Cal. 216, 138 Pac. 1002; *Johnston v. Baker*, 167 Cal. 260, 139 Pac. 86. Assuming, without undertaking to decide the point, that, had there been any showing in any proper legal manner, as, for example, by affidavit, that the note had been satisfied as to the interests of the three plaintiffs who sought to dismiss the action, the court might in its discretion have ordered a dismissal, nevertheless the fact remains that no such showing was made. Under these circumstances, it cannot be held that the court abused whatever discretion it may have had in the matter in giving judgment for the whole sum in favor of all of the plaintiffs.

[6] Appellant contends, however, that the attempted dismissal at least placed before the court "evidence" showing that the obligation of appellant had been altered subsequent to the submission of the case, and that it was therefore error for the court to enter judgment solely upon consideration of the evidence received at the trial. The case,

however, was not opened to receive evidence at any time subsequent to its submission, and the judgment is not in any sense against the evidence. What appellant really means is, apparently, that, upon the purely informal suggestion of partial satisfaction, the court was bound on its own motion to direct some sort of an accounting between Louis MacDermot and appellant as a virtual assignee of the rights of the other plaintiffs and to enter judgment against appellant only for the amount due to Louis MacDermot. This it was clearly not the duty of the court to do.

Appellant may now make a motion for the entry of partial satisfaction of the judgment, making all of the plaintiffs in the original action parties to the proceeding in order that the fact of his release by the three plaintiffs who sought a dismissal may be determined and in order that the extent of the interest of Louis MacDermot in the note and judgment may be ascertained.

The judgment is affirmed.

We concur: ANGELLOTTI, C. J.; SHAW, J.; OLNEY, J.; MELVIN, J.; LAWLOR, J.

(181 Cal. 306)

CITY OF MADERA v. BLACK. (Sac. 2659.)

(Supreme Court of California. Oct. 1, 1919.)

1. APPEAL AND ERROR §1082(2) — IRREGULARITY IN REMOVING CAUSE TO SUPERIOR COURT CANNOT BE FIRST RAISED ON FURTHER APPEAL.

Where the parties appear in the superior court and submit the case without objecting that the court is without jurisdiction because of the irregular manner in which it reached the court from the recorder's court, by appeal instead of certification under Code Civ. Proc. § 838, on appeal subsequently taken to it the Supreme Court will consider the objection of lack of jurisdiction to have been waived so far as possible, and will treat the case as if begun in the superior court, and the parties had appeared without process and submitted the cause on merits.

2. TAXATION §1 — "TAX" INCLUDES EVERY CHARGE ON PERSON OR PROPERTY IMPOSED BY LAW.

A "tax," in the general sense, includes every charge upon persons and property imposed by or under the authority of the Legislature for public purposes.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Tax.]

3. TAXATION §1—"IMPOST" DEFINED.

The word "impost," in its broader sense, means any tax or tribute imposed by authority,

and applies as well to a tax on persons as a tax on property.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Imposts.]

4. COURTS \Leftrightarrow 125—SEWERAGE CHARGE A TAX, IMPOST, AND TOLL WITHIN JURISDICTION OF SUPERIOR COURT.

Sewerage rate or charge levied by ordinance of the city of Madera for use of sewers held a tax, impost, or toll within Const. art. 6, § 5, providing the superior court shall have exclusive original jurisdiction of any case involving the legality of such a charge; a "toll" being a sum of money for the use of something, generally applied to the consideration which is paid for the use of a road, bridge, or the like of a public nature.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Toll.]

5. COURTS \Leftrightarrow 487(8) — RECORDER'S COURT SHOULD CERTIFY ACTION TO RECOVER SEWER TAX TO SUPERIOR COURT.

In an action by the city of Madera in the recorder's court to recover from a sewer user a charge, levied upon him by ordinance, constituting a tax, impost, and toll within Const. art. 6, § 5, providing the superior court shall have exclusive original jurisdiction of a case involving the legality of any such charge, it appearing from the answer that the legality of the charge was involved, the recorder should have certified the papers and transferred the cause to the superior court.

6. COURTS \Leftrightarrow 190(1/2)—SUPERIOR COURT PROPERLY ASSUMED JURISDICTION OF SEWERAGE TAX CASE ON APPEAL FROM RECORDER'S COURT.

Where the particular objection that the superior court had no original jurisdiction of the case appealed from the recorder's court was not made when the case reached the superior court, and the case was within its jurisdiction, the superior court properly took jurisdiction and proceeded to determine the case on its merits.

7. MUNICIPAL CORPORATIONS \Leftrightarrow 58 — LANGUAGE DEFINING POWERS TO BE STRICTLY CONSTRUED.

Language purporting to define the powers of a municipal corporation is to be strictly construed, and any fair, reasonable doubt concerning the existence of a power is to be resolved by the courts against the corporation.

8. MUNICIPAL CORPORATIONS \Leftrightarrow 712—CITY OF SIXTH CLASS WITHOUT POWER TO TAX SEWER USERS FOR EXTENSION OF PLANT.

A city of the sixth class is without power to lay taxes or tolls on those who may use its sewerage system in order to obtain money to build sewers in other streets for the special benefit of other property owners.

9. EVIDENCE \Leftrightarrow 83(2) — PRESUMPTIONS THAT OFFICERS INTEND NECESSARY CONSEQUENCES OF OFFICIAL ACTS.

Persons, even when acting officially, are presumed to intend the necessary consequences of their acts, especially if such consequences are known to them beforehand, so that it must be presumed that the higher rates for use of sew-

ers were imposed by city officials on property owners to accumulate a fund for the general benefit of the city, and thereby enable them to assess a lower rate of tax for general purposes.

10. MUNICIPAL CORPORATIONS \Leftrightarrow 712 — CHARGE FOR USE OF SEWER EXCESSIVE.

Monthly charge of a dollar per dwelling house, with penalty of \$10 for failure to pay a charge, imposed by a city of the sixth class for the use of its sewerage system by property owners, held excessive and unreasonable; it having been intended to result in accumulation of a fund for the general benefit of the city enabling it to fix a lower general tax rate.

In Bank.

Appeal from Superior Court, Madera County; J. J. Trabucco, Judge.

Action by the City of Madera against Alex Black. From judgment for plaintiff defendant appeals. Reversed.

J. J. Coghlan, of Madera, for appellant.

F. A. Fee, of Madera, for respondent.

SHAW, J. Madera is a city of the sixth class. In the year 1909 it acquired, and it has ever since maintained, a system of sewers extending through certain of its public streets. Its ordinances required that all dwelling houses situated on lots abutting on a sewer street should be connected with such sewer, and forbade the disposal of sewage in any other manner. The defendant then owned and ever since has owned and occupied a dwelling house on one of said streets, and in compliance with the ordinance he put in the sewer connections and has ever since used the sewer to carry the sewage from his house.

In February, 1914, the city duly adopted an ordinance imposing a "monthly sewage rate or charge for the use of and connection with the sewer;" the rate for each dwelling house occupied by a single family being \$1 payable in advance on the first day of each month. On May 16, 1916, it duly adopted another ordinance, the same as the former one, except that it provided that the charge should be deemed a debt due to the city from the persons whose duty it was to pay the same, collectible in a civil action by the city, and that for a failure to pay the charge when due the additional sum of \$10 should be added to the charge, as a penalty for the delinquency. The defendant failed to pay the charge for 13 months in succession, beginning June 1, 1915, and ending June 30, 1916.

This action was begun on June 26, 1916, in the recorder's court of Madera, to recover the sum of \$13 for the sewer rates or charges due for said 13 months, and \$10 for the penalty imposed by the last-mentioned ordinance for the delinquency for June, 1916. The complaint alleged the facts as above stated and

set forth said ordinances in full. The defendant demurred to the complaint on the ground that the case involved the possession of real property and the legality of a tax, impost, assessment, toll, or municipal fine, and, consequently, that it fell within the exclusive jurisdiction of the superior court, and the recorder's court was without jurisdiction thereof, under the provisions of the Constitution. Const. art. 6, § 5.

The demurrer was overruled and the defendant filed an elaborate answer, duly verified in which he denied the validity of the said ordinances and of the rates or charges attempted to be imposed thereby, and alleged facts tending to show that the said rates or charges were not reasonable, but were extravagant and exorbitant and were imposed for the purpose of raising revenue to defray the general expenses of the city government. The case was tried and judgment was given for the defendant in the recorder's court. From that judgment the plaintiff appealed to the superior court, where the cause was tried again, resulting in a judgment for the plaintiff in the sum of \$13. The defendant appeals from the latter judgment.

Both in the recorder's court and in the superior court the parties agreed upon the facts. In the superior court the agreed statement used in the recorder's court was accepted as true for the purposes of the trial in the superior court and by stipulation the case was submitted thereon, "saving and excepting to each party herein, respectively, all of his or its objections, exceptions and remedies as to questions of law." It does not appear anywhere in the record that in the superior court either party made the specific objection that the superior court was itself without jurisdiction because of the fact that the case had come to it for determination by the process of appeal, instead of by the process of certification by the recorder, as provided by section 838 of the Code of Civil Procedure in cases where it appears by the verified answer of the defendant that the determination of the action will necessarily involve the legality of a tax, impost, assessment, toll, or municipal fine, or the possession of real property. Upon filing the verified answer in the recorder's court, the defendant there demanded that the case be certified to the superior court as provided in that section, but the demand was refused.

[1] Where, in such a case, the parties appear in the superior court and there submit the case to its determination on the merits, without there making the objection that the superior court is without jurisdiction of the action, because of the aforesaid irregular manner in which it has reached that court, and an appeal is thereafter taken to this court from the judgment given in the superior court, this court will consider the partic-

ular objection above noted to have been waived, so far as it is possible for the parties to waive it, and will treat the case as if it had been originally commenced in the superior court and the parties had appeared without process and submitted the cause for decision on the merits. *Santa Barbara v. Eldred*, 95 Cal. 381, 30 Pac. 562; *Hart v. Carnall, etc., Co.*, 103 Cal. 140, 37 Pac. 196; *De Jarnatt v. Marquez*, 132 Cal. 700, 64 Pac. 1090. The result in this case is that if we find that the action was of a character originally cognizable exclusively in the superior court, we will consider the appeal on the merits, as if it had been begun in that court; but if we find that it was an action of which the superior court had not original jurisdiction, and consequently one in which an appeal would not lie to the Supreme Court or to the District Court of Appeal, we will dismiss the appeal on the ground that we have no jurisdiction of such attempted appeal. The respondent moves to dismiss the appeal on that ground.

It follows that the first question for our consideration is the one of jurisdiction; that is to say, the question whether the recorder's court or the superior court is the court having original jurisdiction of the case. If we consider that the determination of the case did involve the legality of a tax, impost, assessment, toll, or municipal fine, or the possession of real property, we will not dismiss the appeal, but will inquire further whether or not the decision of the superior court was correct, and whether the tax, impost, assessment, toll, or municipal fine, as the case may be, is valid; if we conclude that such legality or possession was not involved, we must dismiss the appeal.

The findings in the superior court state other facts material to the argument of the respondent. In 1908 a private corporation, the Madera Sewerage Company, owned a system of sewers extending over a part of the public streets of the city. The city determined to acquire and construct a sewer system to be operated by the city itself. In pursuance of this plan it issued and sold city bonds amounting to \$25,000. In 1909, with the proceeds thereof it purchased the sewer system of the Madera Sewerage Company for \$18,000 and with the remainder constructed the required extensions. In November, 1909, it adopted an ordinance imposing monthly charges for the use of and connection with said sewers, upon all persons having property so connected, including the plaintiff as aforesaid; the charges being substantially the same as those fixed in the later ordinances above mentioned. Ever since 1909 it has collected the charges so imposed and placed the money in its treasury to the credit of the fund called the "Sewer Fund." The total amount so received from November, 1909, to July 20, 1916, was \$40,734.92. Of this mon-

ey \$21,775 has been transferred to the general fund of the city and expended for general purposes; \$8,910 has been transferred to a fund designated as the "Water Fund" and used for the purposes for which that fund was created; and \$1,234.37 has been transferred to the "Sewer Bond Redemption and Interest Fund," in which is kept the money raised by general taxes levied as required by law to pay the interest and principal of the bonds aforesaid. The remainder, \$8,615.55, has been expended in some manner not specified in the record. It may have been expended for expenses of operating and maintaining the sewer. It also appears that the receipts from sewer rates amounted to \$7,253.90 for the year ending June 30, 1915, and to \$7,277.85 for the year ending June 30, 1916.

[2-4] A "tax," in the general sense of the word, includes every charge upon persons or property, imposed by or under the authority of the Legislature, for public purposes. *Perry v. Washburn*, 20 Cal. 350; *People v. McCreery*, 34 Cal. 454. The word "impost," in its broader sense, means "any tax or tribute imposed by authority, and applies as well to a tax on persons as to a tax on merchandise." *Smith v. Turner* (Passenger Cases) 48 U. S. (7 How.) at page 407, 12 L. Ed. 702. A "toll" is a "sum of money for the use of something, generally applied to the consideration which is paid for the use of a road, bridge, or the like, of a public nature." *Bouvier's Dictionary*, tit. Toll. The money for which the plaintiff sued was a charge upon persons; it was imposed by the legislative authority of the city of Madera for public purposes, and under these definitions it was a tax; also, it was a tribute or contribution required by legislative authority and to be used for public purposes, and so comes within the definition of the word "impost." It may also be considered as a charge made for the use of the sewer constructed and acquired by the city. If so, it would come within the definition of a toll as fully as would the charge for the use of a public street or road. Such tolls are imposed by or under the sanction of public authority. In this case the charge was directly imposed by the ordinance, and, if it is a toll, it comes within the constitutional provision.

[5, 6] The general purpose of that provision obviously is to give to the sovereign power of the state, whether exercised generally or locally, the protection of having the legality of any exaction of money for public uses or needs cognizable in the first instance in the superior courts alone. In view of this purpose, it is apparent that the words used should be applied in their broadest sense with respect to moneys raised for public purposes or needs. The conclusion necessarily follows that the particular charge here involved comes within the constitutional provi-

sion and that any case in which the legality of such a charge is involved is within the exclusive original jurisdiction of the superior court. Upon the filing of the answer it fully appeared that the legality of the charge was involved in the action. The recorder should thereupon have certified the papers and transferred the cause to the superior court. As we have said, the particular objection that the superior court had no jurisdiction was not made when the case reached that court, and, as the case was within its original jurisdiction, the superior court properly took jurisdiction and proceeded to determine the case on its merits. The result is that the motion to dismiss the appeal to this court was not well taken and the same is hereby denied. We find it unnecessary, in this connection, to consider the meaning of the term "municipal fine" as used in the constitutional provision. We proceed to the question whether or not the charge was lawful and valid.

The respondent's main argument is that the charge is not made against property and is not a sum exacted as payment of a license fee for any privilege or right given to the occupants of houses along the sewer, but that it is an ordinary debt owed by the defendant to the plaintiff for services performed by plaintiff for the defendant in carrying away sewage from his premises. There can be no doubt that it is not a charge levied upon property as such. None of the successive ordinances imposing the charge purport to make the same a lien upon property of any description. The respondent cites *In re Zhizhuzza*, 147 Cal. 328, 81 Pac. 955, in which this court held that an ordinance of the city of Oakland providing that no one should collect garbage from the residents of the city except the city itself, and fixing a sum per month which the residents were required to pay for the services of the city in collecting such garbage, was a valid police regulation for the protection of the public health, which the city, under its charter and under section 11, art. 11, of the Constitution, had the power to make. The ordinance was attacked by the persons who had previously collected garbage from the residents under private contracts. The question whether the charges imposed were in the nature of taxes, imposts, or tolls was not presented or decided. We do not perceive that this case has any bearing upon the question here presented. It does not appear that the ordinance prohibited the residents from themselves carrying away the garbage from their respective residences. Their rights and views concerning the nature of the charge were not involved.

[7] If the argument of the respondent that it is a debt is tenable, it must be upon the theory that the city, in its proprietary capacity, is the owner of the sewer and that it was operating the same in that capacity. This

necessarily assumes that the city, by its organic law, was authorized to construct and operate sewers in its proprietary capacity for profit or otherwise, as a private person might do. It is the settled law of this state and the general rule everywhere that—

"Language purporting to define the powers of a municipal corporation is to be strictly construed, and that any 'fair, reasonable doubt concerning the existence of the power is resolved by the courts against the corporation, and the power is denied.'" 1 Dillon on Municipal Corporations, § 89.

It is declared "as a 'general and undisputed proposition of law,' * * * that 'a municipal corporation possesses and can exercise the following powers and no others: (1) Those granted in express words; (2) those necessarily or fairly implied in or incident to the powers expressly granted; and (3) those essential to the declared objects and purposes of the corporation—not simply convenient, but indispensable.'" *Oro Electric Corp. v. Railroad Commission*, 169 Cal. 477, 147 Pac. 122. The court in that case cited *Von Schmidt v. Widber*, 105 Cal. 151, 38 Pac. 682, and *Hyatt v. Williams*, 148 Cal. 585, 84 Pac. 41, both of which fully sustain the quotations above made. Similar expressions are found in *San Christina, etc., Co. v. San Francisco*, 167 Cal. 771, 141 Pac. 384, 52 L. R. A. (N. S.) 676, *Connelly v. San Francisco*, 164 Cal. 105, 127 Pac. 834, *Redondo Beach v. Cate*, 136 Cal. 146, 68 Pac. 586, and *Low v. Marysville*, 5 Cal. 214.

[8-10] *Madera* being a city of the sixth class, its powers are defined solely by our statutes. Among those powers we find none authorizing it to acquire, construct, or operate sewers in its proprietary capacity for the purpose of obtaining revenue or profit therefrom. It is given power "to construct, establish, and maintain drains and sewers." *Deering's General Laws*, p. 1122, § 862, subd. 5. It is also given the power to levy and collect street poll taxes. *Id.* subd. 7. But this is probably forbidden by section 12, art. 13, of the Constitution, as amended in 1914. It has power to impose dog taxes and ordinary property taxes assessed upon a valuation in the usual manner, and also to license for revenue and regulation of all kinds of business carried on in the city and fix and collect the rates of license tax thereon. *Id.* subds. 8, 9, 10. It has been held that the power to construct and maintain sewers is possessed by cities, although not expressly conferred by any charter or statute, "as incident to the general and express power to construct and maintain streets." *Kramer v. Los Angeles*, 147 Cal. 674, 82 Pac. 334; *Harter v. Barkley*, 158 Cal. 745, 112 Pac. 556. But it is obvious that the power to construct and maintain sewers does not include authority to raise rev-

enue for general purposes by means of a toll or tax for the privilege or right to use the sewer for the purposes for which it was constructed. Such means of raising revenue is so unusual and extraordinary that it cannot be implied from the general grant of power to lay and maintain sewers. In *Harter v. Barkley*, *supra*, the court decided that the power to lay and maintain sewers included authority, as incidental thereto, to impose a charge for the privilege of connecting a house with the sewer. It may be that the power to maintain a sewer may carry by implication the additional power to levy a monthly charge to raise money for the repairs and upkeep of such sewer. But the rates here imposed upon the sewer users were obviously for purposes additional to that of paying the expenses of repairs and maintenance. The facts found by the court show this conclusively. Substantially, the same sewer rates have been collected by the city continuously ever since the year 1909. The sum of \$40,734.92 has been raised in this manner. More than three-fourths of this sum has been transferred to other funds and used for purposes other than repairs to the sewers and expenses of their maintenance. More than half of it has been paid out for the general expenses of the city government. It is not even made expressly to appear that any of it has been devoted to sewer repairs or maintenance. If any was used for extensions to the sewer system, such use was unlawful, for it cannot be doubted that the city has no power to lay taxes or tolls on those who may use the sewer, in order to obtain money to build sewers in other streets for the special benefit of other persons. The payment of the principal and interest of the bonds issued as aforesaid is to be paid out of money raised by a general tax upon property, as provided in the act authorizing their issuance. *Stats. 1901*, p. 27, § 7; *Stats. 1907*, p. 611, § 3. No money raised by sewer rates would be necessary to pay these bonds, or could lawfully be used in that manner. The city trustees must therefore be deemed to have known, long before the sewer rate ordinances of 1914 and 1916, respectively, were adopted, that the rates established were far in excess of the needs for repairs and maintenance. Persons, even when acting officially, are presumed to intend the necessary consequences of their acts, especially if such consequences are known to them beforehand. It must therefore be presumed that the high rates were imposed in order to bring about the known and inevitable result; that is, the accumulation of a fund for the general benefit of the city and thereby enable it to fix a lower rate of taxes for general purposes. That the courts may make such inquiry, see *Dobbins v. Los Angeles*, 195 U. S. 239, 25 Sup. Ct. 18, 49 L. Ed. 169. This would be an un-

just discrimination and an unfair burden upon those who used the sewer, and it is clearly beyond any power possessed by the city. It follows that the charges were excessive and unreasonable. They were imposed upon the persons concerned without their consent, and payment was practically compelled by means of penal ordinances authorizing the city officials to remove the sewer connection from any house if the rates were not paid therefor, declaring such house a nuisance and forbidding any person thereafter to occupy the same. A court cannot apportion the charge or ascertain and allow such portion as it might find reasonable, assuming, but not deciding, that the city, under its organic law, is authorized to impose regular charges for such repairs and maintenance. The entire charge must therefore be declared invalid. The judgment of the court below cannot be sustained.

The judgment is reversed.

We concur: ANGELLOTTI, C. J.; LENNON, J.; WILBUR, J.; MELVIN, J.; OLNEY, J.; LAWLOR, J.

(42 Cal. App. 766)

FIDELITY & CASUALTY CO. OF NEW YORK v. LLEWELLYN IRON WORKS. (Civ. 2925.)

(District Court of Appeal, Second District, Division 2, California. Aug. 19, 1919. Rehearing Denied by Supreme Court Oct. 16, 1919.)

1. APPEAL AND ERROR ¶1002—VERDICT ON CONFLICTING EVIDENCE NOT DISTURBED.

A verdict on conflicting evidence cannot be disturbed by the appellate court.

2. MASTER AND SERVANT ¶243(2)—AGREEMENT AS TO METHOD OF WORK NOT KNOWN TO EMPLOYÉ NOT BINDING ON HIM.

An agreement as to the manner of doing work by an employer is not binding upon the employé unless the existence of such agreement is brought home to him.

3. NEGLIGENCE ¶136(27) — CONTRIBUTORY NEGLIGENCE JURY QUESTION.

Where a general contractor's employé, standing on the outer end of a plank which he had placed across the elevator shaft, was killed by a fall when the employé of defendant, the contractor installing elevators in the building, moved an elevator so that the ascending counter weight struck the underside of the plank, the question of contributory negligence in being on the plank was for the jury.

4. NEGLIGENCE ¶33(2)—WORKMEN ON BUILDING UNDER CONSTRUCTION NOT TRESPASSERS IN ELEVATOR SHAFT.

A general contractor's employé, who places a plank across an elevator shaft for the purpose of doing work necessary for completion of the building, is not a trespasser in the shaft or a

mere licensee to whom a contractor installing elevators owes no duty except that of not wantonly injuring him.

5. MASTER AND SERVANT ¶226(1)—SERVANT DOES NOT ASSUME RISK OF INJURY FROM EMPLOYER'S NEGLIGENCE.

An employé voluntarily putting himself in a place of danger does not thereby necessarily assume the risk of injury from the want of care of his employer.

6. NEGLIGENCE ¶85—ASSUMPTION OF RISK BY EMPLOYÉ OF GENERAL CONTRACTOR.

Where a general contractor's employé in doing his work placed a plank across an elevator shaft, he did not assume the risk of injury by the movement of an elevator operated by the employé of defendant, the contractor installing elevators, who did so without investigating his presence on the plank and without warning, although they knew other men were working in the shaft.

7. MASTER AND SERVANT ¶347—WORKMEN'S COMPENSATION ACT IS VALID.

The Workmen's Compensation and Safety Act held constitutional.

8. CONSTITUTIONAL LAW ¶245, 301—WORKMEN'S COMPENSATION ACT NOT VIOLATIVE OF FOURTEENTH AMENDMENT OF UNITED STATES CONSTITUTION.

The Workmen's Compensation and Safety Act is not open to attack as violating the specific injunctions of Const. U. S. Amend. 14.

9. STATUTES ¶114(2)—TITLE OF WORKMEN'S COMPENSATION ACT INCLUDES PROVISIONS AS TO SUBROGATION OF EMPLOYER.

That portion of the title of the Workmen's Compensation and Safety Act which reads "providing the means and methods of enforcing such liability" includes those provisions in the act subrogating the employer or insurance carrier to the employé's right of action for injuries caused by the negligence of another, and the subrogation provisions are not open to attack on the ground that they were not included in the title.

Appeal from Superior Court, Los Angeles County; J. P. Wood, Judge.

Action by the Fidelity & Casualty Company of New York against the Llewellyn Iron Works. From judgment for plaintiff, defendant appeals. Affirmed.

Bowen & Baillie, Jones & Weller, and J. Crider, Jr., all of Los Angeles, for appellant.

R. P. Jennings, J. E. Shelton, and Parker & Collier, all of Los Angeles, for respondent.

THOMAS, J. This is an action brought to recover damages for the death of one James F. Goldsmith by the alleged negligence of defendant. The case was tried by the court and a jury, who brought in a verdict against the defendant for the sum of \$10,000. The appeal is from the judgment so entered.

The facts, so far as material for our present purpose, are as follows: On July 24,

1914, James F. Goldsmith, the deceased, a painter, was accidentally killed by falling from a plank on which he was working, outside a window on the seventh floor of the Broadway Department Store building, in the city of Los Angeles, then under construction by Mr. Arthur Letts, as owner. Mr. C. B. Weaver was the general contractor in charge of the work, including the painting, and as such was the employer of said Goldsmith. The defendant had a contract for the installation of the elevators in the building, and was engaged in such work at the time of the accident. The elevator hatchways with which this case is concerned were five in number, located along the southerly wall of the building. These hatchways were all within one inclosure, formed by the wall of the building with a window opposite each hatchway on each floor, on the back, and a glassed-in framework on the front, with sliding doors. The glass was in process of installation at the time of the accident. In order to perform any work on the south wall of the building it was necessary for the workmen to reach this wall. This they did by erecting a staging within and extending across the hatchways. Up this wall in each hatchway is a pair of upright guiderails, between which are suspended heavy counterweights, which slide up or down contrary to the action of the elevator cage. One crew of men after another had so erected their staging and performed their work. Among these various workmen were plasterers, who plastered the walls of the shaft; carpenters, who put in the window casings; sheet metal men, who put in the metal window sills; glass workers, who put the glass in the front work; painters, who painted the window frames; and window painters, who stained the window sashes, each of whom, including Goldsmith, was engaged in doing a necessary and essential part of the building. Working simultaneously with these various crews were employes of defendant, engaged in the construction and installation of the elevators. At the time of the accident the only elevator which had been installed by defendant was elevator No. 5, the same being on the extreme right hand of a person looking into the hatchways from the floor space. Prior to the day of the accident, this elevator had been operated and used by defendant's employes for testing the same and for carrying up and down laborers and supplies in connection with defendant's work on this and the other four hatchways, and had been run, on the day of the accident, some four or five hours prior thereto. On the second day after being so employed by said Weaver, deceased went to the seventh story of said building, placed one end of a plank on a sawhorse on the floor space opposite hatchway No. 5, the plank extending over the hatchway between the two upright guiderails already

referred to, through the open lower sash of the window on the wall side of the hatchway, and resting on the lower sill of said sash, so that about two feet of the plank projected out of the window and over the alley, seven stories below. On this board, and that particular portion thereof so extending over the alley, as aforesaid, the deceased stood and proceeded to paint. While so employed, and without any previous warning, said elevator descended, and at the same time the said counterweights ascended, striking the plank from the underside, causing deceased to fall therefrom to the alley below, resulting in his death.

The deceased left a widow and a minor child, who made claim for compensation for his death under the Workmen's Compensation Act (St. 1917, p. 831) of this state, against Arthur Letts and C. B. Weaver, as his employers, and against the Fidelity & Casualty Company of New York, plaintiff herein, their insurer. The Industrial Accident Commission, accordingly, on March 26, 1915, awarded compensation, and the said Fidelity & Casualty Company of New York, pursuant to the terms of its policy, assumed liability for the entire award, making the payments thereunder. Thereafter, joining Letts and Weaver as plaintiffs, this action was brought by the Fidelity & Casualty Company of New York for general damages, as hereinbefore set forth.

There was a demurrer to the complaint, which was overruled. In its answer defendant denied negligence, alleged one recovery—the award as made by the Industrial Accident Commission—precluding any other; that deceased was a trespasser, and, at most, a mere licensee; charged contributory negligence; and further alleged that the accident was caused by the negligence of the deceased. On the trial, Letts and Weaver were dismissed as plaintiffs. There was a motion for nonsuit, which was denied. There was a motion for a new trial, which was never passed upon by the trial judge, and hence, under section 660 of the Code of Civil Procedure, is deemed denied. The appeal here is from the judgment so entered.

Appellant urges as a basis for a reversal of the judgment: (1) Excessive damages given under the influence of passion or prejudice; (2) insufficiency of the evidence to justify the verdict; (3) that the verdict is against law; and (4) errors of law occurring at the trial. It also specifies 138 assignments of error.

Referring to the point made as to excessive damages given under the influence of passion or prejudice, suffice it to say that no evidence upon which such statement is based has been called to our attention, and we have failed to find anything in the record from which such an inference could be drawn, or that would justify such a conclusion.

[1] The trial court, after instructing the jury that contributory negligence, if found, would bar recovery, gave certain instructions designated as "P," "Q," and "R." Appellant contends that the verdict of the jury was in "complete disregard of the foregoing instructions, and against the law declared thereby," and urges that "these instructions in effect required a verdict for defendant." Appellant insists, with commendable vigor, that—

"An examination of the evidence will show that every fact on which these instructions were predicated was shown without conflict, and if so a finding of contributory negligence and a consequent verdict for defendant were inevitable."

There is no doubt but that the instructions referred to were proper, were the facts as shown by the evidence in this case such as contended for by appellant; but, after an examination thereof, we are unable to agree with its statement of such facts. Beyond the pale of successful contradiction, we think, the record shows a very decided conflict on every fact upon which the said instructions were predicated. Upon these conditions there was no disregard by the jury of the court's instructions. There was evidence upon which the said instructions were predicated, and which, if believed by the jury, would have sustained a verdict for defendant; but, the jury having settled that conflict in favor of the plaintiff, this court cannot now disturb the judgment based thereon. Under these circumstances, it is obvious that discussion of the question as to whether instructions given by the court, right or wrong, became the law of the case, is unnecessary.

[2, 3] The next point urged by appellant is that of contributory negligence on the part of deceased. We are not able to agree with it in that contention. For instance, defendant contends that, even if its employes had seen the said plank, they would have no intimation that they might injure any one by moving the car. But we are compelled to conclude that the very fact of the known presence of the plank across the shaft was notice to defendant for further investigation of that fact, and such an investigation would have disclosed the presence of deceased on the outer end thereof, as before stated. It is also contended by defendant that there was an agreement between the employers that workmen should not use the shaft without notifying the foreman of defendant. But assuming such to have been the case, notice of that arrangement must be shown to have been given to deceased. There is not one word of evidence that this was done. The rule is, as we understand it, that an agreement as to the manner of doing work by an employer is not binding upon the employe unless the existence of such

is brought home to him. *Alabama Midland R. Co. v. McDonald*, 112 Ala. 216, 20 South. 472; *Brown v. Louisville, etc., R. Co.*, 111 Ala. 275, 19 South. 1001; *Atchison, T. & S. F. Ry. Co., v. Plunkett*, 25 Kan. 188. We are not informed of the existence of any rule of law which made it necessary for decedent to anticipate and guard against negligent acts of defendant. *Morgan v. Robinson Co.*, 157 Cal. 348, 107 Pac. 695, and cases there cited; *Herold v. Mathews*, 179 Pac. 414. Although by looking up the shaft and seeing the plank, defendant's employes could not see the man, still, in contemplation of law, the man being where he was, was within the shaft, and, as already seen, care and further investigation would have disclosed his position at the place stated. At any rate, we are satisfied that the question as to whether or not deceased was guilty of contributory negligence in being on the outer end of the plank, and as to whether or not his being there was such as to endanger his safety, was one for the jury. *McKune v. Santa Clara, etc., Co.*, 110 Cal. 480, 42 Pac. 980; *Seller v. Market Street Ry. Co.*, 139 Cal. 268, 72 Pac. 1006; *Herbert v. S. P. Co.*, 121 Cal. 227, 53 Pac. 651; *Fox v. Oakland, etc., Ry. Co.*, 118 Cal. 55, 50 Pac. 25, 62 Am. St. Rep. 216; *Lottus v. P. E. Ry. Co.*, 166 Cal. 464, 137 Pac. 34.

[4] Appellant's next contention is that decedent was not its employe, but was the employe of an independent contractor, and that, being such, he was a trespasser in the shaft at the time of the accident, or at the most a mere licensee, to whom defendant owed no duty, except that of not wantonly injuring him. Confronted with the record before us, we think this contention without merit. When we take into consideration the fact that in the construction of a modern business block—and the Broadway Department Store building of Los Angeles is such a block—there are required, including many others, such artisans as plasterers, carpenters, glass men, sheet metal men, and interior finish men, all of whom, according to the evidence here, had necessary work to do on the south wall of this building, and were under contract to do such work, we are at a loss to understand by what line of reasoning a conclusion can be arrived at that the employes of defendant (also just as essential in their part of the construction of such a block) were doing a more necessary work, and a work of such importance that the other contractors and their employes could be treated as trespassers. How any one reading this record, not to say anything of those who saw the witnesses and heard their testimony, would arrive at any other conclusion than that both before and after the time of the ill-fated accident, several workmen were continually engaged in work in the elevator shaft or hatchways, including the one—No.

5—in which was the elevator that caused the accident, that no less than seven men were working in this very hatchway on the day of the accident, and further that this fact was known to defendant during all of said time, we are unable to understand.

[5, 6] Defendant asks what more it could have done than it did for Goldsmith's protection. From the record before us we are justified, we believe, in suggesting that the answer to that inquiry is that it does not appear that anything was done, or any precaution taken by defendant, for the safety of deceased. Indeed, it appears that the things which ordinary prudence would have suggested were omitted. Not even was the presence of the board in the hatchway investigated, nor was the board removed. Notwithstanding the fact that other men than deceased were actually working in this very hatchway at the time, to defendant's knowledge, no warning was given. This in itself constituted negligence which deceased could not anticipate, and which, under the law and the evidence as disclosed here, he did not assume. "The authorities seem clear * * * that an employé voluntarily putting himself in a place of danger does not thereby necessarily assume the risk of injury from the want of care of his employer." *Morgan v. Robinson Co.*, supra.

[7-9] Appellant next urges, throughout some 37 pages of its opening brief, the point that the plaintiff corporation has no legal capacity to sue in this case. It is also urged, among other things, that there is no proof that a lawful claim was made "in conformity with law"; that in the proceedings had before the industrial accident commission under the Workmen's Compensation and Safety Act defendant was not called upon to contest the question as to whether or not the claim was a lawful one, and whether or not a legal liability existed on the employer's part; that, if the award of the commission is made binding and conclusive by the terms of the act, then the provisions are unconstitutional, and, conversely, if the award is not binding, then no foundation was laid for plaintiff's right to sue, because there was no other evidence offered; that the provisions of said act in question violate specific injunctions of the Constitution of this state, and infringe also specific provisions of the Fourteenth Amendment to the Constitution of the United States; that the provisions of said act authorize a double satisfaction for the same tort; that the act contains more than one subject; and that the right of subrogation is not expressed in its title. We think, however, that the mere mention of these contentions will serve to make obvious their lack of merit. The constitutionality of the Workmen's Compensation and Safety Act has been upheld by the Supreme Court of this state in the case of *Western Indemnity*

Co. v. Pillsbury, 170 Cal. 686, 151 Pac. 398, and practically all of the foregoing objections decided contrary to the contention of appellant here. The fact that the act does not specifically mention the matter of the subrogation of the employer, or his insurance carrier, to the rights of the injured employé, or, in the case of death, to the rights of the heirs or personal representatives, we think is immaterial. All that the act itself does is to provide that the payment of compensation shall be contingent upon the subrogation of the employer, or his insurance carrier, to the rights of the injured employé. This is a mere incident to the liability, or to the payment of compensation, and is included in the general language of the title of the act, and especially of that portion of the title providing for the creation of a liability. "The right to subrogation" is, we think, included within that portion of the title of the act which reads: " * * * Providing the means and methods of enforcing such liability." "Subrogation," under these conditions, is one of the essential steps necessary to the enforcement of such liability, and embraced within the title of the act. Does not this question of subrogation come within the purview of legitimate inquiry made by any person of ordinary intelligence? Would not such a person naturally be led to ask such questions as the following: What employers are compensated? Under what circumstances? Upon what conditions? What rights, if any, do the employers surrender or acquire by reason of their having to compensate their employés? What are the methods by which the compensation is made to inure to the benefit of the employé? We think the answer to our own query must be in the affirmative; for, certainly all of the foregoing hypothetical questions are, undoubtedly, germane to the purpose expressed in the title. Citations might be multiplied, but the following will, in our opinion, serve to support our present conclusions: *In re Schuler*, 167 Cal. 282, 139 Pac. 685, Ann. Cas. 1915C, 706; *In re Maginnis*, 162 Cal. 200, 121 Pac. 723; *Matter of Yun Quong*, 159 Cal. 508, 114 Pac. 835, Ann. Cas. 1912C, 969; *Anglo-Californian Bank v. Field*, 146 Cal. 644, 80 Pac. 1080; *Gieske v. County of San Joaquin*, 109 Cal. 489, 42 Pac. 446; *Kings County v. Johnson*, 104 Cal. 198, 37 Pac. 870; *People v. Superior Court*, 100 Cal. 105, 34 Pac. 492; *San Francisco v. Kiernan*, 98 Cal. 614, 33 Pac. 720; *Ex parte Liddell*, 93 Cal. 633, 29 Pac. 251; *Francais v. Soms*, 92 Cal. 503, 28 Pac. 592; *Davies v. Los Angeles*, 86 Cal. 37, 24 Pac. 771; *Abeel v. Clark*, 84 Cal. 226, 24 Pac. 383; *Massachusetts, etc., Co. v. San Francisco, etc., Ry. Co.*, 178 Pac. 974; *Stackpole v. Pacific Gas & Electric Co.*, 186 Pac. 854.

Appellant urges next that the court erred in giving certain instructions requested by

plaintiffs, and in refusing to give certain other instructions requested by defendant. With this contention we are not able to agree. Having read every instruction given, as well as every requested instruction denied, we are of the opinion: (1) That the instructions given, objection to which is urged by appellant here, were ample, and as favorable to defendant—as disclosed by the record—as they properly could be on the questions presented. This is especially and obviously so, we think, when the instructions objected to are considered with, and in the light of, the other instructions given. (2) As to those denied, some were based upon a view of the case absolutely unsupported by the evidence, and therefore erroneous as a matter of law, while others had already been covered by instructions given at defendant's request, and also by the general instructions given by the court.

The remaining points urged, we think, need not be considered.

In our opinion the evidence is sufficient to support the verdict, and the verdict and judgment based thereon are, and each is, according to law.

Judgment affirmed.

We concur: FINLAYSON, P. J.; SLOANE, J.

(42 Cal. App. 753)

SWALL et al. v. LOS ANGELES COUNTY et al. (Civ. 2932.)

(District Court of Appeal, Second District, Division 2, California. Aug. 19, 1919.)

1. HIGHWAYS §90—CONSTITUTIONALITY OF ROAD DISTRICT IMPROVEMENT ACT.

The road district improvement act of 1907 held not unconstitutional as not providing an opportunity for a property owner within a district to raise objection concerning the size of the assessment district or the inclusion of his property therein, in view of section 5.

2. HIGHWAYS §90—ROAD DISTRICT ACT NOT UNCONSTITUTIONAL IN NOT REQUIRING DETERMINATION OF BENEFITS.

The road district improvement act of 1907 held not unconstitutional as failing to make express provision for determining benefits as a condition for including territory within the district.

3. HIGHWAYS §90—ROAD DISTRICT ACT NOT UNCONSTITUTIONAL IN ASSESSING PROPERTY ACCORDING TO VALUE.

The road district improvement act of 1907 held not unconstitutional in permitting the assessment of property within a district formed under it according to its value, rather than according to benefits conferred.

4. EVIDENCE §83(4)—PRESUMPTION OF DETERMINATION OF BENEFITS FROM INCLUSION OF LANDS IN ROAD DISTRICT.

It will be presumed from the action of a board of county supervisors in including lands in a road improvement district, formed under the road district improvement act of 1907, that the board determined that all the lands included would be benefited.

5. HIGHWAYS §90—FINDING OF BENEFITS TO LAND INCLUDED IN ROAD DISTRICT NOT REVIEWED.

When jurisdiction is given to a board to pass on the question of benefits to land from its inclusion in a road improvement district, the courts will not disturb their finding unless there appears a clear abuse of discretion.

6. HIGHWAYS §90—DISCRETION OF BOARD AS TO INCLUSION OF LAND IN IMPROVEMENT DISTRICT.

The only limitation on the power of a board of supervisors as to the inclusion of land within a road improvement district is that its exercise of discretion must not be arbitrary, and, if the conditions are so unreasonable as to outrage a common sense of fairness, the courts may interfere.

7. HIGHWAYS §90—INCLUSION OF LAND IN IMPROVEMENT DISTRICT NOT OBVIOUS ABUSE OF DISCRETION.

The inclusion of farm lands within a road improvement district, formed under the road district improvement act of 1907, as lands to be benefited by the proposed improvement, held not an obvious abuse of discretion by the board of supervisors of the county.

8. HIGHWAYS §90—SUBMISSION TO JURISDICTION OF BOARD TO DETERMINE NECESSITY FOR IMPROVEMENTS.

Where owners of farm lands filed no written protest to organization of a road improvement district under road district improvement act of 1907, and made no objection to inclusion of their lands, they must be deemed to have submitted to jurisdiction of supervisors of county in determining necessity for improvements.

Appeal from Superior Court, Los Angeles County; John M. York, Judge.

Action by William Swall and another against the County of Los Angeles and others. From judgment of dismissal, plaintiffs appeal. Affirmed.

Milton K. Young, of Los Angeles, and W. W. Middlecoff, of Visalia, for appellants.

A. J. Hill, County Counsel, Edward T. Bishop, Deputy County Counsel, and F. C. Austin, all of Los Angeles, for respondents.

SLOANE, J. The plaintiffs brought this action in the superior court of the county of Los Angeles for the purpose of avoiding a special assessment against their land for the construction of cement curbs and sidewalks under the "Road District Improvement Act of 1907" (St. 1907, p. 806). The defendants

demurred to the complaint on the ground of its insufficiency to state a cause of action. The demurrer was sustained, and, plaintiffs declining to amend, judgment of dismissal was rendered. Plaintiffs have appealed on the judgment roll.

The grounds of attack upon the assessment, on which the sufficiency of the complaint depends, are the allegations: (1) That the lands of plaintiffs derive no benefit whatever from the curbs and sidewalks, but that, on the contrary, the lands, being farming lands, are injured by the curbs and sidewalks; (2) that no allowance was made for the difference in benefits which would accrue to the several parcels of land in the district, and that the supervisors particularly disregarded the question of benefits with reference to the properties of the plaintiffs; (3) that the estimated burden of the tax levied and to be levied under the assessments closely approximates the present assessed value of the land, and amounts to confiscation; and (4) that the road district improvement act of 1907 is unconstitutional.

[1-3] Taking up first the question of the constitutionality of the act: Appellant does not very clearly indicate in what respect the provisions of the road district improvement act in question are violative of any constitutional right. He objects that the act nowhere provides an opportunity for an owner of property within a district to raise an objection concerning the size of the assessment district or the inclusion of his property therein. This objection seems to be sufficiently met by section 5 of the act, which provides for a hearing of objections of landowners, and, specifically, that—

"In the order of the hearing shall be heard such objections as shall be made to the boundaries of the district as set forth in the resolution of intention. Objections to the grades or to the boundaries of the district may be made by an owner of land lying within the district upon the hearing without any written statement of the same."

We do not understand the permission granted by this section to landowners to file written objection to ordering of the work as an entirety, to be a limitation upon filing other objections, but to provide a means by which a majority of the landowners may entirely block further proceedings. *Thomas v. Pridham*, 171 Cal. 98, 153 Pac. 933. Just what may be included in the objections to the boundaries of the district under section 5 is not indicated, but it might reasonably embrace an objection to the inclusion of specific land on the ground that it was not benefited by the proposed improvement. In denying a rehearing in *Thomas v. Pridham*, supra, the court says:

"While the right of protest in writing is limited to owners of record as defined in the section, this limitation does not prevent all interested

persons (including those not owners of record) from appearing before the board of supervisors and voicing their objections."

As to the violation of any constitutional right in failing to make express provision for determining benefits as a condition of including territory within the district, the District Court of Appeal, in the case of *Hunt v. Manning*, 24 Cal. App. 44, 140 Pac. 39, in passing on this precise point, says:

"The act, it is true, does not provide that in determining the boundaries of the assessment district the board of supervisors shall include only property which it is considered will be benefited by the public work, but attention is called to no authority holding that such a provision is essential to the validity of such a statute. As the power to specially tax in the manner proposed by this act can only be exercised upon the theory that benefits will accrue to the property affected thereby, the presumption of good faith and fair action that accompanies the acts of public officers is entitled to be indulged, and it then must be assumed that the board of supervisors properly considered and determined that all of the property included within the established district would receive benefits from the doing of the work."

Furthermore, it is held in *Thomas v. Pridham*, supra, that this road district improvement act is not unconstitutional in permitting the assessment of property within the district formed under it according to its value, rather than in accordance with the benefits conferred. This covers all the points raised by appellants on the constitutionality of the act.

[4, 5] The allegation that the property was not benefited by the improvement does not aid the complaint. For the reasons heretofore stated, under the rule laid down in *Hunt v. Manning*, supra, it will be presumed from the action of the board in including these lands in the district that they determined that all the lands so included would be benefited. And it is well settled that when jurisdiction is given to a board to pass upon the question of benefits, the courts will not disturb their finding, unless there appears a clear and palpable abuse of such discretion. Quoting from *Duncan v. Ramish*, 142 Cal. 686, 76 Pac. 661, we find this expression of the rule:

"It is true that local assessments are said to be imposed on the theory that the property adjacent to the improvements receives special benefit therefrom. But this is a matter which is for the determination of the legislative authority of the state, acting through its established agencies for the government of political subdivisions, or directly by the Legislature of the state, as that body may see fit. It is enough for the local property owner that he has a right to be heard before the city council upon the question, by filing a petition of remonstrance, in the proceeding prescribed by law, setting forth his reasons why the improvement should not be made. * * * *Stats. 1891, 196; French v. Barber Asphalt*

Pav. Co., 181 U. S. 324 [21 Sup. Ct. 625, 45 L. Ed. 879]; *Spencer v. Merchant*, 125 U. S. 345 [8 Sup. Ct. 921, 31 L. Ed. 763]; *Brown v. Drain*, 187 U. S. 635 [23 Sup. Ct. 842, 47 L. Ed. 343]. * * * In *Brown v. Drain* [C. C.] 112 Fed. 582, the plaintiff sued the street superintendent and city treasurer of Los Angeles to obtain a decree declaring invalid the local assessment for a street improvement and to quiet his title to the land assessed. The Circuit Court of the United States in that case held that the offer of the plaintiff to allege and prove that the benefits accruing to his property from the improvements did not exceed \$2,000, whereas the assessment was over \$5,000, was wholly immaterial, and that these facts would not, if alleged and proven, affect the validity of the proceedings; the position of the court being that the determination of the city council on that subject, under the street work Act, was exclusive. This case was appealed to the Supreme Court of the United States, and the decision was affirmed by that court on the authority of *French v. Barber Asphalt Pav. Co.*, 181 U. S. 324 [21 Sup. Ct. 625, 45 L. Ed. 879], and the other like cases above cited. * * * The question may therefore be considered as absolutely settled, and the decision in the *Norwood Case* [172 U. S. 269, 19 Sup. Ct. 187, 43 L. Ed. 448], as thoroughly discredited, although not expressly overruled."

The further allegation of the complaint, that the assessment was levied upon the lands of appellants without reference to any ascertainment of the benefits to be derived by such lands from the improvements, does not entitle them to relief, for the reason that the assessment is authorized under the act in question according to the value of the property, rather than in accordance with the benefits conferred. As already pointed out, the validity of the ad valorem assessment under this road district improvement act is upheld in *Thomas v. Pridham*, supra. In *Emery v. San Francisco Gas Co.*, 28 Cal. 346, the court, speaking through Mr. Justice Sawyer, says:

"The result of our investigation is that there is no restriction in our Constitution upon the power of the Legislature to impose assessments to defray the expenses of public improvement in the nature of grading and plankng streets, upon the property supposed to be benefited thereby in any district designated by the Legislature, or the proper officers of municipal governments acting under the authority of law, and that it is authorized to apportion the amount to be raised according to value, according to the benefits received, in proportion to frontage or the superficial contents, or to adopt any principle of apportionment that can be referred to the general sovereign right of taxation."

Under the act in question here the ad valorem assessment was provided for.

[8-8] There is one limitation on the power of the supervisors, or whatever board is intrusted with the discretion to form an improvement district and determine the lands to be included therein. The discretion grant-

ed is not arbitrary. If the conditions shown by the record, or coming within the judicial knowledge of the court, are so unreasonable as to outrage the common sense of fairness and justice, the courts may interfere. *Spring Street Co. v. City of Los Angeles*, 170 Cal. 24, 148 Pac. 217, L. R. A. 1918E, 197; *Lent v. Tillson*, 72 Cal. 404, 429, 14 Pac. 71; *Iowa Pipe & Tile Co. v. Callanan*, 125 Iowa, 358, 101 N. W. 141, 67 L. R. A. 408, 108 Am. St. Rep. 311, 3 Ann. Cas. 7. An attempt against the will of the owners to curb and sidewalk a remote and unoccupied quarter section of land in the sagebrush, and levy assessments therefor in excess of the value of the property, would be open to attack, irrespective of the closest adherence to the forms of law providing for such "improvement," unless the owners had slept upon their rights and were estopped thereby. Appellants here rely upon some such condition, in alleging in their complaint that their lands are farming lands, used and acquired solely for farming purposes; that only four families are residing thereon; that the construction of the improvements are of no benefit, but a detriment to their property, by reason of impeding ingress and egress to and from the same; and that the aggregate of the assessments will amount to \$5,842.70 upon lands, the assessed value of which only amounts to \$6,390. It does not, however, appear from the facts pleaded, nor from the record presented, that the surroundings and conditions of these and other lands of the road improvement district in question are such as to show the action of the supervisors an obvious abuse of discretion, in including them in the district as lands to be benefited by the proposed improvement. And, moreover, it does not appear that appellants filed any written protest to the organization of the district, or made any objection to the inclusion of their lands therein. They must be deemed to have submitted themselves to the jurisdiction of the board of supervisors in the determination of the necessity for the improvements for which the district was organized. *Duncan v. Ramish*, supra; *United Real Estate, etc., Co. v. Barnes*, 159 Cal. 242, 113 Pac. 167; *Dillingham v. Welch* (Sup.) 178 Pac. 512.

We find nothing in the authorities cited by appellant, in so far as they apply at all to the conditions presented on this appeal, inconsistent with the conclusions indicated in this opinion. The citations to United States Supreme Court decisions, referred to us by appellant in lieu of a closing brief, not previously cited—*Myles Salt Co. v. Commissioners*, 239 U. S. 478, 36 Sup. Ct. 204, 60 L. Ed. 392, L. R. A. 1918E, 190; *Houck v. Little River Drainage District*, 239 U. S. 254, 36 Sup. Ct. 58, 60 L. Ed. 266; and *Fallbrook Irrigation District v. Bradley*, 184 U. S. 112, 17 Sup. Ct. 58, 41 L. Ed. 369—go no further than to hold that the courts will review the

discretion of the local board to whom authority to act in the premises has been delegated only in the event of palpably arbitrary and plain abuse; as, for example, the inclusion of lands in a drainage or irrigation district which, from their topographical situation, could not be drained or irrigated by the proposed system.

The judgment is affirmed.

We concur: FINLAYSON, P. J.; THOMAS, J.

(42 Cal. App. 725)

BARR v. BRANSTETTER et al. (Civ. 2008.)

(District Court of Appeal, Third District, California. Aug. 16, 1919.)

1. APPEAL AND ERROR §219(2)—FINDINGS NOT OPEN TO ATTACK FOR FIRST TIME ON APPEAL.

In an action involving disputed water rights, where plaintiff, in referring to defendants' ditch, stated that they cleaned it out or repaired it, and that they turned in water, etc., a finding that defendants turned into the ditch more than a certain amount of water and thereby caused the lands of plaintiff to be overflowed, etc., is not open to attack for the first time in the appellate court on ground that plaintiff's testimony that "they" did certain acts did not refer to defendants.

2. WATERS AND WATER COURSES §152(8)—FINDING AS TO AMOUNT OF WATER USED IN IRRIGATION WARRANTED.

Evidence held to warrant a finding that 121.3 inches of water was all that had been used by defendants in the irrigation of their lands.

3. APPEAL AND ERROR §1011(1)—FINDINGS OF JUDGE ON CONFLICTING EVIDENCE CONTROLLING.

In an action tried to the court, findings on conflicting evidence are controlling on appeal.

4. WATERS AND WATER COURSES §152(8) — EVIDENCE SUSTAINING ALLOWANCE OF WATER FOR IRRIGATION.

In an action involving disputes as to water rights and to enjoin defendants from turning into their ditch over plaintiff's lands more than a certain amount of water, findings that the amount allowed defendants was sufficient for the irrigation of their premises, etc., and that they had enlarged the ditch over plaintiff's lands, held warranted.

5. APPEAL AND ERROR §1071(1)—ALLOWANCE OF WATER SUBJECT TO DEFENDANT'S RIGHTS HARMLESS AS TO HIM.

In an action involving disputed water rights, where defendants were given prior right to a specified amount of water, a finding that plaintiff was entitled to a specified amount of water is not prejudicial to defendants, for plaintiff's rights were made subject to those of defendants.

6. WATERS AND WATER COURSES §143—DEFENDANT CONFINED TO WATER ALLOWANCE REGARDLESS OF SIZE OF DITCH.

Where defendants were entitled to only 121.3 inches of water for irrigation purposes, they were confined to that amount, regardless of the size of their ditch.

7. WATERS AND WATER COURSES §152(7) — EVIDENCE ADMISSIBLE ON QUESTION OF FLOODING PLAINTIFF'S LAND.

In an action involving disputed water rights and to enjoin defendants from diverting into their ditch over plaintiff's lands more than a certain amount of water, evidence that on diversion of a greater amount lands lying lower than those of plaintiff were overflowed, whereupon defendants widened their ditch, held admissible.

8. EVIDENCE §215(1), 272—OF WIDENING OF DITCH TO ACCOMMODATE EXCESSIVE FLOW OF WATER ADMISSIBLE.

In an action involving disputed water rights, a certified copy of an application filed by plaintiff with the state water commission for an increased appropriation of water is not admissible as a declaration by plaintiff against interest; such application merely being an attempt by plaintiff to lawfully obtain a greater amount of water than he was already entitled to, and was not an admission that he had no right to any of the water.

9. DAMAGES §100—MEASURE OF DAMAGES FOR OVERFLOWING LANDS.

In an action involving disputed water rights, where plaintiff sought damages for the flooding of his lands when defendants turned an increased amount of water into their ditch, held, that the measure of damages for the flooding of the lands was not the fair rental value of the property overflowed, but under Civ. Code, § 3333, was an amount which would compensate for all the detriment caused thereby.

10. WATERS AND WATER COURSES §152(11)—ALLOWANCE OF WATER MEASURED UNDER FOUR-INCH HEAD PROPER.

Notwithstanding St. 1901, p. 680, defining a miner's inch, a judgment in an action involving disputed claims to water for irrigation purposes, which allowed defendants 121.3 inches of water measure under a 4-inch pressure, is not open to attack on the ground that defendants, who claimed a greater number of miner's inches, were entitled to a measurement of their water under a 6-inch head.

11. WATERS AND WATER COURSES §179(1)—COMPLAINT TO RESTRAIN FLOWING OF PLAINTIFF'S LAND SUFFICIENT.

A complaint seeking to enjoin defendants from diverting an increased amount of water into their irrigation ditch over plaintiff's lands, which, following Code Civ. Proc. § 428, contained a statement of facts constituting the cause of action in an ordinary concise manner, and which averred that defendants threatened to make enlargements of the ditch, followed by statements as to damage which would result, is not open to attack on the ground that there was no allegation that defendants threatened to make any material enlargement of the ditch.

**12. WATERS AND WATER COURSES §—179(1)—
COMPLAINT TO RESTRAIN FLOWING OF PLAINTIFF'S LANDS SHOWING IRREPARABLE DAMAGE.**

A complaint seeking to enjoin defendants from increasing the amount of water diverted into their drainage ditch over plaintiff's lands, which alleged that plaintiff's lands would be overflowed and rendered unfit for cultivation, was a sufficient statement of irreparable injury.

Appeal from Superior Court, Siskiyou County; James T. Lodge, Judge.

Action by A. J. Barr against Martha E. Branstetter and others. From a judgment for plaintiff, defendants appeal. Affirmed.

Braynard & Kimball, of Redding, for appellants.

Taylor & Tebbe, of Yreka, and Henry McGuinness, of Sisson, for respondent.

HART, J. Plaintiff brought the action to have defendants enjoined from diverting into a certain ditch which crossed plaintiff's lands more than 121 inches of water measured under a 4-inch pressure and from enlarging said ditch. Judgment was entered in favor of plaintiff as prayed for in the complaint, except that the amount of water to which defendants were entitled was found to be 121.3 inches measured under a 4-inch pressure. The appeal is by defendants from said judgment.

It was alleged in the complaint, which was filed June 6, 1917, that plaintiff was the owner of 80 acres of land (describing it) in Siskiyou county, upon which he raised crops of hay, fruit and vegetables; "that defendants Martha E. Branstetter, Mary McKenzie, John B. Stuck, and Philip Reed are the owners of a certain water ditch which diverts the waters of Cold creek to the amount of 121 inches measured under a 4-inch pressure over and across the said lands of plaintiff," which said ditch has been used by defendants for diverting said 121 inches of water during the time plaintiff and his predecessors have owned the land; "that during the year last past defendants, disregarding plaintiff's rights, have at times turned into said ditch, where the same crosses the land of plaintiff, more than 121 inches measured under a 4-inch pressure of the waters of said Cold creek, and said waters have overflowed a large portion of plaintiff's lands to such an extent that said lands have been covered with water and have been rendered unfit for cultivation," to the damage of plaintiff in the sum of \$300.

Defendants filed an answer and cross-complaint, in which they denied that any more than 25 acres of plaintiff's land was agricultural land or had been cultivated, and alleged that a portion of plaintiff's land was rocky and unfit for cultivation; denied the

allegation of the complaint that the four defendants named therein "were limited to the amount of 121 inches" of water, but alleged that they were entitled to 272 miner's inches of water and to divert the same over plaintiff's lands by means of said ditch, and set up adverse possession thereto. Defendants denied the allegation of the complaint which stated that they had turned into the ditch more than 121 inches of water and had thereby overflowed plaintiff's land, but alleged that they were entitled to turn into said ditch 272 miner's inches of water.

The cross-complaint of defendants set up affirmatively the ownership by said defendants of certain lands and the ownership of said Cold creek ditch, and also their right to use 272 miner's inches of water on said lands, which are dry and practically useless without such water; "that the amount of water reasonably necessary for the proper irrigation and development of said lands of said defendants, during the irrigation season of every year, is the whole of the natural flow of said Cold creek at the head of said Cold creek ditch, to wit, 272 miner's inches of water;" that plaintiff's claims to divert waters are wholly without right, and that during two years last past, "by means of dams, ditches, and other obstructions, he has wrongfully, unlawfully, and without right diverted large quantities of water, * * * and permitted his cattle to trample down and obstruct said Cold creek ditch where said ditch crosses his lands," thereby depriving said defendants of the use of said water, to their damage in the sum of \$3,000.

[1] 1. Appellants attack several findings of the court as not supported by the evidence, but an examination of the record has convinced us that there is no merit in the contention. Findings 5, 6, and 7 are first referred to. They were to the effect that "defendants have turned into said Cold creek ditch * * * more than 121.3 inches measured under a 4-inch pressure, and thereby caused a portion of the lands of plaintiff * * * to be overflowed and covered with water"; that "defendants continued to turn" water into said ditch "in such quantities as to overflow plaintiff's lands and to damage the same and render said lands unfit for cultivation"; and that "plaintiff was damaged by the acts of defendants in the sum of \$100."

The point made by appellant is that there is no evidence that *defendants* did the acts referred to in said findings. We think, though, that those findings derive sufficient support from the following testimony given by plaintiff:

"The water was turned in on the 14th day of May, and I always cut the ditch—the head of the ditch was left open at the intake and the water came down and washed over my land. I

cut the ditch in one place, where it would run over the high ground and not do any damage, down into the pasture, so it wouldn't damage the property, and as they cleaned it out or repaired it in the spring, when it was time to turn the water in, they always repaired the ditch. Well, it seems as though they turned the water in and didn't clean out the ditch, and I supposed they had their ditch in repair, and the water run there until the 24th of May."

It is true that the plaintiff did not in so many words say the *defendants* turned the water into the ditch. His language was that *they* did so. The allegation in the complaint, with which the court was, of course, familiar, was that "defendants * * * have at times turned into said ditch" water, etc. If the court or counsel had entertained any doubt as to whom the witness was referring by his answer, it is reasonable to suppose the uncertainty would have been cleared up at the time. But the defendants at the trial, did not make the objection now urged, and it cannot be made for the first time in this court.

[2] It is next claimed that there is no evidence to support the finding that 121.3 inches of water is all that has been used by defendants for the irrigation of their lands. On direct examination, plaintiff testified that no greater quantity than 121 inches of water ever did run through the ditch. It appeared on his cross-examination that he was not a civil engineer, and that he had had no experience in measuring ditches or the flow of water, and appellants claim that his estimate was a mere guess and entitled to no credence. But the record shows that Harvey J. Sarter, the county surveyor of Siskiyou county, testified that he made surveys and measurements in June and September, 1917, and in April, 1918, and that the water flowing in the ditch on June 1, 1917, was 121.3 inches. This testimony is sufficient to support the finding, and in view of the testimony of the surveyor it becomes immaterial whether plaintiff was or was not qualified to express an opinion upon the subject.

[3, 4] As to the finding that 121.3 inches of water was sufficient for defendants' use, appellants criticize the testimony of the plaintiff and of his witness, Henry B. Ream. It may be conceded that the testimony of these witnesses on this point was of little value. The testimony as to the amount of land cultivated and irrigated by defendants was conflicting, and the court's finding in that regard must control. There was received in evidence a table prepared by the United States Agricultural Weather Bureau showing how many acre-feet of water are considered necessary for irrigation of certain crops on various kinds of soil. Applying the amounts stated in this table to the requirements of defendants' lands, it appeared that 121.3 inches would be about double the necessary amount of water. It was alleged in the an-

swer and cross-complaint that "at the time of the commencement of this action the said Cold creek ditch was, and is, in first-class repair and order as an irrigation ditch." As seen, the action was commenced on June 6, 1917, and the testimony of the surveyor, Sarter, was that when he measured the ditch on June 1st it was full of water and overflowing at points.

Appellants next complain of the finding that the ditch across plaintiff's lands was enlarged, so that its carrying capacity was doubled. There was considerable testimony as to the ditch having been widened; the witnesses varying in their estimates as to the width from 4 to 27 inches. Appellants claim that what they did was merely to clean out the ditch. C. R. Weigel, a witness for defendants, testified that after the ditch had been enlarged, and on June 19, 1917, he made measurements and found that the carrying capacity of the ditch across plaintiff's land was about 272 miner's inches of water. The witness Sarter testified that he found the water in the ditch to be as follows: On June 29, 1917, 162.29 miner's inches; on September 16, 1917, 164.55 miner's inches; on April 28, 1918, 131.47 miner's inches. Sarter testified that when he made these measurements the ditch was not full of water.

[5] As to the finding that plaintiff is the owner of and entitled to 14 miner's inches of water, the plaintiff testified that about 14 years prior to the trial he had constructed a ditch about 2 feet and 8 or 10 inches deep across the corner of his land for about 600 feet; that he had used it every year since, and that when the creek was lowest the ditch contained about 27 inches of water. We cannot perceive how defendants would be injured by the finding. The court gave to them the prior right to 121.3 inches, and whatever amount was awarded to plaintiff was subject to that right.

[6] 2. Appellants claim that the court should have made a finding as to what the carrying capacity of the Cold creek ditch was across the land of plaintiff. In the cross-complaint it was alleged that the carrying capacity of the ditch was 272 miner's inches of water, and testimony was introduced tending to prove the allegation. It is contended that this was a material issue and should have been found upon. We think, however, that the carrying capacity of the ditch was not material. While it may have been capable of carrying 272 inches, the court found, upon what we regard as sufficient evidence, that defendants were entitled to 121.3 inches only; that being the amount that had been used by them for the irrigation of their lands. They were therefore confined to the use of that amount, regardless of what was the size of their ditch.

[7] 3. Over the objection of defendants, plaintiff was permitted to show that, on September 4, 1917, the Cold creek ditch over-

flowed on the land of one Mose Zelle, and that defendants widened the ditch through Zelle's land from 6 to 18 inches for a distance of 413 feet. Zelle's land is the next farm below that of plaintiff, and between the two tracts there is a fall or drop of about 20 feet. Respondent disclaims any right to damages by reason of the overflow of Zelle's land, but maintains that the testimony was pertinent to show that defendants had turned in so much more water than they had in former years that it could not be carried off Barr's place and into Zelle's without widening the ditch through Zelle's place.

The evidence was properly admitted. There was testimony showing that in former years the ditch through Zelle's land had always carried the water that was turned in it, and there had never been an overflow. It is true that, on cross-examination, Zelle testified that, prior to the overflow, 30 or 40 head of cattle had been pastured on the place and had trampled the ditch; but the damage done by the cattle could have been remedied without widening the ditch to the extent that it was widened. The inference seems irresistible that the widening of the ditch was for the purpose of accommodating the increased flow of water which Sarter testified he found in the ditch on September 16, 1917, 12 days after the overflowing of Zelle's land.

[8] 4. Defendants offered in evidence a certified copy of an application, filed by plaintiff with the state water commission in 1917, showing that construction work would be commenced about May 15, 1917, and that the notice of appropriation was posted before the commencement of the irrigation season of 1917, for the purpose of diverting 40 miner's inches of water from Cold creek. The document was offered as a declaration against interest. Plaintiff objected to its introduction as not being a declaration against interest and the court sustained the objection. Appellants cite 16 Cyc. 954, as follows:

"Conduct of a party inconsistent with his present contention may tend to show that the latter is an afterthought, and proof of such contention is therefore competent as an admission"

—and contend that under that rule the offered evidence was improperly rejected. To this, respondent replies:

"An application for water cannot be construed as an admission that the plaintiff had no water right in Cold creek. Any action of the commission would not affect existing rights, and plaintiff or any other party could have a right to make an application for the surplus water of Cold creek or any other creek."

We agree with the position taken by respondent. It is established by the findings of the court that plaintiff was entitled to 14 inches of the water of the creek. His application for 40 inches, or any other amount,

could not affect his title to the 14 inches. Nor was the application an admission that he had no right to any of the water. It was simply an attempt legally to secure, if he could, more water than he at that time had. The objection to the admission in evidence of the application was properly sustained.

[9] 5. The plaintiff testified that he had been damaged in the sum of \$300 from the overflowing and swamping of his land. Appellants insist that the admission of said testimony was error and that the true measure of damages would be the fair rental value of the ground which was overflowed, citing *Crow v. San Joaquin, etc., Irrigation Co.*, 130 Cal. 309, at pages 314, 315, 62 Pac. 562, 1058. That case was an action for damages arising from a breach of contract, and the Supreme Court stated that the measure of damages was the detriment caused by the breach, as provided in sections 3330 and 3333 of the Civil Code. The citation of section 3330 was probably an error, as there is no such section. It was probably intended to be section 3300, which prescribed the measure of damages for breach of contract. Section 3333 covers the breach of obligation other than contract and provides that it "is the amount which will compensate for all the detriment proximately caused thereby, whether it could have been anticipated or not."

In the cases of *Dennis v. Crocker-Huffman, etc., Co.*, 6 Cal. App. 58, 91 Pac. 425, and *Strecker v. Gaul*, 35 Cal. App. 619, 170 Pac. 646, we held that the measure of damages for destruction of growing crops was that laid down by section 3333 of the Civil Code. While the testimony of the plaintiff was not as complete as it should have been as to the value of crops destroyed, he did testify as to potato ground and pasture being rendered useless and alfalfa being "killed out" by the water. The court evidently considered his estimate of \$300 damages as too high, for the judgment gave him \$100 for this item.

[10] 6. Appellants contend that they "are entitled to a judgment giving them a measurement of their water under a 6-inch head," while the court gave them 121.3 inches of water measure under a 4-inch pressure. Our statute defines a miner's inch of water as follows:

"The standard miner's inch of water shall be equivalent or equal to one and one-half cubic feet of water per minute, measured through any aperture or orifice." *Stats.* 1901, p. 660.

Of this statute, we had occasion to say, in *Lillis v. Silver Creek, etc.*, *Water Co.*, 32 Cal. App. 668, 674, 163 Pac. 1040, 1043:

"This makes the miner's inch equivalent to one-fortieth of a second-foot. Prior to the adoption of the above statute, an inch or miner's inch in this state was defined as the quantity of water passing through an orifice one inch

square under a 4-inch pressure, which would make the inch equivalent to one-fiftieth of a cubic foot per second."

In a work entitled "The Theory and Practice of Surveying," by J. B. Johnson, the following is said regarding the miner's inch:

"This is an arbitrary standard, both as to method and as to volume of water discharged. It rests on the false assumption that the volume discharged is proportional to the area of the orifice under a constant head above the top of the orifice. Its use grew out of the necessities of frontier life in the mining west, and should now be discarded in favor of absolute units. The miner's inch is the quantity of water that will flow through an orifice 1 inch square, under a head of from 4 to 12 inches, according to geographical locality. * * * When the miner's inch can only be defined as a certain number of cubic feet per minute, it is evidently no longer of service and should be abandoned."

In Kinney on Irrigation and Water Rights (2d Ed.) vol. 2, § 890, it is said that in arriving at the quantity of water prescribed by the act of 1901 as constituting a miner's inch, "by computation the head of water must be under a 6-inch pressure."

It will thus be observed that, if the award to defendants had been 121.3 "miner's inches" of water, they would receive approximately 50 per cent. more water than they would if the number of inches were measured under a 4-inch pressure. But water users in the Western states have long been accustomed to measuring their water under the old method, and it is a fixed and ascertainable quantity in California. The plaintiff's surveyor in the present case made all his measurements "under a 4-inch pressure" and the court's award of that amount to defendants must control, though it is quite apparent that in such cases as this it would be advisable that any reference to a miner's inch of water should be "one and one-half cubic feet of water per minute," as a miner's inch is defined by the law, without specifying any particular pressure under which it should be measured.

[11] 7. It is finally contended that defendants' demurrer to the complaint should have been sustained for the following reasons:

"(1) There is no allegation in the complaint that the defendants threatened to make any material enlargement of the ditch on plaintiff's land. (2) There is no allegation showing how or why the overflow from the ditch on plaintiff's land would cause plaintiff irreparable injury."

As to the first point: The complaint contains "a statement of the facts constituting the cause of action, in ordinary and concise language." Code Civ. Proc. § 426. The allegation therein that defendants threaten "to make enlargements of said ditch" is followed by statements as to the damage which will

result to plaintiff in case the enlargements are made, which are sufficient to show that the damage would be serious. Inasmuch as the allegation is that such damage will flow from the "enlargements" previously mentioned, it would seem to be of no consequence that the word "material," as qualifying the "enlargements," should have been omitted.

[12] As to the second point, the appellants cite *City Store v. San Jose-Los Gatos, etc., Co.*, 150 Cal. 277, 280, 88 Pac. 977, 978, and other cases, to the effect that—

"General allegations of irreparable injury are never sufficient; the facts must be stated from which it will appear that irreparable injury will probably follow."

The complaint before us contains sufficient allegations in this respect. It is therein stated that the overflowing of plaintiff's lands will render the same unfit for cultivation and for raising crops because thereby they will be made too wet for cultivation. In connection with the allegation that said land is agricultural land and that plaintiff for 10 years has cultivated said land and raised crops of hay, fruit, and vegetables thereon, and that the land is valuable for such purposes, nothing further, in our opinion, is required to show that the damage which would probably result to plaintiff from the threatened acts of the defendants would cause him irreparable injury.

The demurrer to the complaint was properly overruled.

The judgment is affirmed.

We concur: CHIPMAN, P. J.; BURNETT, J.

(42 Cal. App. 796)

JIRKU v. BROD. (Civ. 3013.)

(District Court of Appeal, First District, Division 1, California. Aug. 25, 1919.)

1. MALICIOUS PROSECUTION §16—PLAINTIFF MUST PROVE MALICE AND WANT OF PROBABLE CAUSE.

In actions for malicious prosecution, plaintiff to recover must establish not only malice but want of probable cause, and the two elements must concur.

2. MALICIOUS PROSECUTION §71(2)—WHERE EVIDENCE NOT CONFLICTING, WANT OF PROBABLE CAUSE QUESTION FOR COURT.

Where there is no conflict in the testimony in an action for malicious prosecution, the question whether or not the evidence introduced shows a want of probable cause is for the court, and it would be error to submit it to the jury.

3. MALICIOUS PROSECUTION §22—RELIANCE IN GOOD FAITH UPON ADVICE OF COUNSEL AS AFFECTING PROBABLE CAUSE.

Where defendant before instituting a prosecution against plaintiff for criminal libel con-

sulted an attorney at law in good standing, and also an assistant prosecuting attorney, and, upon the advice of each that a prosecution would lie, commenced such prosecution honestly relying on such advice, he acted upon probable cause.

4. MALICIOUS PROSECUTION §—18(2)—CIRCULAR PUBLISHED AS CONSTITUTING PROBABLE CAUSE FOR PROSECUTION.

In an action for damages for malicious prosecution of plaintiff for criminal libel, evidence including a circular containing the alleged libelous matter *held* of itself sufficient to constitute probable cause for the prosecution.

Appeal from Superior Court, Los Angeles County; Charles Monroe, Judge.

Action by John Jirku against J. M. Brod. Judgment for defendant, and plaintiff appeals. Affirmed.

A. R. Holston, of Los Angeles, and S. C. Schaefer, of San Pedro, for appellant.

Hudson P. Hibbard, of Los Angeles, for respondent.

WASTE, P. J. This is an action against defendant for a malicious prosecution, for causing the arrest of the plaintiff upon a criminal charge. At the conclusion of all the testimony in the case, the court, without hearing argument on the evidence, and of its own motion, instructed the jury to return a verdict for the defendant, which the jury did. Judgment was entered in favor of the defendant, and plaintiff appeals. The action of the court in instructing the jury to return a verdict for the defendant is the only error of which the appellant complains.

Plaintiff published and circulated a statement in the Bohemian language, in which he charged, among other things, that defendant did not speak the truth. The defendant thereupon made complaint before the clerk of the police court of the city of Los Angeles, charging plaintiff with having committed the crime of criminal libel. Plaintiff was arrested and imprisoned for a space of several hours, finally obtaining his release upon giving bail. After due trial in the police court, of the city of Los Angeles, before a jury, plaintiff was acquitted of the charge, and was not further prosecuted.

It appears without contradiction, from the record, that before defendant caused the arrest of plaintiff he consulted a regularly admitted and practicing attorney at law, in good standing. To him defendant made a full, fair, and complete statement of all the facts within his knowledge, in relation to the alleged libel. On the advice of counsel, he further consulted the deputy city prosecutor of the city of Los Angeles, who was intrusted with such matters, and to whom defendant again made a full, fair, and complete state-

ment of all the facts relating to the matter, and submitted the objectionable publication. Defendant was advised by the attorney at law, and by the deputy city prosecutor, and by each of them, that an offense had been committed, and that there was probable cause to believe the plaintiff guilty of the offense, whereupon defendant, acting in entire good faith, believing such advice to be true, appeared before the clerk of the police court, and made the complaint which led to the arrest and trial of plaintiff. In addition to these facts, it also appears that before seeking the advice of the attorney, and of the deputy city prosecutor, defendant believed that the plaintiff had committed, and was guilty of, the crime of criminal libel.

[1] The trial court was therefore justified in directing the jury to return the verdict in favor of the defendant. There was no want of probable cause shown for the arrest of plaintiff. No principle is better established than that in actions for malicious prosecution the plaintiff must, in order to recover, establish, not only malice, but want of probable cause. These two elements are essential, and they must concur, or the action will not lie. *Potter v. Seale*, 8 Cal. 224; *Smith v. Liverpool, etc., Ins. Co.*, 107 Cal. 432-438, 40 Pac. 540. One of the elements essential to maintain the action not being present, plaintiff had not made out his case.

[2] Where there is no conflict in the testimony, the question whether or not the evidence introduced shows a want of probable cause is for the court to decide. It is error in such cases, where there is no proof of want of probable cause, to submit any question to the jury. *Davis v. Pac. Tel. & Tel. Co.*, 127 Cal. 312, 319, 57 Pac. 764, 59 Pac. 698.

[3] Defendant was entitled to the benefit of the rule announced in the foregoing cases that where one, before instituting such a prosecution, has, in good faith, consulted an attorney at law in good standing, particularly if such attorney be one charged with the prosecution of public offenses, and has stated to him all the facts in the case, and has been thereupon advised by such attorney that a prosecution will lie, and such person has acted honestly on that advice, this, of itself, constitutes probable cause. *Johnson v. Southern Pacific Co.*, 157 Cal. 333, 338, 107 Pac. 611.

[4] Furthermore, the evidence in the case, consisting in part of the circular containing the alleged libelous matter, was of itself sufficient to constitute probable cause for the prosecution.

The judgment is affirmed.

We concur: RICHARDS, J.; BARDIN, Judge pro tem.

(42 Cal. App. 785)

HUGHES v. SILVA. (Civ. 2923.)

(District Court of Appeal, First District, Division 1, California. Aug. 22, 1919.)

1. TRUSTS ¶44(1) — EVIDENCE SUPPORTING FINDINGS OF TRUST IN LAND.

In an action to impress a trust on land, evidence held to support judgment for plaintiff.

2. TRUSTS ¶373 — COMPLAINT ON EXPRESS TRUST AND FINDINGS OF TRUST BY OPERATION OF LAW.

In an action to enforce a trust in lands, an amended complaint predicated on the averment of an express trust held not inconsistent with findings predicated upon a joint adventure for the purchase of the lands creating a trust by operation of law, where the findings follow almost the precise language and averments of the complaint, and further set out in *hæc verba* two written declarations of trust.

3. TRUSTS ¶17, 18(1)—ORAL UNDERSTANDING FOR PURCHASE OF LAND MAY CREATE AN ENFORCEABLE TRUST.

An oral understanding between two parties for the purchase from others of land to be paid for by cutting the timber therefrom may give rise to an enforceable trust in favor of one of them.

4. TRUSTS ¶21(1)—DECLARATIONS OF TRUST SHOWING EQUITABLE TRUST IN PROPERTY INVOLVED.

Where parties purchased property through the efforts of one of them to be paid for out of timber cut therefrom, declarations of trust in favor of one of them with reference to a loan secured to further the enterprise held to show an equitable trust in all the property in question.

5. TRUSTS ¶365(2) — FAILURE TO CLAIM TRUST OR ACCOUNTING INSUFFICIENT TO SHOW LACHES.

Where plaintiff and defendant purchased land in defendant's name for which plaintiff borrowed money, that plaintiff made no claim for an accounting or declaration of trust during four years when the relations between the parties were intimate and cordial and consisted of interchanges of courtesies and services, and the property had not increased in value, did not show laches.

Appeal from Superior Court, Sacramento County; Wm. M. Finch, Judge.

Action by Joseph W. Hughes against Charles F. Silva, in which Nellie S. Hughes, as executrix of the plaintiff's last will and testament, was substituted for plaintiff. Judgment for plaintiff, and defendant appeals. Affirmed.

Devlin & Devlin, of Sacramento, and Sullivan & Sullivan and Theo. J. Roche, of San Francisco, for appellant.

Arthur C. Huston, of Woodland, and Hughes & Bradford, of Sacramento, for respondent.

RICHARDS, J. This is an appeal from a judgment in the plaintiff's favor in an action wherein the present plaintiff's predecessor in interest sought to impress a trust in his favor as to several tracts of land lying in what is known as the Sutter Basin, in the county of Sutter, state of California. The particular tract of land as to the proceeds of which the judgment was in plaintiff's favor was known and is described in the record herein as the "Wilcoxson Point ranch," consisting of approximately 2,600 acres of land, and was originally owned by one Jackson Wilcoxson, and upon his death, in the early eighties, became the property of the Wilcoxson Estate. The present plaintiff's predecessor in interest, Joseph W. Hughes, was one of the heirs of said estate, his mother having been a sister of Jackson Wilcoxson, but his interest therein derived from this source was comparatively small, being only a one-ninetieth interest therein. Joseph W. Hughes was in those years an attorney at law in active practice in the city of Sacramento. He was not, however, the attorney for the estate or any of its heirs other than himself, but at times, and as a matter of accommodation, looked after the interests of the heirs in such of the property of the estate as seemed to require attention. Thus it was that in the year 1884 Joseph W. Hughes, for a period of about four months, was upon the Wilcoxson Point ranch looking after the property at the request of certain of the heirs. While there upon that occasion he first met and became well acquainted with Charles F. Silva, the defendant herein, who was then an employé upon the ranch. Some time thereafter said Charles F. Silva came to the said Hughes, who had in the meantime become one of the superior judges of the county of Sacramento, seeking to obtain a contract for the cutting of wood upon the ranch at a dollar a cord stumpage for the wood. Through the offices of Judge Hughes, Silva was able to secure such a contract, and began cutting the wood thereon under this contract. At that time this piece of property was not esteemed of great value, since it was subject to overflow during the major portion of the year, and aside from being occupied largely with timber was mainly usable for pasturage when not under water. During the year which followed the making of the woodcutting contract with Silva, he cut approximately 3,800 cords of wood upon the property, and Judge Hughes and he went together to the ranch to measure the wood which had thus been cut before its removal from the premises. While they were there upon this mission, Silva, according to the testimony of Judge Hughes, proposed to him that they go in together and buy the property from the heirs of the estate for the price of \$5 per acre, and pay for it out of the wood which they could cut from it,

having the land left as their profit. Judge Hughes was agreeable to this proposition and undertook to present the matter to the rest of the heirs. He preferred, however, not to be known in the transaction because of his interest in the estate. At that time one George H. Wilcoxson, one of the heirs, held a general power of attorney from all the rest of the heirs residing outside of California and representing the bulk of the estate. Judge Hughes either wrote to him or saw him personally and laid Silva's proposition before him. It was substantially to the effect that Silva was willing to pay \$5 an acre for the property, or in round figures \$13,000. In response to this proposition, George H. Wilcoxson stated he was satisfied the heirs would be willing to sell at that figure, and undertook to lay the matter before them by letter. In a short time he reported to Judge Hughes that he was authorized to sell the property at the price named, but would require a payment of \$4,000 in cash. When this was reported to Silva, he agreed to it; but, when the transaction was about ready to be consummated, Silva was unable to raise the full amount of the cash payment required, whereupon Judge Hughes borrowed \$1,400 from one Adolphe Jean, giving his note therefor. He also at the same time wrote out a declaration of trust for Silva to sign, declaring that he (Silva) held one-half of the said ranch in trust, first, as security for the payment of the amount of Judge Hughes' loan from Jean, and second, upon its payment to convey one-half of the ranch to Judge Hughes.

Having thus arranged for the initial payment upon the purchase price of the ranch, a conveyance was made by all of the Wilcoxson heirs to Silva, Judge Hughes joining with the rest in this conveyance. Some emphasis is sought to be laid by appellant upon the proposition that a fraud in some sort was perpetrated by Judge Hughes upon the other heirs of the Wilcoxson estate through his concealment from them in the course of this transaction of the fact that he was an interested party with Silva in the purchase of the property. We attach no significance to this suggestion, since it nowhere appears, either that Judge Hughes used any advantage which his position as an heir or otherwise gave him to promote the transaction, apparently with Silva, but really in part with himself, to their injury; nor that the price which Silva offered for the property was not the fair and full value thereof according to the then estimation of the value of similarly situated lands. So far as the record discloses, the Wilcoxson heirs, who were the only parties who could have been injuriously affected by any concealment of Judge Hughes' interest in the transaction with Silva, have never complained, and hence it does not lie in the mouth of Mr. Silva, who

jointly with Judge Hughes profited by the transaction, to urge that it was attended with any unfairness on the latter's part. The purchase of the Wilcoxson Point ranch having thus been consummated by the deed to Silva, dated March 15, 1899, the duty of paying the balance of the purchase price devolved apparently upon Silva in accordance with the understanding of the parties that the revenues to be derived from wood to be cut upon the land would suffice to pay its purchase price. Silva went into possession of the property and entered into various activities with respect to it, and also to other properties of like location and quality in the same region. He delivered wood to the river boats, and established a woodyard in Sacramento to which wood he had cut upon this and other properties in which he became interested was brought in launches or barges and there sold. Several years went by. The note which Judge Hughes had made to Adolphe Jean became due and was about to outlaw, when, in the year 1904, a new note was executed by Judge Hughes, and a new declaration of trust, in the main similar in terms to the former trust declaration, was executed by Silva. Several years more went by during which the activities of Silva were being extended in various directions and he was making considerable money, being aptly described by Judge Hughes in his deposition as "an energetic and thriving fellow." When the time arrived, in 1908, for the renewal of the Jean note, it was renewed by Judge Hughes by a writing to that effect upon it; but the declaration of trust was not then re-executed by Silva. In the year 1911 the Jean note was paid by Silva out of funds which, according to the contention and testimony of Judge Hughes, had been derived by him from the proceeds of the property. During all of these years the relations of the parties continued to be of a friendly and confidential nature. Judge Hughes from time to time rendered legal services of various kinds to Silva in connection with his varied activities, and for which, according to the testimony of the former, he made no charge and received no pay. On the other hand, Silva from time to time, according to his testimony, loaned Judge Hughes money, furnished him wood, and contributed to his election expenses. In the year 1912 the Wilcoxson Point ranch, in common with other like properties in that region, became greatly increased in value by reason of reclamation projects undertaken by the federal and state governments, aided by private enterprise, and looking to the drainage, protection and reclamation of the lands of the Sutter Basin. As a result of this increase in value, Silva was able in the latter year to make a sale of this ranch to the Sutter Basin Company for the sum of \$100,128.71. Not long thereafter Judge Hughes sought an accounting with

Silva, but being unable to obtain it, began the present suit.

In his complaint herein, filed in December, 1913, Judge Hughes undertook to set forth in a single cause of action his claim that a trust relation had arisen and existed between himself and the defendant Silva in respect to four separate tracts of land, embracing in all 6,263 acres lying in the Sutter Basin, which it was asserted in said complaint had been purchased by the latter pursuant to an understanding and agreement between himself and the defendant that the latter was to hold the legal title thereto but that Hughes was to be the equitable owner of an undivided one-half interest in said lands, and that said defendant had subsequently sold all of said lands for the price of \$50 per acre, realizing therefrom the sum of \$313,168, or thereabouts, of which said sum the plaintiff was entitled to have an accounting and an equitable division of one-half thereof. The plaintiff subsequently filed an amended complaint amplifying the averments of his original pleading into five separate causes of action. The first of these causes of action related to the lands above referred to as the Wilcoxson Point ranch; the other causes of action had reference to other tracts of land alleged to have been purchased and held by the defendant Silva under a like understanding as that above detailed as to the Wilcoxson Point ranch. The prayer of the plaintiff was for an accounting as to each and all of these properties. The answer of the defendant put in issue all of the material averments of this amended complaint. In the meantime Judge Hughes died, and his widow, as the executrix of his last will and testament, was substituted as the plaintiff herein. Upon the trial of the action the court made its findings sustaining the plaintiff's contention as to the existence of a trust relation as to the Wilcoxson Point ranch, and as the result of an accounting taken as to said property and the proceeds thereof found and decreed that the plaintiff was entitled to recover from the defendant the sum of \$45,175.40, as being one-half of the net amount realized by said defendant as the result of his holding, management and disposition of the Wilcoxson Point ranch. As to the tracts of land referred to in the other counts of plaintiff's amended complaint the findings and judgment of the court were in the defendant's favor, and as to these the plaintiff was held entitled to take nothing.

[1] The defendant has appealed from said judgment in so far as the same is in the plaintiff's favor. A voluminous record has been presented upon said appeal. From the large mass of testimony presented by said record the foregoing statement as to the facts of this case has been prepared by us as embracing a summary which is in harmony with the findings of the court and which supports said findings, and which is in

turn sustained by the testimony in the case. In so far, therefore, as the argument of the appellant upon this appeal is directed to his contention that the findings and judgment of the trial court are not supported by the evidence in the case, we hold without further discussion that this contention is without merit, in view of the substantial conflict in the testimony of the two original parties as to the facts pertaining to their relation and dealings in respect to the particular tract of land in question during a long series of years.

This brings us to a consideration of the appellant's several contentions as to the law of the case.

[2-4] The first of these is his contention that there is a variance between the plaintiff's amended complaint and the findings herein, in this, that said complaint is predicated upon the averment of an express trust in the lands in question, whereas the findings are predicated upon the fact that the parties engaged in a joint adventure for the purchase of said lands out of which a trust arose by operation of law. We are unable to discover the inconsistency of which the appellant complains. The findings of the court follow in almost their precise language the averments of the plaintiff's amended complaint. They then go further and set forth in *hæc verba* the two declarations of trust signed by Silva in connection with the loan from Adolphe Jean. That an oral understanding between two parties of the kind in question here may give rise to an enforceable trust in favor of one of them is abundantly supported by a long line of authorities in this state, of which the following are a few: *Brisson v. Brisson*, 75 Cal. 525, 17 Pac. 689, 7 Am. St. Rep. 189; *Bradley Co. v. Bradley*, 165 Cal. 237, 131 Pac. 750; *Younger v. Moore*, 155 Cal. 768, 108 Pac. 221; *Arnold v. Loomis*, 170 Cal. 95, 148 Pac. 518; *Lamb v. Lamb*, 171 Cal. 577, 153 Pac. 913; *Willats v. Bosworth*, 33 Cal. App. 710, 166 Pac. 357; and in the case last-cited this court held that such a trust could at the same time be an express and a resulting trust, and that the fact that the trustee of such trust had made a written declaration of trust did not change the character of the trust itself, but merely furnished additional proof of its existence. The criticisms which the appellant herein aims at the two written declarations of trust executed by him in connection with the making and renewal of the plaintiff's note to Adolphe Jean thus lose much of their force; but, apart from this, they are not justified by the terms of these writings taken as a whole, for, while it is true that they were made with express reference to the transaction with Adolphe Jean, they both expressly declare the existence of a trust entitling the plaintiff to an equitable interest in the property in question, and in its proceeds in the event of a sale of such interest in order to pay said

note, while the fact that the appellant and not the maker of the Jean note did eventually pay the same in no wise changes the situation, since according to the original understanding of the parties the entire purchase price of the property was to be paid out of itself, and this, according to the finding of the court, was what was actually and eventually done.

[5] The appellant's next contention is that the plaintiff's claim for accounting is barred by laches for the reason that between the years 1909 and 1913 he made no assertion of a claim of interest in the property nor made any demand for an accounting. The evidence abundantly shows, however, that during all these years the relation between the parties was intimate and cordial, consisting of interchanges of courtesies and services, and that down to a short time before the sale of the property its character and value had remained about the same as when it was purchased by them, and hence that there was no reason for a balancing of accounts between them. It was not, in point of fact, until the rather unexpected rise in the values of this and similarly situated property made its advantageous sale a possibility, and until it was actually sold to such advantage, that the occasion for an accounting and settlement between the parties arose; and it was only a short while after this that a demand for an accounting was made and refused and that the present action was instituted. We think the contention that the plaintiff was guilty of laches under these circumstances cannot be sustained.

The other contentions of the appellant herein we find upon a careful examination of the quite elaborate briefs of counsel to be either covered by the point that they are not reviewable because based upon conflicting evidence, or by the other points already discussed, or else that they are not of themselves of sufficient importance to warrant consideration or to justify a reversal of the case.

The judgment is affirmed.

We concur: WASTE, P. J.; KERRIGAN, J.

(43 Cal. App. 45)

MATHEWS v. SAVINGS UNION BANK & TRUST CO. (STATE, Intervener).
(Civ. 2807.)

(District Court of Appeal, First District, Division 2, California. Aug. 28, 1919. Rehearing Denied by Supreme Court Oct. 23, 1919.)

1. CONSTITUTIONAL LAW §48—CONSTRUCTION FAVORING VALIDITY OF STATUTE.

Unless the language of a statute is express and unmistakable, courts will not attribute to the Legislature the purpose of invading the

common right, and violating those fundamental constitutional provisions by which the individual is protected against arbitrary action by government.

2. ESCHEAT §4—RIGHT OF OWNER TO BANK DEPOSIT AS AGAINST STATE AFTER TWENTY YEARS.

Under Code Civ. Proc. §§ 1269a, 1273, and Bank Act, § 15, as amended in 1915, a bank deposit on which, except for interest, neither deposits nor withdrawals have been made for 20 years, may be taken by the state only in the absence of claim by the true owner or his representative, the limitation period of 20 years being merely jurisdictional, and investing the state treasurer with right to sue for the deposit in the superior court of Sacramento county.

3. ESCHEAT §6—UNTIL SUIT TO ESCHEAT OWNER CAN RECOVER DEPOSIT IN BANK AFTER TWENTY YEARS.

Despite Code Civ. Proc. §§ 1269a, 1273, and Bank Act, § 15, as amended in 1915, until suit is brought by the Attorney General in the superior court of Sacramento county to recover for the state as an escheat a bank deposit on which no deposits or withdrawals have been made for 20 years, the court, having jurisdiction of an action by any one for property withheld by another without right, is open to the owner of the deposit as well after as before the expiration of the 20-year period.

4. PARTIES §47—INTERVENTION MUST NOT RETARD PRINCIPAL SUIT.

An intervention must not retard the principal suit, nor delay the trial of the action, nor change the position of the parties.

5. STATUTES §182—CONSTRUCTION TO AVOID UNCONSTITUTIONALITY AND PROMOTE JUSTICE.

The construction of a statute must be consistent with sound sense and wise policy, and with a view to promote justice.

Appeal from Superior Court, City and County of San Francisco; E. P. Shortall, Judge.

Action by Mack Mathews, administrator of the estate of William Anderson, deceased, against the Savings Union Bank & Trust Company, wherein the State intervened. From a judgment for the State, plaintiff appeals. Reversed.

Lovett K. Fraser, of San Francisco, Herbert V. Keeling, of Lakeport, and Ornbaum & Fraser, of San Francisco, for appellant.

U. S. Webb, Atty. Gen., and Frank L. Gueren, Deputy Atty. Gen., for the State.

BRITAIN, J. This appeal concerns the construction of sections 1269a and 1273 of the Code of Civil Procedure, and section 15 of the Bank Act, as they were amended in 1915. They relate to escheats of unclaimed bank deposits. The facts are admitted.

In 1868 William Anderson deposited with the Savings Loan Society Bank of San Fran-

cisco, the predecessor of the defendant, \$1,500, which with the accumulations of interest grew to \$12,525.12 by the 1st of January, 1917. Anderson died at his residence in Lake county in August, 1892. Under the provisions of section 15 of the Bank Act the defendant made report to the state treasurer that for 20 years prior to the 1st day of January, 1917, there had been neither deposit nor withdrawal of funds from the Anderson account, and no claim had been made nor address of the owner of the account filed within the 20-year period. On March 16, 1917, the public administrator of Lake county was granted letters of administration on the estate of Anderson, and on the day following he made demand upon the bank for payment of the deposit account, which being refused the administrator sued the bank at its place of business in San Francisco. The Attorney General intervened on behalf of the state. The judgment was against the plaintiff and in terms declared the money on deposit had escheated on January 1, 1917, nearly 9 months before the judgment was entered.

In this case there is no question of identity involved. The plaintiff, as the administrator of the estate of the depositor, stands in his shoes. His rights in regard to the money in question are neither greater nor less than those of the depositor. If, on December 31, 1916, either the depositor or the administrator of his estate had made demand on the bank, it was obligated to pay, because the money then on deposit rightfully belonged to the depositor or his estate. If payment had been refused, the superior court in San Francisco would have had jurisdiction of a suit against the bank, and upon the admitted facts its judgment must have been in favor of the depositor or his personal representative. Because the demand was not made until after January 1, 1917, the trial court determined, and the Attorney General here argues, that the moneys escheated on that day, that the right of the depositor to the immediate payment no longer existed, and that this result flowed from the amendments of 1915.

[1] So obnoxious to the sense of justice is the suggestion that the state may take for its own use the property of one of its citizens, without compensation and without hearing, that, unless the language of a statute is express and unmistakable, courts will not attribute to the co-ordinate law-making body the purpose of invading the common right and violating those fundamental constitutional provisions by which the individual is protected against arbitrary action on the part of the government. The language of the statutes here in question requires no such interpretation.

Section 1273 of the Code of Civil Procedure and section 15 of the Bank Act are correlative. They deal with bank deposits upon

which, except for the accumulation of interest, neither deposits nor withdrawals have been made for a period of 20 years. The Bank Act provides that the moneys in such deposits—

“which shall have remained unclaimed for more than twenty years * * * and where neither the depositor or any claimant has filed any notice with such bank showing his or her present residence, shall * * * be deposited with the state treasurer after judgment in the manner provided in the Code of Civil Procedure.” Stats. 1915, p. 1106.

The general language of the Code section is the same, except that the last phrase reads “shall * * * escheat to the state.” Code Civ. Proc. § 1273. The section then provides that, when the Attorney General shall learn of such deposits he shall bring suit in the superior court of Sacramento county, and that upon the trial, “if it be determined that the moneys * * * are unclaimed as hereinabove stated, then the court must render judgment in favor of the state declaring that said moneys have escheated,” and commanding the bank to deposit the money with the state treasurer thereafter to be dealt with as other escheated property.

So careful is the state of the rights of its citizens that even after the adjudication, for a period of 5 years, any person not a party or a privy to the escheat judgment may sue the state to recover the money, and this time is extended to infants and persons of unsound mind for a period of one year after the removal of the disability. Code Civ. Proc. § 1272.

[2] In the suit commenced by the Attorney General any claimant may appear and present his claim of ownership. Code Civ. Proc. § 1273. The Attorney General argues that the only adverse claim which could prevail in the suit would be one based on the non-existence of the very fact on which the suit is based, namely, that no claim had been made within the 20 years of dormancy. If this construction should be adopted, how unreliable would be the guaranty of justice contained in section 15 of the Bank Act, which provides that “any person interested may appear in such action and become a party thereto,” and that “the court shall have full and complete jurisdiction over the state, and the said deposits, and of the person of every one having or claiming any interest in the said deposits, or any of them, and shall have full and complete jurisdiction to hear and determine the issues therein, and render the appropriate judgment thereon.” This language is most appropriate to provide for a real trial of the claim of interest or ownership, and it is equally inappropriate to provide for a merely formal adjudication of the jurisdictional fact of non-demand for a period of 20 years. Just as the statute provides for a claim of ownership after the judgment, so does it provide

for a claim of ownership after the Attorney General sues and before the judgment. Of course, a claim may be made by the owner against the bank at any time before the expiration of the 20 years. There necessarily must elapse a period of time between the expiration of the 20 years and the commencement of the state's suit. What are the rights of the owner of the money during that intermission?

[3] The Attorney General argues that after the expiration of the 20 years no court save that in Sacramento county has jurisdiction to make any order in relation to the deposit. The Bank Act provides that, when summons is issued under section 1273 of the Code of Civil Procedure, the clerk shall also issue a special notice directed to all persons, requiring them to appear within 60 days after the first publication of summons to show cause why the money should not be paid to the state treasurer. This notice must be published with the summons; that is, for a period not less than 4 weeks. Code Civ. Proc. § 1273. Under the Bank Act it is not until the completion of publication that jurisdiction vests in the Sacramento court. The duties of the Attorney General are many; the demands upon his office are great. There may be most cogent reasons for delay in the bringing of suits of this nature. The suit in Sacramento concerning this deposit was not commenced until July 30, 1917, 7 months after the expiration of the 20-year period.

Suppose the depositor had not died, but, returning from a far country, had been delayed by stress of weather, so that a demand which would have been honored on December 31st could not be presented until January 2d; suppose, further, that he was in sickness, that his family was in distress, or that the fund he had thriftily laid by against the day of his dire need alone would save him from the bankruptcy court; and, suppose the bank should pay him what rightfully was his—is it conceivable that the court in Sacramento would require the bank again to pay the amount of the deposit to the state? If the bank should refuse to pay upon such a demand, as it did in this case, would the admitted owner of the deposit be compelled to wait until the Attorney General should find time or be willing to open the door of the Sacramento court, so that he might as a defendant present his claim? Under such a rule he might be driven into bankruptcy, and he and his family become public charges. It would be no answer to say he might by the roundabout method of mandamus force the Attorney General to throw open the door of the Sacramento court. The rule that justice shall not be denied is no more sacred than is that which declares it shall not be delayed. Until suit is brought by the Attorney General in Sacramento county, the court having jurisdiction of an action by any one for property which another without

right withholds, is open to the depositor, as well after as before the expiration of the 20-year period. In the exercise of its constitutional jurisdiction (article 6, § 5) the superior court in San Francisco had power to entertain the suit of the plaintiff, and its jurisdiction having attached, it necessarily had power to determine the substantial rights of the parties before it (*Hibernia, etc., Soc. v. Lewis*, 117 Cal. 577, 47 Pac. 602, 49 Pac. 714; *Peck v. Jenness*, 7 How. 612, 624, 12 L. Ed. 841).

[4] In the present case, in view of the fact that the enactments of 1915 had received no judicial interpretation, the bank refused to pay, and upon suit being brought submitted itself to the judgment of the court. Under the provisions of 1269a of the Code of Civil Procedure the Attorney General intervened in this action. That section was adopted at the same session of the Legislature at which the amendments under discussion were adopted, and no doubt to protect the interests of the state in the contingency of a claim being made in the interim which must elapse in every instance between the report of the bank and the commencement of the suit in Sacramento county. It provides that whenever the Attorney General is informed that property has escheated or is about to escheat, he may commence an action on behalf of the state to determine its rights to the property "or may intervene on its behalf in any action * * * and contest the rights of any claimant or claimants thereto." The statute does not say that upon his intervention the court in which the action is brought shall be divested of its jurisdiction pending the bringing and determination of another suit. There is no suggestion that any different rules of law shall apply to an intervention under this section of the Code than those which ordinarily control in such cases. It has been broadly stated that the intervener must take the suit as he finds it. A better statement is that the intervention must not retard the principal suit, nor delay the trial of the action, nor change the position of the parties. *Hibernia, etc., Soc. v. Churchill*, 128 Cal. 634, 61 Pac. 278, 79 Am. St. Rep. 73; *Van Gorden v. Ormsby*, 55 Iowa, 664, 8 N. W. 625; *Boyd v. Heine*, 41 La. Ann. 393, 6 South. 714; *Mayer v. Stahr*, 35 La. Ann. 57; *Ragland v. Wisrock*, 61 Tex. 391; *Cahn v. Ford*, 42 La. Ann. 965, 8 South. 477. The fact found by the court that after the commencement of this action the statutory suit was commenced by the Attorney General in Sacramento county had no bearing upon the determination of this case. Jurisdiction having attached, the court should have determined the issue of ownership of the money. *Dunphy v. Belden*, 57 Cal. 427; *Sharon v. Sharon*, 84 Cal. 424, 23 Pac. 1100.

[5] What has already been said concerning the question of jurisdiction applies equally to the substantial rights of the parties. A

construction of section 1273 of the Code of Civil Procedure and section 15 of the Bank Act by which title to money on deposit would pass to the state absolutely on the expiration of 20 years, without compensation to the owner and without notice and hearing before his property should be taken, would be intolerable. Not only must a statute be construed, if possible, to avoid unconstitutionality, but the construction must be consistent with sound sense and wise policy, and with a view of promoting justice. *San Joaquin, etc., Inv. Co. v. Stevinson*, 164 Cal. 229, 128 Pac. 924; *In re Mitchell*, 120 Cal. 386, 52 Pac. 799; *Merced Bank v. Casaccia*, 103 Cal. 645, 37 Pac. 648.

In the present case the identity and death of the depositor are admitted and the appellant is the administrator of his estate. As the personal representative of the depositor he was entitled to payment of the deposit at any time the admitted facts were established. Code Civ. Proc. §§ 1552, 1726, 1732. The facts were established by the findings in this action to which the state was a party. Upon the facts found the plaintiff was entitled to judgment. This conclusion is in consonance with the reasons underlying the decision of the Supreme Court in the somewhat similar case of *People v. Roach*, 76 Cal. 297, 18 Pac. 407.

The judgment is reversed.

We concur: LANGDON, P. J.; HAVEN, J.

(43 Cal. App. 39)

MILLER v. BOYLE, Auditor of City and County of San Francisco. (Civ. 3089.)

(District Court of Appeal, First District, Division 1, California. Aug. 26, 1919. Rehearing Denied by Supreme Court Oct. 23, 1919.)

1. MUNICIPAL CORPORATIONS ⇨214(2) — BOARD OF PUBLIC WORKS CAN CONTRACT SPECIALLY WITH ARCHITECTS.

Under its implied powers, the board of public works of the city and county of San Francisco is authorized in its discretion to secure by special contract the services of architects in any special case, as the projection of a schoolhouse, to prepare such plans and specifications as may be needed.

2. MUNICIPAL CORPORATIONS ⇨236—BOARD CAN CONTRACT WITH ARCHITECT WITHOUT CALLING FOR BIDS.

The board of public works of the city and county of San Francisco was authorized to contract with an architect for the preparation of plans and specifications for a projected schoolhouse at the usual rate of compensation for such services in the city without calling for bids and awarding the contract to the lowest bidder.

Application for writ of mandate by J. R. Miller against Thomas F. Boyle, as Auditor

of the City and County of San Francisco, etc. On demurrer to the petition. Writ directed to issue.

Cullinan & Hickey, of San Francisco, for petitioner.

George Lull, City Atty., and Maurice T. Dooling, Jr., Asst. City Atty., both of San Francisco, for respondent.

J. G. De Forest, of San Francisco, amicus curiae.

WASTE, P. J. This is an application by the petitioner, who is a duly licensed, certified, and authorized architect, for an alternative writ, to be directed to the defendant as auditor of the city and county of San Francisco, requiring him to approve a claim and demand of petitioner for the sum of \$1,205.66, alleged to be due as fees for services as architect, rendered the city and county. The claim was properly presented and duly allowed and approved, until it reached the defendant, who declined to audit the same, upon the ground that the petitioner herein was not employed in accordance with the civil service provisions of the charter of the city and county of San Francisco, and that the claim is not for a regular, stated salary, or based on a per diem. He further contends that the contract for the preparation of the plans and specifications of the schoolhouse, and supervision of such construction, should have been let to the lowest bidder, in accordance with the provisions of sections 14, 15, 16, 17, and 18 of chapter 1 of article 6 of the charter. The facts behind the application are admitted to be correctly set forth in the petition. The matter is submitted to this court on questions of law, raised by the demurrer of respondent.

It appears that, by ordinance of the board of supervisors of the city and county, the board of public works is authorized in its discretion, to obtain plans, drawings, specifications, and details for the erection of public buildings for the city and county of San Francisco, to be erected under the supervision and direction of the board of public works, and for that purpose to engage the services of architects, either by selection or by competition. The method of competition in case the architects, for the purposes specified in the ordinance, are selected by competition is to be determined by the same board. Likewise, that board is authorized to pay for the preparation of details, plans, and drawings and necessary supervision of the work of construction a sum which (including the cost of the preparation of the contract, plans, and specifications) shall not exceed 6 per centum of the entire cost of the building to be constructed. The ordinance further authorizes the board of works to enter into contracts with architects for the purpose of engaging the services therein contemplated.

Another provision of the ordinance declares that nothing therein contained shall be deemed, or construed, as preventing the board of public works from appointing a city architect, or such persons as that board may deem necessary, to perform architectural services for the city and county, or to inspect and supervise the construction of public buildings; it being the intent and purpose of the ordinance, so it declares, to place in the discretion of the board of public works the manner and method of obtaining plans and specifications for public buildings, and the supervision of the construction thereof.

The board of education of the city, after proceedings duly and regularly had in that behalf, requested the board of public works to prepare plans and specifications for a certain schoolhouse, to be known as the Jefferson School, and to be constructed in and by the city and county. The board of public works thereupon, by resolution duly adopted, appointed petitioner, the architect, to prepare plans and specifications for such schoolhouse at an estimated cost of construction of approximately \$100,000, and in and by said resolution it was provided that the fee of petitioner for such services should be 6 per cent. of the total cost of the construction of the said schoolhouse, and that the services of the petitioner should include the necessary supervision of construction. It was further agreed by and between the board of public works, acting for the city, and petitioner, prior to his entering into his work, that the fee of 6 per cent. should be paid at certain times and amounts, one-fifth of the fee to be paid upon completion and approval of the preliminary studies for the plans and specifications of the schoolhouse. It was likewise agreed that until the actual cost of the construction of the schoolhouse should be ascertained the payments on account of petitioner's fee were to be based on the estimated cost of the construction thereof.

Thereupon, petitioner prepared the preliminary studies for the plans and specifications of said schoolhouse. In the preparation of these studies for the plans and specifications petitioner used his own private office and materials and employed draftsmen and assistants, paying the cost of said materials and the wages of said draftsmen and assistants, out of his private funds. The estimated cost of the construction of the school, when the preliminary studies for its plans and specifications were completed, was \$100,471.66. These preliminary studies for the plans and specifications were delivered to, and accepted and approved by, the board of education and the board of public works. Thereupon, petitioner presented, as before stated, to the proper officers of the city and county, his bill and demand, in proper form, for \$1,205.66. That claim the auditor refuses to approve.

It appears as a fact in the case that the fee of 6 per cent. of the actual cost of the construction of the Jefferson School is not greater than the compensation paid to architects on similar employment in the city and county, and is the reasonable value of such services petitioner agreed to render. The fee of 6 per cent. and the times and amounts of progress payments, and the mode of payment, are the usual and customary mode, times, and amounts, respectively, of paying architects in the city and county of San Francisco, whether said architects be employed by the said city and county, or by private persons.

The board of public works of the city and county of San Francisco has charge, superintendence, and control, under such ordinances as are from time to time adopted by the supervisors, of the construction of any, and all, public buildings, and structures, under plans duly approved by the various departments, including all schoolhouses, and fire department buildings, and the repair and maintenance of any, and all, buildings and structures owned by the city and county. Charter of the City and County of San Francisco, subd. 6, § 9, c. 1, art. 6. The same board has power to employ such clerks, superintendents, inspectors, engineers, surveyors, deputies, architects, and workmen, as shall be necessary to a proper discharge of their duties under the article of the charter, and to fix their compensation; but no compensation of any of said persons shall be greater than is paid in the case of similar employments. Charter, § 3, c. 1, art. 6. The first question to be decided in this case is whether, by this language of the charter, the board of works is bound to engage architects exclusively as "employés," at stated monthly salaries, or at a given per diem, or whether it may engage an architect by special contract, to prepare plans and specifications at his own time and expense, for a stipulated fee based on the cost of the construction work to be planned and supervised by him.

[1] The board of public works may employ any number of architects, as it employs all needed clerical forces and workmen, necessary to a proper discharge of the duties imposed by the charter. It may also fix their compensation on a monthly basis. Charter, § 1, c. 4, art. 3. Such architects, when thus regularly employed, would, in our judgment, become employés of the city, and subject to the civil service provisions of the charter, except in the case of the city architect, with which case we are not now dealing. However, we do not find anything in the charter provisions, or in the general law, as we understand it, which will prevent the board of public works, in its discretion, securing the services of skillful architects, in any special case, to prepare such plans and specifications as may be needed. When the charter permits a certain result to be accomplished, but does

not prescribe the means, any reasonable, or suitable, means may be adopted. A municipal board not only has the powers expressly enumerated in the organic act, but also those implied powers which are necessary to the exercise of the powers expressly granted, except in the instances where such implied power is expressly, or impliedly, prohibited. *Harris v. Gibbins*, 114 Cal. 418-421, 46 Pac. 292.

The right to employ an architect, and prepare plans and specifications, therefore, was incident to the general power of the city to erect schoolhouses. *Dillon on Municipal Corporations*, § 701; *Spalding v. Chamberlain & Co.*, 130 Ga. 649, 61 S. E. 533. We find nothing in the charter which makes the employment of architects at a regular fixed salary, or per diem, the exclusive method by which the city might carry out this incidental power. The board of public works, clothed with general authority to construct and acting under the ordinance of the board of supervisors had power to accomplish a certain result, which could not be accomplished by it without the employment of other agencies, to wit, of architects, to prepare the plans and specifications for such erection. In this case, the charter not directly prescribing that such plans and specifications could only be prepared by such architects as might be regularly employed by the board of public works, it must be construed to afford opportunity for the adoption, as was said in *Harris v. Gibbons*, supra, "of any reasonable, and suitable, means."

[2] The claim of respondent that the contract between the board of public works, and the petitioner, should only have been awarded after compliance with the provisions of the charter, relative to letting contracts to the lowest bidder, has been disposed of adversely to his contention. The same cases also seem to establish that the board of public works, in employing a duly authorized architect, and upon the terms and conditions prevailing in the community, were adopting reasonable and suitable means, these decisions holding that the engagement of an architect to prepare plans and otherwise render services in connection with the erection of city buildings on a percentage basis is not in violation of the provisions of municipal charters requiring a written contract with the lowest and best bidders. "The reasonableness of such construction," said the court in one of these cases, "is most strikingly illustrated in the present case. An architect is an artist. His work requires taste, skill, and technical learning, ability of a high and rare kind. Advertising might bring many bids, but it is beyond peradventure that the lowest bidder would be least capable and most inexperienced and absolutely unacceptable. As well advertise for a lawyer or civil engineer for the

city and intrust its vast affairs and important interests to the one who would work for the least money." *Cudell v. Cleveland*, 16 Ohio Cir. Ct. R. (N. S.) 374; *Stratton v. Allegheny Co. et al.*, 245 Pa. 519, 91 Atl. 894; *City of Newport News v. Potter*, 122 Fed. 321, 58 C. C. A. 483; *City of Houston v. Glover*, 40 Tex. Civ. App. 177, 89 S. W. 425.

It being admitted that the terms and conditions of compensation provided in the contract entered into between the petitioner and the city are just and reasonable, and are the usual terms and conditions covering the rendition of similar services in this community, we are of the opinion that the petitioner is entitled to the relief sought.

Petitioner is also invoking the doctrine of estoppel, claiming that the city and county of San Francisco has received the benefit of his labor and expenditure of time and money, and should not now be heard to say that he should not be compensated. In view of the conclusion we have already announced, it is not necessary to rest our decision upon that contention, but we are of the opinion that what we said in a very recent case (*Warren Bros. Co. v. Boyle*, 183 Pac. 706) does apply to the facts of this case.

Let the writ issue as prayed for.

We concur: RICHARDS, J.; BARDIN, Judge pro tem.

(43 Cal. App. 34)

REID v. BOYLE, Auditor of City and County of San Francisco. (Civ. 3087.)

(District Court of Appeal, First District, Division 1, California. Aug. 28, 1919. Rehearing Denied by Supreme Court Oct. 23, 1919.)

MUNICIPAL CORPORATIONS — 220(1)—ARCHITECT NOT EMPLOYÉ OR OFFICER DRAWING MONTHLY SALARY.

City architect exempted from civil service under City and County of San Francisco Charter, art. 13, § 11, subd. a, and appointed by resolution of board of public works to draw plans for and supervise construction of public buildings and improvements when directed to so do by the board, for a compensation specified in resolution, the resolution having been made pursuant to ordinance authorizing such board to obtain plans for erection of public buildings, was not, in the ordinary sense, an employé or officer of the city and was not required to be paid a fixed monthly salary under chapter 4, art. 3, § 1.

Mandamus by John Reid, Jr., against Thomas F. Boyle, as Auditor of the City and County of San Francisco, etc. Writ granted.

Cullinan & Hickey, of San Francisco, for petitioner.

George Lull, City Atty., and Maurice T. Dooling, Jr., Asst. City Atty., both of San Francisco, for respondent.

J. G. De Forest, of San Francisco, amicus curiæ.

WASTE, P. J. In this proceeding, as was the case in *Miller v. Boyle*, 184 Pac. 421, this day decided, the petitioner is seeking an alternative writ of mandate directed to the respondent as auditor of the city and county of San Francisco, requiring him to audit a claim in the sum of \$180, alleged to be due as architect's fees for the preparation of preliminary studies for plans and specifications for a residence building, for the use of the chief of the fire department of the city and county. The facts are in all particulars, with one essential difference, so similar to those presented in the *Miller Case*, supra, that we will only state the additional matter in controversy. The two cases were argued and submitted to us for decision upon the facts set forth in the petition, and the law as raised by the demurrer.

After the passage of the ordinance authorizing the board of public works, in its discretion, to obtain plans, drawings, specifications, and details for the erection of public buildings, referred to in the *Miller Case*, the board of supervisors of the city and county, by resolution regularly adopted, directed the board of public works to prepare plans and specifications for a building, suitable and adapted for residential purposes, for the chief engineer of the fire department of the city, and to submit the same, when so prepared, first to the board of fire commissioners, and then to the board of supervisors for approval and action thereon. Thereafter, by resolution, duly adopted, the board of public works, appointed John Reid, Jr., the petitioner here, city architect. The resolution provides:

"That the duties of the city architect shall be to prepare plans and specifications for all public buildings, works, or improvements, for which the board of public works shall direct him to prepare such plans and specifications, and to supervise the construction of all public buildings, works, or improvements, the construction of which the board of public works shall direct him to supervise."

The resolution also provides:

That the compensation of such city architect "shall be six per cent. of the total cost of the construction of the respective public buildings, works, or improvements, plans and specifications of which he shall so prepare, and the construction of which he shall so supervise; provided, however, that if he prepares the plans and specifications, when directed by the board of public works, as aforesaid, but is not directed to, or does not, supervise the construction of any particular public building, work, or improvement, his compensation in preparing such plans and specifications alone shall be four and one-half per cent. of the total cost of the construction of such building, work, or improvement."

The resolution then provides for partial payments as the work progresses, one-fifth

of the entire compensation for the entire work to be paid upon the completion of the preliminary studies for plans and specifications for any particular public building. Until the actual cost of construction of any particular building, work, or improvement, shall be ascertained, the payments on account of such compensation of the city architect shall be based upon the estimated cost of the construction.

The resolution recites the authorization and direction to the board of public works, by the board of supervisors, to prepare plans and specifications for the fire chief's house, then directs the city architect to prepare plans and specifications for that building, and superintend its construction, his compensation for such services to be 6 per cent. of the total cost of the building, which total cost is estimated at \$20,000. Further direction to prepare plans and specifications for the Galileo high school is contained in the resolution.

Immediately after the adoption of the resolution of the board of works last mentioned, the petitioner accepted such appointment as city architect, upon the terms stated in the said resolution, at once entered upon the performance of his duties as such, and ever since has been, and now is, the duly appointed and acting city architect of the city and county of San Francisco. In the discharge of these duties he thereafter prepared and completed the preliminary studies for plans and specifications of the fire chief's residence, the estimated cost of the construction of which, when said preliminary studies were completed, was found to be \$15,000. The preliminary plans were delivered to, and accepted by, the board of public works. One hundred and eighty dollars is the correct amount of the installment of the fee due under the terms of his employment, which, as in the case of *Miller v. Boyle*, supra, are the identical terms of employment for architects engaged in the general practice of the profession of architecture in the city and county of San Francisco.

Under the provisions of the charter of the city and county of San Francisco (subdivision A, § 11, art. 13), the city architect is exempt from the provisions thereof relating to classification of employes by the civil service commission. The respondent in the instant case makes no contention, therefore, that the civil service provisions of the charter apply to petitioner, but bases his refusal to audit the claim on the ground that it arises out of a fee and compensation of an architect computed upon the cost of the construction of a public building. In other words, as we understand it, respondent's contention is that, under the provisions of the charter, the city architect is an employé of the city under the appointment by the board of public works, and that his compensation must be a fixed salary, payable monthly. He relies up-

on section 1, c. 4, art. 3, which, in part, reads:

"The salaries and compensation of all officers, including policemen, and employés of all classes, and of all teachers in public schools, and others employed at fixed wages, shall be payable monthly."

No express provision is made by the charter of the city and county of San Francisco creating the office of city architect. The only reference to such position found in the charter is its enumeration in the list of positions exempted from the civil service provisions. No salary is fixed and no method of compensation is provided. Assuming, therefore, that under its implied powers it created such an office, there still remains the question as to how the compensation attached to the office shall be paid. There seems to be a reasonable analogy between the situation thus presented and the facts existing in the line of cases in which the right has been upheld of city councils and boards of supervisors of counties to employ special assistants, particularly for the rendition of legal services, and to compensate them by a certain amount of the amount recovered in litigation. We are not inclined to hold that the ordinance directing the board of public works, in its discretion, to obtain plans for public buildings of the city and the resolution of the board of public works appointing petitioner city architect can be held to make petitioner thereby an employé, or an officer of the city, in the ordinary sense, or an employment requiring a definite fixed monthly compensation. His duties are to prepare plans and specifications only for such public buildings, works, or improvements as may be directed by the board of public works, and for a compensation already agreed upon and fixed by resolution. Until the board directs performance of the services, and they are performed, no claim arises against the city by virtue of the office. Nothing contained in oral argument, or in the briefs of the parties, causes us to waver in our opinion that, under such circumstances, the board of public works adopted a reasonable and a customary means of availing itself of the services of petitioner. Under the facts of the instant case the question whether or not petitioner holds the position styled "city architect" is a false quantity for consideration.

No reason presents itself to us why the city was not empowered by its charter to enter into the arrangement made with the petitioner. Having done so, through its authorized agency, the board of public works, and petitioner, with his own private organization, having performed his part of the contract, the fruits of which have been accepted by the city, petitioner is entitled to compensation for his work.

If, in the judgment of the board of public

works, which has full power and authority over such matters, the employment of petitioner was proper and in accord with the conduct of such business in the community, the compensation agreed upon appearing to be just and reasonable, we see no reason why petitioner is not entitled to have his claim audited.

What we said in the case of *Miller v. Boyle*, supra, disposes of all other contentions made by the respondent.

Let the writ issue as prayed for.

We concur: RICHARDS, J.; BARDIN.
Judge pro tem.

(43 Cal. App. 67)

DUPES v. DUPES. (Civ. 2951.)

(District Court of Appeal, First District, Division 1, California. Aug. 28, 1919.)

1. DIVORCE ⇐186 — DISMISSAL OF APPEAL FOR CONTUMACY OF APPEALING DEFENDANT WIFE.

In view of the nature of the action, an appeal from a judgment granting a husband divorce and custody of minor children, who were later placed in a children's home by order of court, will not be dismissed because the wife wrongfully secured possession of the minor children and removed them from the jurisdiction.

2. DIVORCE ⇐184(4, 6, 7)—TRIAL COURT EXCLUSIVE JUDGE OF CREDIBILITY OF WITNESSES.

In a divorce suit, the trial court is the exclusive judge of all questions of credibility of witnesses and weight of evidence, and on appeal will be assumed to have considered all such evidence in the light of such rules laid down by law for the guidance of court and jury.

3. DIVORCE ⇐184(6) — DECISION AS TO CRUELTY REVERSED ONLY WHEN WITHOUT SUBSTANTIAL SUPPORT IN EVIDENCE.

Whether acts and conduct constitute such cruelty as warrants granting a divorce is a question of such nature that the conclusion of the trial court is necessarily entitled to great weight, and it is only where it is without any substantial support in evidence that it will be disturbed on appeal.

4. APPEAL AND ERROR ⇐757(3)—OBJECTION TO EVIDENCE NOT REVIEWABLE WHEN PART OBJECTED TO NOT IN BRIEF.

Where appellant made no attempt to print in the briefs any portion of the testimony relative to, or having even the most remote bearing on, alleged errors with reference to rulings on matters of evidence, as required by Code Civ. Proc. § 953c, the appellate court is under no compulsion to examine a voluminous record with reference to alleged errors in admission of evidence.

5. DIVORCE ⇐184(12)—ERROR IN ADMITTING EVIDENCE AS TO MOTHER-IN-LAW HARMLESS.

In an action by a husband for divorce on the ground of wife's extreme cruelty, where

he maintained that his mother-in-law exercised an immoral control over his wife, *held*, that error in allowing too wide a latitude in the examination of witnesses relative to the character and conduct of the mother-in-law was harmless; the matter being collateral.

6. DIVORCE §27(14) — WHETHER ABSENCE CONSTITUTES EXTREME CRUELTY.

Whether specific absence of one spouse from the family home without consent of the other constitutes extreme cruelty depends on the facts and circumstances of each particular case.

7. DIVORCE §27(18)—EXTREME CRUELTY IS QUESTION OF FACT.

Whether any particular acts or course of conduct constitutes extreme cruelty, warranting granting of a divorce, is a question of fact to be deduced from the circumstances of each case.

Appeal from Superior Court, Kern County; J. W. Mahon, Judge.

Action by T. W. Dupes against Eugenia N. Dupes. From a judgment for plaintiff, defendant appeals. Affirmed.

MacKnight & Fitzgerald and P. N. Myers, all of Los Angeles, for appellant.

E. J. Emmons and Chas. N. Sears, both of Bakersfield, and T. C. Gould, of Los Angeles, for respondent.

BARDIN, Judge pro tem. The plaintiff instituted an action against the defendant for divorce upon the ground of extreme cruelty. The defendant denied the allegations of cruelty and cross-complained against plaintiff, seeking a decree of divorce upon the grounds of extreme cruelty, habitual intemperance, and willful neglect. Judgment was for the plaintiff, and he was awarded the custody of the two minor children of the parties. Two proceedings have already been disposed of by the higher courts of the state involving the custody of these children. In *re Dupes*, 31 Cal. App. 698, 161 Pac. 276; *Dupes v. Superior Court*, 176 Cal. 440, 168 Pac. 888.

[1] Before taking up the consideration of this appeal from the judgment of the lower court upon its merits, it will first be proper to dispose of a motion to dismiss the present appeal because of the claim of respondent that appellant has so interfered with the custody of said children, since taking the appeal, that she has placed herself in contempt of the order of the superior court of the county of Kern, sitting as a juvenile court, and ought not, therefore, be permitted to press her appeal to a conclusion upon its merits. A number of reasons are urged for the dismissal of the appeal, but the only one meriting the particular attention of this court relates to alleged willful and contumacious conduct on the part of the appellant with reference to the custody of the children of the parties to this action.

Briefly, the facts, stated in form of affidavit, surrounding such alleged misconduct of the appellant, which, since they are not denied, may, for the purpose of this discussion, be assumed to be true, are these: Very shortly after the decision in *Re Dupes*, supra, the juvenile court of Kern county, by its order, caused these unfortunate children to be placed in the custody of the Children's Shelter of the city of Bakersfield; C. P. Badger, truant officer of that county, having direct charge of them, pending the hearing of a petition placed before it to have them declared wards of that court. Leave was given the appellant by the judge of the juvenile court to visit the children on January 17, 1918; but, in violation of the terms of that permission and in contempt of the order of said juvenile court, the appellant took possession of said children and shortly thereafter removed them, it is believed, from the jurisdiction of the state of California, as the whereabouts of defendant and of the two children has ever since been unknown to plaintiff and to said court, although plaintiff has expended a large amount of money and has been very diligent in endeavoring to ascertain their whereabouts.

The point made for the dismissal of the appeal is not different in principle from that urged for the dismissal of three appeals in the case of *Vosburg v. Vosburg*, 131 Cal. 628, 63 Pac. 1009, and on the authority of that case the motion to dismiss the appeal must be denied. Not only are we guided to this end by the sound logic of that particular case, but also by the analogous case of *Johnson v. Superior Court*, 63 Cal. 578. And we may here add that consideration for the welfare of the minors and of their probable ultimate disposition, as well also the interest the state has in the maintenance of the marital state, require that appeals involving the merits of such actions should not be dismissed, except upon clear authority so to do.

In *Deyoe v. Superior Court*, 140 Cal. 476, 74 Pac. 28, 98 Am. St. Rep. 73, Mr. Justice Angellotti, speaking for the court, said:

"While an action to obtain a decree dissolving the relation of husband and wife is nominally an action between two parties, the state, because of its interest in maintaining the same, unless good cause for its dissolution exists, is an interested party. It has been said by eminent writers upon the subject that such an action is really a triangular proceeding, in which the husband and the wife and the state are parties."

And in *McBlain v. McBlain*, 77 Cal. 507, 20 Pac. 61, it is stated that:

"The parties to the action are not the only people interested in the result thereof. The public has an interest in the result of every suit for divorce, the policy and the letter of the law concur in guarding against collusion and fraud,

and it should be the aim of the court to afford the fullest possible hearing in such matters."

The cases cited in support of the motion to dismiss the appeal are from other jurisdictions, and are directed to the contumacious conduct of the husband relative to the payment of money for the prosecution of the wife's cause of action, or for alimony, or such kindred matters. As stated in the note to the case of *Brown v. Brown*, 22 Wyo. 316, 140 Pac. 829, in 51 L. R. A. (N. S.) 1119:

"Some of the courts lay down the rule that the proper remedy for failure * * * to comply with an order of the trial court for the payment of counsel fees, etc., is by dismissal of the appeal or suspension of final judgment" (citing cases).

But other courts have adopted rules analogous to and in support of the principle stated in *Vosburg v. Vosburg*, supra. See *Eastes v. Eastes*, 79 Ind. 363; *Dwelly v. Dwelly*, 46 Me. 377.

[2, 3] Numerous charges of misconduct on the part of the wife are made in plaintiff's complaint, but the principal allegations thereof relate to defendant's departure from the home of plaintiff and defendant with one of their children of very tender years, under peculiar and unwarranted circumstances, the plaintiff not being advised as to her whereabouts or that of the child until her return to Bakersfield after an absence of over four months, and that shortly after her return she suffered a miscarriage by reason of her own willful act, being actuated by the desire to conceal from plaintiff her sinful and adulterous conduct while away from him. The plaintiff also alleged in his complaint that the defendant permitted plaintiff's mother-in-law to exercise an immoral influence and control over her, subverting her morals, undermining her character, and causing her to pursue a course of apparent illicit intimacy with other men.

It will serve no useful purpose to go into a detailed survey of the evidence produced to substantiate the husband's charges, and which the trial court by its findings found to be true, only a portion of which are here referred to. Suffice it to say, in a general way, that the findings are responsive to the pleadings and are sufficiently supported by substantial evidence, and, where necessary, corroborated as required by section 130 of the Civil Code, and that the trial judge was fully warranted in his view of the merits of the case, so far as we can discover from the cold pages of the transcript.

The plaintiff's charge, found to be true, that the wife had suffered a miscarriage by reason of a self-inflicted abortion, giving birth to a fetus of such growth as to preclude the belief that conception had taken place by reason of the accessibility of the plaintiff, was

sufficiently corroborated. The probable age of the evacuated fetus was testified to by the surgeon called in to administer to defendant. The husband's testimony of the admission on the part of the wife as to the instrument which she had used, was corroborated by the discovery by a third party of such instrument in defendant's home, which, by the testimony of another physician, was proven to be well suited to the operation complained of.

The following language from the learned author of the opinion in the case of *Robinson v. Robinson*, 159 Cal. 203, 113 Pac. 155, is relevant to the present case:

"The trial court was the exclusive judge of all questions of credibility of witnesses and weight of evidence, and must be assumed to have considered all the evidence given in the light of such rules as are laid down by the law for the guidance of court and jury in the determination of questions of fact. It should further be borne in mind that the question whether acts and conduct constitute such cruelty as, under all the circumstances shown, warrants the granting of a divorce, is of such a nature that the conclusion of the trial court is necessarily entitled to great weight, and it is only where it is clear that it is without any substantial support in the evidence that it will be disturbed on appeal."

The defendant has assigned a number of errors claimed to have been committed by the trial court in the admission and exclusion of evidence, and which, it is contended, warrants a reversal of the judgment.

[4] The reporter's transcript of the testimony in this case embraces 852 pages of typewritten matter. No attempt was made to print in the briefs of the appellant any portion of the testimony relative to, or having even the most remote bearing upon, the alleged errors of the court with reference to rulings upon matters of evidence, as required by section 953c of the Code of Civil Procedure. While this court does not feel under any compulsion to examine the very voluminous record with reference to these alleged errors referred to in the briefs of appellant, it has, nevertheless, done so under the feeling that the welfare of two children is vitally concerned, and that this is an action in which the state is also an interested party, and that to require counsel now to file a supplement to appellant's brief would be to entail further delay.

[5] After a careful examination of each of such asserted grounds of error, we cannot find error of any substantial weight. We are inclined to believe that there was too wide a departure from the issues of the case permitted in the examination of witnesses relative to the character and conduct of the mother-in-law of plaintiff, but such error, being upon a collateral matter, is of no grave importance.

[6] The court did not commit error in admitting evidence in support of the allegation

concerning defendant's departure from the family home. *Smith v. Smith*, 62 Cal. 466, does not purport to establish a rule of evidence, nor attempt to state a positive rule of law to be applied to other like cases where the conditions are not identical. Whether or not any specific absence of one spouse from the family home, without the knowledge or consent of the other, constitutes extreme cruelty, depends entirely upon facts and circumstances of each particular case. In the instant case, however, the mere absence of the defendant from the family home without plaintiff's consent is not made the basis of his cause of action. That is but a single element in the theory of plaintiff's case.

[7] Whether or not any particular acts or course of conduct constitutes extreme cruelty within the meaning of the law is a question of fact to be deduced from all the circumstances of each case. *Barnes v. Barnes*, 95 Cal. 171, 30 Pac. 298, 16 L. R. A. 660.

Certain of the findings of the court, beside that already stated, are made the object of attack as not having the proper support in the evidence. Commenting briefly upon these criticisms, we may say that an examination of the record of the case shows such attacks to be without merit. There was sufficient evidence to show that the defendant left her home against the will and over the protest of the plaintiff; that the defendant's mother was an inmate of the home of plaintiff and defendant, and was permitted to exercise an evil influence over her daughter; that in the absence of plaintiff the defendant was in the habit of inviting men who were strangers to plaintiff to the home of plaintiff and defendant; that defendant was in the habit of frequenting dances and associating with persons unknown to plaintiff; and that defendant suffered the miscarriage already referred to in order to conceal from plaintiff her condition of pregnancy for which plaintiff was not responsible. These findings are sustained by the testimony of either the husband with proper corroboration, or by the testimony of other witnesses.

The claim of counsel for defendant that the findings against the truth of certain of the allegations contained in her cross-complaint are not sustained by the evidence may be dismissed with the remark that, since the trial court was the judge of the credibility of the witnesses below, who gave conflicting testimony upon the subject of defendant's allegations, this court cannot now weigh the evidence in order to see where the preponderance of proof lay.

The judgment is affirmed

We concur: WASTE, P. J.; RICHARDS, J.

(43 Cal. App. 74)

PARK v. ORBISON. (Civ. 3011.)

(District Court of Appeal, First District, Division 1, California. Aug. 29, 1919.)

1. MUNICIPAL CORPORATIONS §705(5)—DRIVER OF AUTOMOBILE INJURING PEDESTRIAN NEGLIGENT.

Defendant, who ran plaintiff down at a busy street intersection, held negligent in operating his automobile at a speed in excess of 10 miles an hour while his wind shield was obscured by rain, etc.

2. MUNICIPAL CORPORATIONS §705(2)—DRIVERS OF AUTOMOBILES AND PEDESTRIANS MUST USE ORDINARY CARE TO AVOID INJURY.

While pedestrians walking across busy public streets are required to use ordinary care, drivers of vehicles must also use ordinary care to prevent injuries to pedestrians.

3. MUNICIPAL CORPORATIONS §705(10)—PEDESTRIAN CAN PRESUME THAT OPERATOR OF VEHICLE WILL OBSERVE LAW.

A pedestrian crossing a busy street has the right to presume that a motorist will not approach, either on the wrong side of the street or at an excessive rate of speed, and will endanger him without warning in violation of Vehicle Act 1913, §§ 12, 20, and 22.

4. MUNICIPAL CORPORATIONS §706(7)—CONTRIBUTORY NEGLIGENCE OF PEDESTRIAN JURY QUESTION.

Plaintiff, a pedestrian, who was run down by a motor vehicle proceeding at an excessive rate of speed on the wrong side of the street, held not contributorily negligent as a matter of law in failing to keep a lookout for vehicles coming from the direction from which the defendant's motor approached, where plaintiff had no reason to anticipate injury; the question of his negligence being one of fact.

5. APPEAL AND ERROR §996—FINDINGS OF FACT ON CONFLICTING EVIDENCE CONCLUSIVE.

A finding of fact by the trial court on a question from which conflicting inferences might be drawn is conclusive on appeal.

6. TRIAL §90—COUNSEL SHOULD MOVE TO STRIKE OUT OBJECTIONABLE PORTION OF ANSWER.

Where a question was answered without objection, counsel if deeming the answer objectionable, should move to strike out the objectionable portion.

7. APPEAL AND ERROR §237(2) — WHERE QUESTION WAS ANSWERED WITHOUT OBJECTION MOTION TO STRIKE NECESSARY TO REVIEW.

Where counsel failed to move to strike objectionable portions of an answer, the question having been answered without objection, the matter is not available in the appellate court though counsel, after the question was answered, made objections.

Appeal from Superior Court, Los Angeles County; Frank G. Finlayson, Judge.

Action by Andrew Park against Thomas J. Orbison. From a judgment for plaintiff, defendant appeals. Affirmed.

Duke Stone, of Los Angeles, for appellant.
Wheaton A. Gray, of Los Angeles, for respondent.

BARDIN, Judge pro tem. Plaintiff was awarded a judgment for \$1,000 for damages suffered by him through the alleged negligent operation of an automobile of the defendant at the intersection of Hill and First streets in the city of Los Angeles. The defendant denied negligence upon his part, and in further defense to the action pleaded affirmatively the contributory negligence of the plaintiff.

The accident took place on the evening of December 16, 1914, at about the hour of 7 o'clock p. m. and at a time when it was dark and stormy. The plaintiff was proceeding eastward on the south side of First street and intended to cross Hill street at its intersection with First street. When he reached the outer edge of the sidewalk and before stepping out into Hill street proper, he looked and listened for approaching vehicles coming from both directions on that street. He was carrying a typewriter in his hands at the time, and lap robe over his shoulders. At about 200 feet to the north of the intersection of the streets referred to, the traffic on Hill street is accommodated by two tunnels, one for the use of a railway and the other for the use of automobiles and pedestrians. Plaintiff testified that he heard the sound of an automobile emerging from the tunnel to the north and coming towards him, and that he saw, near the intersection of Hill and Second streets, which would be to the south and approximately 400 feet distant, the light of an automobile approaching from that direction. Estimating that he had an abundance of time to cross the street without danger from the machine approaching from his right, he continued his journey across Hill street, with his eyes fixed upon the machine approaching from his left, and which was close at hand. At the instant the plaintiff reached the center of Hill street, which at that point is 56 feet wide from curb to curb, he looked to his right, that is, to the south, and saw the flare of the light of the automobile driven by the defendant, and attempted to escape the impending danger by stepping backward. When he first observed this machine it was distant, so plaintiff testified, about 15 or 20 feet and coming rapidly towards him. Plaintiff heard no warning of its approach, and it is not claimed by the defendant that any such warning was given. The effect of its projected light was overcome by the light of cars approaching from the opposite direction. The particular street cross-

ing was well lighted at the time by street lights.

The plaintiff, unable to escape collision, was knocked down and received personal injuries for which, and for loss of earnings by reason thereof, the court awarded him judgment.

The plaintiff, a lawyer and publisher by occupation, stated that he was, at the time of the accident familiar with the terms of the statute regulating the use of motor-driven vehicles upon streets and highways and believed that he was exposed to no danger from any vehicle approaching from the south until he had passed the center of the street.

It may be stated that the automobile tunnel already referred to is situate at the east side of Hill street, the west wall of which projects 23 feet out into the street. By reason of this, all automobiles using this tunnel are accustomed to make the east side of Hill street in the near vicinity of the tunnel, the principally traveled part of that highway, such use extending to about the intersection of First street, of which practice both parties to the action were familiar.

The defendant testified that at the time of the accident he was traveling very slowly and on the right-hand side of the street. The evidence is sharply conflicting upon both these elements. An eyewitness to the accident estimated the speed of defendant's automobile at that time to be at the rate of from 10 to 12 miles per hour, while the plaintiff testified the rate to be from 15 to 20 miles per hour. If the offending machine traveled as far as 400 feet, or substantially that distance, while the plaintiff was walking from the curb to the center of the street, a distance of 28 feet, it follows that the speed of defendant's automobile had, at least immediately previous to the accident, been very rapid. It is very plainly shown by direct and indirect evidence produced at the trial that the defendant was not traveling on his right-hand side of the street as claimed, and that the plaintiff was struck while at a point west of the center of Hill street.

[1] It appears very clear to us that the defendant did not operate his automobile at the time of the accident in a careful and prudent manner and with due regard for the safety of pedestrians. His view of the crossing at the intersecting streets was obscured and obstructed by reason of the condition of his wind shield because of the falling rain, yet, notwithstanding this, he was traveling at a rate of speed in excess of one mile in six minutes. He blindly ran his machine across these intersecting streets where pedestrians might very well be expected to be. He did not see the plaintiff until it was too late to avoid striking him. He sounded no warning of his approach at the street crossing. He was not traveling upon his right-hand side of

the street as the statute and common usage required, and there was no obstruction or condition of the street requiring his departure from this rule of the road. The evidence abundantly supports the findings of the trial court as to the defendant's negligence.

[2] It is insisted that the plaintiff should be precluded from recovering in this action for the reason that his conduct clearly established contributory negligence in that it was plaintiff's duty to keep a sharp lookout for the approach of vehicles coming from both directions and at all times and at every point while crossing the street; and that, having seen the lights of automobiles coming from both his left and his right, he should have kept a lookout for both approaching machines, although he had not passed the center line of the street at the time of the accident.

While it is true that pedestrians walking across busy public streets are required to use ordinary care to see that they do not collide with or are run over by vehicles, it is likewise true that the drivers of vehicles must use ordinary care to prevent injury to pedestrians under such circumstances. *Brown v. Brashear*, 22 Cal. App. 135, 133 Pac. 505; *Wiezorek v. Ferris*, 176 Cal. 353, 167 Pac. 234.

[3-5] The scene of the accident was in the business section of a populous city. The plaintiff did as a prudent man would have done under like circumstances. He was justified in his belief that he had ample time to at least reach the center of Hill street before there could be any danger coming from his right. He was warranted in believing that any machine approaching from that direction would, as required by law, and in conformity with the customary usage of the street at that particular place by reason of the local conditions well known to both plaintiff and defendant, and already referred to, travel on the east side of Hill street. And he furthermore was entitled to the assurance that the driver of any vehicle approaching from his right would use such care and circumspection as the circumstances required, and that such machine would not approach at an excessive rate of speed nor endanger him without warning. Vehicle Act 1913, §§ 12, 20, and 22; Stats. 1913, c. 326. For the trial court to have held as a matter of law that the plaintiff's conduct was such as to constitute negligence under the circumstances set out would have required the adoption of a standard of care and circumspection on the part of a pedestrian crossing intersecting streets not in accord with the customary use of streets by pedestrians under like circumstances, nor obedient to any rule of law which has been brought to our attention.

The cases of *Niosi v. Empire Laundry Co.*, 117 Cal. 257, 49 Pac. 185, and *Brown v. Pacific Electric Railway Co.*, 167 Cal. 199, 138

Pac. 1005, do not justify the contentions made by appellant on this particular point. The question of whether the conduct of plaintiff, upon the occasion referred to, amounted to negligence or not, is to be determined from the attendant circumstances. He was not bound to look and listen for approaching vehicles when he started across the street, regardless of the circumstances of his environment. There might well be circumstances when to fail to do so would amount to negligence. *Mann v. Scott*, 182 Pac. 281, decided June 13, 1919. And for like reasons it cannot be said, as a matter of law, that plaintiff was negligent in not keeping a vigilant lookout for approaching machines coming from both directions before he reached the center of the street.

But in the instant case the evidence shows that, whether required by any positive rule of law or not to look and listen for approaching vehicles coming from both directions before crossing the street, the plaintiff did in fact so act. It is true that he did not look to his right again until he reached the center of the street; but, as a reasonably prudent man, he was justified in this conduct by reason of the attendant circumstances. Not only had he estimated that he had ample time to cross the street before he would be liable to any danger from the defendant's automobile on account of its relatively great distance from him when he took up his journey across the street, but he had the right to assume that the driver of that machine would perform his duty and obey the law. *Harris v. Johnson*, 174 Cal. 55, 161 Pac. 1155, L. R. A. 1917C. 477, Ann. Cas. 1918E, 560; *Scott v. San Bernardino Valley, etc., Co.*, 152 Cal. 604, 93 Pac. 677.

The question of plaintiff's alleged contributory negligence was a question for the trial court, and the following language from the somewhat similar case of *Blackwell v. Renwick*, 21 Cal. App. 131, 131 Pac. 94, may well be applied to this case:

"In this case, under the state of the evidence, as we have briefly summarized it, it became the duty of the court to determine the question as to the negligence of the defendant and as to whether plaintiff was, under all of the circumstances shown, guilty of contributory negligence, and with the conclusions thereon made, under the authorities, an appellate court cannot interfere."

[4, 7] There is no merit in the claim that the court committed error in admitting hearsay evidence when it permitted the plaintiff to testify as to the effect attacks of dizziness, stated to have resulted from the injury complained of, had upon his mental feelings. The question was a proper one, and not objected to. In answer to this question it was testified that upon one occasion, a considerable time after the accident, when attacked

by dizziness, plaintiff saw a former business associate with a broad smile upon his face, who asked the plaintiff "where he had gotten his drink." Counsel for the defendant was silent until the question had been fully answered, and then said, "We object to that as incompetent, irrelevant, and immaterial." The claim is now made that a portion of the answer was hearsay and was a conclusion of the witness and too remote in time to be admissible at all. The proper remedy was for counsel for the defendant to have made a motion at the time this testimony was given to strike out the objectionable portion of the answer, if it contained any such matter. *People v. Swist*, 136 Cal. 520, 69 Pac. 223; *People v. Cole*, 141 Cal. 88, 74 Pac. 547. Having failed to avail himself of the remedy at hand, defendant may not now complain, even though the objection made at the trial be now subject to amendment so as to include grounds of objection not then stated, which, of course, cannot be granted. The portion of the answer now criticized, while perhaps not directly responsive to the question, was relevant and material to the issue of damages.

The judgment is affirmed.

We concur: WASTE, P. J.; RICHARDS, J.

(42 Cal. App. 674)

BECK et al. v. RANSOME-CRUMMEY CO. et al. (Civ. 2880.)

(District Court of Appeal, First District, Division 2, California. Aug. 14, 1919. Rehearing Denied by Supreme Court Oct. 9, 1919.)

1. CONSTITUTIONAL LAW §290(1)—ASSESSMENT FOR IMPROVEMENTS INVALID WHERE LOCAL BOARD HAD NO JURISDICTION.

Owner attacking assessment on ground that local board failed to acquire original jurisdiction may rest on the constitutional guaranty that his property may not be taken without due process of law.

2. MUNICIPAL CORPORATIONS §488, 489(5)—WHERE ASSESSMENT VOID, OWNER NEED NOT APPEAL BUT RESIST ENFORCEMENT ON JURISDICTIONAL GROUNDS.

If the invalidity of the initial resolution of intention is apparent on its face, the owner is not required to seek its correction by appeal to the council, but may stand upon his rights whenever an attempt is made to assert any claim based on a void assessment.

3. CONSTITUTIONAL LAW §251—DUE PROCESS OF LAW AS A DEFENSE.

Constitutional guaranty against taking of property without due process of law is always and everywhere present to protect the citizen against arbitrary interference with his rights.

4. CONSTITUTIONAL LAW §251—"DUE PROCESS OF LAW" DEFINED.

"Due process" of law is the exact equivalent of the "law of the land" as used in the Magna Charta, and, broadly speaking, means that before a man's life, liberty, or property may be taken by the state, he must be given notice of the proceedings which may terminate in the taking, and be given an opportunity to be heard in his own defense, the notice to be a real and reasonable one, and the hearing such as ordinarily or at least reasonably is given in similar cases.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Due Process of Law.]

5. CONSTITUTIONAL LAW §278(1)—PERFORMANCE OF INITIAL STATUTORY ACT NECESSARY TO DUE PROCESS OF LAW.

If the statute requires, as the initial step in the process of depriving a man of his property, the performance of a specifically defined act, that act must be performed substantially, or no jurisdiction exists for further action in that proceeding against him.

6. MUNICIPAL CORPORATIONS §408(1)—ACTS REGARDING SPECIAL ASSESSMENTS TO BE LIBERALLY CONSTRUED.

Legislative acts regarding special assessments for public improvements are to be liberally construed.

7. CONSTITUTIONAL LAW §309(1)—SUMMONS NOT IN COMPLIANCE WITH STATUTE WANTING IN DUE PROCESS OF LAW.

If any statement expressly required by Code Civ. Proc. § 407, to be made in summons, is entirely omitted, service of summons does not give the court jurisdiction to proceed against the defendant; such service not constituting the notice to defendant essential to due process of law.

8. PROCESS §104—COMPLIANCE WITH STATUTE NECESSARY FOR CONSTRUCTIVE SERVICE.

Where constructive service is permitted, the substantial requirements of the statute regarding the matters to be stated in the published notice must be fulfilled.

9. MUNICIPAL CORPORATIONS §513(7)—BURDEN ON THE STATE TO SHOW NOTICE OF PROCEEDINGS FOR STREET IMPROVEMENT.

The burden is on the state, and those claiming under it adversely to the individual pursuant to proceedings for street improvements under the Vrooman Act, to show that the individual had notice of the proceedings; notice in such case being implied from publication.

10. LIMITATION OF ACTIONS §1—PUBLIC POLICY REQUIRES ENFORCEMENT OF STATUTE.

Statutes of limitations are upheld and enforced regardless of personal hardship because public policy requires it.

11. MUNICIPAL CORPORATIONS §450(1)—FILING OF MAP AND REFERENCE THERETO IN RESOLUTION OF INTENTION MANDATORY.

In street pavement proceedings under Vrooman Act, the filing of map or plat showing territory to be included in assessment district,

and the reference thereto in resolution of intention under St. 1913, p. 406, are mandatory and jurisdictional requirements.

12. CONSTITUTIONAL LAW ⇨289—OMISSION OF STATUTORY REQUIREMENT IN PROCEEDING FOR STREET IMPROVEMENTS RENDERS IT INVALID.

Where a clear statutory requirement is omitted from the initial resolution or process which is the means of imparting notice of proceedings, the rule of liberal construction must yield to the constitutional guaranty of due process of law.

13. MUNICIPAL CORPORATIONS ⇨321(1)—FINDING THAT RESOLUTION OF INTENTION IS SUFFICIENT CONCLUSIVE.

If, in resolution of intention in improvement proceedings, there is not an entire omission of a statutory requirement, but merely a defect, a court may properly determine there has or has not been a substantial compliance with the statute; the trial court's determination being controlling in absence of abuse of discretion.

14. MUNICIPAL CORPORATIONS ⇨488, 489(5)—REQUIREMENT FOR FILING MAP OF IMPROVEMENT JURISDICTIONAL.

Owner's failure to object to street improvement proceedings on ground that map or plat was not filed or referred to resolution of intention was not waiver of the objection, under Vrooman Act, § 5½; such requirements affecting jurisdiction to which the statute has no application.

Appeal from Superior Court, Santa Clara County; Beasley, Judge.

Action by Fred Beck and others against the Ransome-Crummey Company and another. Judgment for plaintiffs, and defendants appeal. Affirmed.

R. M. F. Soto, of San Francisco, for appellants.

Louis Oneal and Beggs & McComish, all of San Jose, for respondents.

BRITTAI, J. Fred Beck, with 32 other property owners of San Jose, obtained a judgment against the Ransome-Crummey Company and the city treasurer of that city quieting the title to their respective lands as against any claim of lien, and enjoining the issuance of bonds, based upon work done by the Ransome-Crummey Company, under proceedings taken by the city council, for paving and otherwise improving north Thirteenth street in San Jose from Santa Clara street to the northerly limits of the city. The defendants appeal. The city treasurer has no personal interest in the controversy.

The appellants do not make any clear and direct attack upon the judgment, except that, the suit being one in equity, the judgment should be reversed on the authority of *Coleman v. Spring Construction Co.*, 182 Pac. 473. The portion of that decision to which

reference is made was to the effect that a property owner may not permit public work to be done and thereafter attack the validity of the jurisdictional proceedings leading to the assessment. The statement was unnecessary to the decision of the case, which involved the question of original jurisdiction. Further hearing was denied by the Supreme Court, with an expression of its disapproval of the statement. *Coleman v. Spring Construction Co.*, 182 Pac. 473.

[1, 2] When an assessment is attacked on the ground that the local board failed to acquire original jurisdiction, the owner may rest on the constitutional guaranty that his property may not be taken without due process of law. If jurisdiction is lacking, no equities asserted by the contractor can prevail. *Schwiesau v. Mahon*, 110 Cal. 543, 42 Pac. 1065; *Heft v. Payne*, 97 Cal. 108, 31 Pac. 844. If the invalidity of the initial resolution of intention is apparent on its face, the owner is not required to seek its correction by appeal to the council. He may stand upon his rights whenever an attempt is made to assert any claim based on an assessment void on its face. *City Security Co. v. Harvey*, 176 Cal. 682, 169 Pac. 380. In this case the respondents maintain the resolution of intention was void because it provided for a district assessment and made no reference to a map of the district required to be on file when the resolution was adopted. On each side of this question the usual argument, supported by the usual citation of multitudinous authorities from this and other states, is made.

This court recently had occasion to analyze the able opinion written by Mr. Justice Shaw of the Supreme Court in the leading case of *Chase v. Trout*, 146 Cal. 362, 80 Pac. 81. Hearing was granted by the Supreme Court and is now pending in the case in which this analysis was made. *Watkinson v. Vaughn*, 28 Cal. App. Dec. 657.¹ Reference to the opinion of this court in *Watkinson v. Vaughn* is not, therefore, in present reliance upon it as an authority, but to avoid incorporating in this opinion a further analysis of *Chase v. Trout*.

Doubt existing in the minds of public officials and attorneys regarding the application of well-established rules of law has placed upon the property owners of the state and upon those engaged in the business of making public improvements a heavy burden of expense, annoyance, and delay through the litigation which is instituted either by property owners or the contractors in regard to practically every important public improvement. In every such suit the property owner relies on the constitutional guaranty of due process of law. In many, probably in

¹ Rehearing pending in Supreme Court.

most, of the cases the question of constitutional guaranty has no proper place. In the clear and learned opinion in *Chase v. Trout*, the principles governing the rule of due process of law in public improvement cases were discussed. Notwithstanding the fact that the decision in that case was rendered in 1905, and has probably been cited in every public improvement case arising in California since that date, the clear statement of the meaning of the constitutional guaranty of due process of law, as applied to such cases, seems to have been misapprehended.

[3-5] It is as impossible to define with precision "due process of law," as it is exactly to define "fraud" or "police power." As applied to different classes of cases, courts, by process of inclusion and exclusion, apply the principles involved in the phrase. The Supreme Court of the United States has said that without the constitutional guaranty the right of private property could not be said to exist in the sense in which it is known to our laws. *Ochoa v. Hernandez y Morales*, 230 U. S. 139, 33 Sup. Ct. 1033, 57 L. Ed. 1427. The guaranty is always and everywhere present to protect the citizen against arbitrary interference with his rights. *Ulman v. Baltimore*, 72 Md. 587, 20 Atl. 141, 21 Atl. 709, 11 L. R. A. 224. Due process of law is the exact equivalent of the law of the land as used in the Magna Charta. *Murray v. Hoboken L. & I. Co.*, 18 How. 272, 15 L. Ed. 372. Broadly speaking, it means that, before a man's life or liberty or property may be taken by the state, he must be given notice of the proceedings which may terminate in the taking, and be given an opportunity to be heard in his own defense. It means further that the notice shall be a real and reasonable one, and the hearing such as ordinarily, or at least reasonably, is given in similar cases. *Simon v. Craft*, 182 U. S. 427, 21 Sup. Ct. 836, 45 L. Ed. 1165; *Lent v. Tilson*, 140 U. S. 316, 71 Sup. Ct. 825, 35 L. Ed. 419; *Turpin v. Lemon*, 187 U. S. 51, 23 Sup. Ct. 20, 47 L. Ed. 70; *Galpin v. Page*, 18 Wall. 350, 21 L. Ed. 959. The law of the land does not necessarily mean simply statutory law, for no state can make everything due process of law, which by its own legislation it declares to be such. *Burdick v. People*, 149 Ill. 600, 36 N. E. 948, 24 L. R. A. 152, 41 Am. St. Rep. 329. On the other hand, if the statute requires as the initial step in the process of depriving a man of his property the performance of a specifically defined act, unless that act be performed substantially no jurisdiction—power—exists for further action in that proceeding against him.

[8-8] The analogy between the ordinary suit at law and proceedings for the levy of special assessments for public improvements is not exact, but the same broad principles of common right and common sense control the application of the law of the land to the

question of jurisdiction in both instances. Legislative acts regarding special assessments for public improvements are to be liberally construed. So, too, are the provisions of the Code of Civil Procedure. Code Civ. Proc. § 4. Such acts usually prescribe with more or less particularity what the resolution of intention shall contain. The Code of Civil Procedure prescribes what shall be stated in the summons in a civil suit. Code Civ. Proc. § 407. If any statement expressly required by the statute to be made in the summons is entirely omitted, its service does not give the court jurisdiction to proceed against the defendant, because in legal effect he has received no notice at all of the proceeding. The law of the land in such a case has not been obeyed, and the defendant may rely upon the constitutional guaranty. The fact that a former statute may have required fewer or more or different facts to be stated does not change the rule. The requirements of the statute in force at the time the summons is issued must be substantially obeyed, or its service does not constitute the notice essential to due process of law. A defective summons, which does not meet the requirement of substantial compliance with the statute, may be amended; but in that case notice is not complete and jurisdiction to proceed does not exist until after service of such a summons as the law requires. Because service of an unlawful or void summons is ineffectual to give the defendant notice, he is under no obligation to call its defects to the attention either of the court or the plaintiff. He may safely proceed with his own business as if no suit were pending. If in such a case the court should proceed to judgment, regardless of any change in the defendant's position or of any expenditure or loss sustained by the plaintiff, the defendant's property could not be taken on execution nor would the plaintiff be heard upon a claim that the defendant should have waived the protection of the Constitution. In cases where constructive service is permitted, the substantial requirements of the statute regarding the matters to be stated in the published notice also must be fulfilled. These rules of law relating to the matter of obtaining jurisdiction in a civil action are too familiar to every judge and practicing attorney to require citation of authority. Each essential requirement has its counterpart in the matter of initiating proceedings for charging private property with the cost of local improvements.

[9,10] In proceedings under the Vrooman Act (St. 1885, p. 147), there is no provision for personal service. Notice is implied from publication. The notice is the essential thing as distinguished from knowledge. It must be the notice required by the statute, not some other publication. It must be substantially the same in all similar cases.

Otherwise, it would depend upon the personal views of different judges in successive suits, perhaps upon the same assessment, whether or not the original power existed to order the work done. Uniformity in the administration of justice is a substantial right. *Ransome-Crummey Co. v. Bennett*, 177 Cal. 565, 171 Pac. 304. The burden is on the state and those claiming under it adversely to the individual to show that he has had notice. In the matter of jurisdiction the individual is not required to show that he has not had knowledge. If the contractor in such cases signs a contract in disregard of the law requiring a particular kind of notice to be given, when he has expended his money he is in no worse position than if he disregarded the law concerning limitations of actions and neglected to bring suit on a promissory note within the statutory period. Statutes of limitations are upheld and enforced regardless of personal hardship because public policy requires it. Similarly that broader public policy which protects the individual against encroachment of the state without sanction of law requires that legislative enactments prescribing that certain things must be done to authorize the state to invade private rights must be enforced.

In the present case the common council of San Jose undertook to order the work done under the sanction of the Vrooman Act, which, among other things, provides that under certain circumstances the council may make the expense of a contemplated public improvement chargeable upon a district. The resolution of intention in such a case is required to "describe the said district and refer to a plat or map approved by the city council, which shall indicate by a boundary line the extent of the territory to be included in said assessment district, which plat or map shall be on file in the office of the city engineer before said superintendent of streets shall proceed with the publication and posting of notices of street work, and shall govern for all details as to the extent of the said assessment district." Stats. 1913, p. 406.

[11] The resolution of intention in question on this appeal is incorporated in the findings by a reference to a copy appended to the defendants' answer. It describes the work to be done, declares that in the opinion of the mayor and council the work is of more than ordinary public benefit, and that the costs and expenses are made chargeable to an assessment district which was declared to be the district benefited and which is described with reasonable certainty. It contains no reference to any plat or map approved by the city council, and there is no suggestion in the appellants' brief that such a map as was required by the statute to be on file at the time the resolution was passed was in fact

on file. The requirement of the statute is as positive in regard to the reference to the map as that of section 407 of the Code of Civil Procedure that the summons must contain a notice that unless the defendant appears the plaintiff will take judgment or apply to the court for other relief demanded in the complaint. These requirements are mandatory and jurisdictional in the one case as in the other. *Cooley, Const. Lim.* (7th Ed.) p. 747; 1 *Cooley, Taxation* (3d Ed.) p. 639; 2 *Cooley, Taxation* (3d Ed.) p. 1241; *Brown, Jurisdiction* (2d Ed.) §§ 51, 169a.

[12, 13] Where a clear statutory requirement is omitted from the initial resolution or process which is the means of imparting notice of adverse proceedings, the rule of liberal construction must yield to the constitutional guaranty of due process of law. Courts cannot in a particular case dispense with any element of notice which the Legislature has enacted shall be given in all similar cases. If, either in the summons or in the resolution, there is not an entire omission of a statutory requirement, but merely a defect, a court may properly determine there has or has not been a substantial compliance with the statute dependent upon the facts of the particular case. This necessarily calls for the exercise of that faculty which Mr. Chief Justice White of the Supreme Court of the United States, in discussing the meaning of the word "reasonable" in the Sherman Act (Act July 2, 1890, c. 647, 26 Stat. 209) designated as "practical common sense." *Standard Oil Case*, 221 U. S. 1, 31 Sup. Ct. 502, 55 L. Ed. 619, 34 L. R. A. (N. S.) 834, Ann. Cas. 1912D, 734. This judgment of what is a substantial compliance with the statute is to be exercised in the first instance by the trial court. If the case is one where a requirement of the statute has not been entirely disregarded, its determination of the question of substantial compliance ought to be controlling in the absence of an abuse of discretion. In the present case the resolution shows the absence of any reference to the map or plat required by the statute.

[14] On behalf of the appellants it is argued that under section 5½ of the Vrooman Act (added by St. 1909, p. 31) all objections to any act or proceeding prior to the date of notice of award not made in writing within 10 days from the date of the first publication of notice of award of contract shall be deemed to have been waived. By the last clause of section 5½ matters directly affecting the jurisdiction of the council to order the work are excepted expressly from its provisions.

It is next argued that, since the Vrooman Act did not originally require that a map or plat should either be on file or referred to in the resolution, the requirement contained in the act under which these proceedings are taken was not a constitutional prerequisite.

Reference is made to a number of cases with a lengthy quotation from the opinion in *Imperial Land Co. v. Imperial Irrigation District*, 173 Cal. 660, 181 Pac. 113.

In that case the court construed certain curative provisions of the *Bridgford Act* (Stats. of 1897, p. 254). The legal effect of this and similar decisions is that, if constitutional prerequisites are met, the rule of due process of law has not been violated. This is simply another way of saying that the rule of due process of law requires reasonable notice of hearing and an opportunity to be heard. It does not determine what reasonable notice is, and no decision of any court of the United States has been cited which holds that anything less than substantial compliance with what the Legislature has determined shall constitute notice meets the constitutional prerequisite. After jurisdiction attaches different principles come into play, and the constitutional guaranty of "due process of law" is rarely involved. This phase of the general subject is discussed in the opinion of *Hutchinson Co. v. Coughlin*, 184 Pac. 435, No. 2723, filed this day.

The judgment appealed from might be sustained upon other grounds relied upon by respondents, but the lack of jurisdiction to order the work done, which is so plainly apparent by reason of the disregard of the requirement of the *Vrooman Act*, renders discussion of other questions presented by the briefs improper until their determination becomes necessary in connection with a case where such determination will have controlling force.

The judgment is affirmed.

We concur: LANGDON, P. J.; HAVEN, J.

(42 Cal. App. 661)

HUTCHINSON CO. v. COUGHLIN.
(Civ. 2723.)

(District Court of Appeal, First District, Division 2, California. Aug. 14, 1919. Rehearing Denied by Supreme Court Oct. 9, 1919.)

1. CONSTITUTIONAL LAW §251 — PURPOSE OF GUARANTY OF DUE PROCESS OF LAW.

The purpose of the constitutional guaranty that property is not to be taken without due process of law is to exclude arbitrary power from every branch of the government; it being a restraint upon the legislative, executive, and judicial departments.

2. JUDGMENT §660 — CONCLUSIVE WHEN FINAL NOTWITHSTANDING ERROR OF COURT.

After the court acquires jurisdiction of the defendant and subject-matter of a particular case, it may proceed to judgment, and the judg-

ment, if within general power of court and with-in issues of particular case, is conclusive, when it shall have become final, upon the parties as to all matters adjudged, regardless of any error on part of court.

3. JUDGMENT §441, 460(4), 461(1)—BURDEN OF PROOF IN SETTING ASIDE IN EQUITY FOR FRAUD.

Judgment may be attacked for fraud by a suit in equity in which the burden of both pleading and proving the fraud rests upon complainant.

4. JUDGMENT §660—ATTACK FOR FRAUD OR ARBITRARY ACTION OF COURT.

If there is fraud or arbitrary action in excess of the jurisdiction of the court, either may be shown in a proper proceeding unless the injured party has waived his right by consent to the act or in some other way.

5. MUNICIPAL CORPORATIONS §484(2) — FRAUD OR ARBITRARY ASSESSMENTS MAY BE ATTACKED IN PROPER PROCEEDINGS.

If there is fraud or arbitrary assessment in excess of jurisdiction in levying assessment, owner may attack assessment in proper proceeding; but the right to be heard does not necessarily require a determination in a court proceeding, and may consist of opportunity to present objections to local governing board.

6. MUNICIPAL CORPORATIONS §484(2)—DECISION OF LOCAL GOVERNING BOARD AS TO ASSESSMENTS MAY BE CONCLUSIVE.

Decision of local governing board on objections to assessment, in absence of fraud, or arbitrary action amounting to fraud, may be as conclusive as the judgment of a court in a civil action.

7. FRAUD §50—NEVER PRESUMED.

Fraud is never to be presumed.

8. MUNICIPAL CORPORATIONS §568(1) — IN ACTION TO FORECLOSE LIEN, NO PRESUMPTION THAT CITY WOULD NOT HAVE CORRECTED ASSESSMENT.

Where owner did not appeal from action of superintendent of streets, who levied the assessment, to city council, it will not be assumed, in contractor's action to foreclose lien, that, if owner had just cause of complaint, the city council would not on appeal have ordered the assessment corrected.

9. MUNICIPAL CORPORATIONS §488, 489(5) — INVALIDITY OF ASSESSMENT WAIVED BY FAILURE TO OBJECT.

If a property owner, having a right to defend against an erroneous assessment for work ordered after jurisdiction has been established, fails to assert that right in an administrative tribunal, which is vested with power to correct the error, he may not be heard, either as a plaintiff or defendant, in any litigation involving the assessment, to assert its invalidity without showing either fraud or the exercise of arbitrary and harmful power on the part of the administrative tribunal.

10. MUNICIPAL CORPORATIONS **493(6)** —
CONCLUSIVENESS OF COUNCIL'S APPROVAL OF
ASSESSMENT.

An erroneous, arbitrary, or even a fraudulent assessment would not be void, after the council approved it, either actually upon hearing, or impliedly because no protests were made, in view of Civ. Code, §§ 3515, 3516.

11. MUNICIPAL CORPORATIONS **463** — **ASSESSMENT EXCEEDING FORMER APPRAISAL NOT NECESSARILY CONFISCATORY.**

That an assessment exceeds amount at which property had theretofore been appraised for taxation does not necessarily make assessment confiscatory, since it may be presumed that improvement will so benefit the property as to warrant an increased valuation more than equal to amount of assessment.

12. MUNICIPAL CORPORATIONS **488, 489(5)** — **FAILURE TO APPEAL TO CITY COUNCIL BARRED ATTACK ON ASSESSMENT ON FORECLOSURE OF LIEN.**

Where superintendent of streets had jurisdiction to levy assessment, and where assessment was regular on its face, owner's failure to appeal from assessment to city council precluded her, under Street Improvement Act 1911, § 26 (Stats. 1911, p. 745), from attacking validity of assessment in contractor's action to foreclose lien.

. Appeal from Superior Court, Alameda County; William H. Waste, Judge.

Action by the Hutchinson Company against Margaret Fay Coughlin. Judgment for plaintiff, and defendant appeals. Affirmed.

Walter J. Thompson and Henry F. Marshall, both of San Francisco, for appellant. Fitzgerald, Abbott & Beardsley, of Oakland, for respondent.

BRITAIN, J. The defendant appeals from a judgment foreclosing the lien of a street assessment on her four lots in Oakland.

The assessment proceedings were under the Street Improvement Act of 1911 (St. 1911, p. 730) as originally adopted. The work was grading, curbing, macadamizing, and guttering one block on Brooklyn avenue, between Lake Shore boulevard and Newton avenue, one block on Wesley avenue, between Lake Shore boulevard and Newton avenue, and the crossing formed by the intersection of Brooklyn, Newton, and Wesley avenues, in the city of Oakland. Newton avenue and Lake Shore boulevard are approximately parallel, and Brooklyn avenue connects them, running at right angles to Newton avenue. Wesley avenue runs diagonally across an imaginary square, two sides of which are formed by the lines of Newton avenue and Brooklyn avenue, extended, the other sides being represented by lines parallel to the two extended lines. The crossing formed by the intersection of the three avenues is represented by

the triangle formed between the sides of Newton avenue and Brooklyn avenue, extended, and the lower diagonal side of Wesley avenue. The total cost of the work, with expenses, was \$5,400.50, of which \$1,630.90 represented the cost of the work on the block on Brooklyn avenue; \$1,795.90, the cost of the work on the block on Newton avenue; and \$1,855.28, the cost of the work on the crossing.

In the resolution of intention to do the work it was declared that it was of more than local or ordinary public benefit and that the expense should be chargeable upon a district. The district included seven entire blocks and parts of four other blocks. The blocks were not uniform in size nor shape. No part of the district extended across Lake Shore boulevard. The work done was in the southwest corner of the district, the improved portions of Brooklyn avenue and Wesley avenue abutting on the westerly boundary of the district. In the entire district there were 162 lots, of which 23 or 24 fronted on the work. Many of the lots, by reason of the diagonal direction of Wesley avenue, were small and of irregular shapes. Four of the lots of full size and rectangular in shape belong to the appellant. Two of them face Lake Shore boulevard and two of them face Wesley avenue. They extend lengthwise on both sides of the entire block of Brooklyn avenue, which was improved. The appellant's two lots fronting on Wesley avenue also abutted on the crossing.

After the work was done the assessment was made, and the appellant's lots were assessed, respectively, \$418.96, \$509.69, \$442.19, and \$576.27, aggregating \$1,948.11. Of the 162 lots in the district, only 4, those belonging to the appellant, were assessed for more than \$276; 27 for sums between \$10 and \$100; the remainder for sums under \$10, of which 40 were assessed for but one cent apiece. The appellant claims the assessment is void, and to show its invalidity relies upon three propositions: First, that the district established by the resolution was ignored and disregarded by the superintendent of streets, who, it is claimed, in excess of his jurisdiction, imposed a frontage system of assessment; secondly, that the assessment appears on its face to be without uniformity and regardless of benefit; and, lastly, that the assessment upon each of the appellant's four lots is confiscatory.

The complaint is in the ordinary form in such cases. In her answer the defendant denied the essential allegations of the complaint and set forth the assessment, alleging that it "was without reference to, disproportionate to, irrespective of and contrary to any or all benefits received or to be received by each of said lots or portions thereof," and that "said purported assessment was and

is disproportionately, unequally, and unjustly placed upon the various lots or portions of lots or subdivisions of land mentioned in said diagram and purported assessment, without regard to the district declared to be benefited in said resolution of intention of the city council and that said assessment was and is without uniformity and is confiscatory, and void." The findings negatived the appellant's allegations of fact, and support the conclusions of law.

While the usual number of cases is cited in the appellant's briefs, her reliance is chiefly placed upon the decision of the Supreme Court in *Spring Street Co. v. City of Los Angeles*, 170 Cal. 24, 148 Pac. 217, L. R. A. 1918E, 197. In that case in declaring an assessment void a statement of Mr. Justice Redfield of the Supreme Court of Vermont was quoted as follows:

"We have no doubt that a local assessment may so transcend the limits of equality and reason that its exaction would cease to be a tax, or contribution to a common burden, and become extortion and confiscation. In that case, it would be the duty of the court to protect the citizen from robbery under color of a better name." *Allen v. Drew*, 44 Vt. 174.

In the *Los Angeles* Case it appeared that the city of *Los Angeles* having determined to widen one of its streets, condemnation proceedings were prosecuted to judgment to take a strip five feet wide from the lots fronting on either side of the street. The judgment in favor of the lot owners aggregated something over \$226,000, of which \$20,000 was awarded to the owner of one lot, which may be designated the *Hamberger* lot. Under the *Los Angeles* charter the duty of levying the assessment for the cost of the improvement rested in the board of public works. In its original assessment it charged the remainder of the *Hamberger* lot with \$12,794.10. Protests against the assessment having been made, the city council adopted a recommendation of its street committee that the assessments on the lots fronting on the widened street should be the same in amount as that allowed in the condemnation proceedings, and that surplus costs of the improvement should be levied in accordance with the front-foot rule upon all the lots in the assessment district. The board of public works was directed to make a new assessment, which it did in accordance with the recommendation of the committee. In transmitting the new assessment the board of public works expressed its opinion that the original assessment was correct, and called attention to the fact that under the new method certain lots which received the larger benefits than others were assessed for the smaller amounts. Protests against the second assessment were overruled by the council. The court determined that the reassessment was not even a quasi judicial act of

the board intrusted with the duty of making the assessment. The defense was that the property owners had had their day in court before the city council, and the action of the council in overruling their protests, in the absence of fraud, should be held conclusive. Citing *Chase v. Trout*, 146 Cal. 350, 80 Pac. 81, and other cases in the opinion, the Supreme Court said:

The record "furnishes convincing evidence that the assessment was ordered prepared without the slightest exercise of judicial discretion, and so unwarrantedly, arbitrarily, and unjustly, as to work a confiscation of the property and to be, therefore, in no legal sense an assessment at all." *Spring Street Co. v. City of Los Angeles*, 170 Cal. 32, 148 Pac. 220, L. R. A. 1918E, 197.

[1] In neither the briefs in this case, nor in the opinion in the *Los Angeles* Case, is the phrase "due process of law" used. The facts in the *Los Angeles* Case and the language used by the Supreme Court clearly show that the determination was based upon the rule that property of the individual shall not be taken without due process of law. The purpose of the constitutional guaranty is to exclude arbitrary power from every branch of the government. It is a restraint upon the legislative, executive, and judicial departments. *State v. Guilbert*, 56 Ohio St. 575, 47 N. E. 551, 38 L. R. A. 519, 60 Am. St. Rep. 756; *Ulman v. Baltimore*, 72 Md. 587, 20 Atl. 141, 21 Atl. 709, 11 L. R. A. 224; *Chicago, etc., R. Co. v. Chicago*, 166 U. S. 226, 17 Sup. Ct. 581, 41 L. Ed. 979. In the *Los Angeles* Case the property owners were within the constitutional guaranty.

In the case of *Beck et al. v. Ransome-Crummey Co.* (No. 2880) 184 Pac. 431, the decision in which is filed coincidentally with this in discussing the application of the rule of due process of law, this court, for the purpose of illustration only, referred to the analogy between the steps necessary for a municipal corporation to acquire jurisdiction to order the performance of public work, the cost of which is to be made chargeable upon private property, and the steps necessary to be taken to vest jurisdiction in a court to proceed to hear and determine a civil cause. In considering the question of the erroneous, arbitrary, or fraudulent exercise of jurisdiction, the analogy is no less illustrative of the principles involved.

[2, 3] After the court acquires jurisdiction of the defendant and subject-matter of a particular case, it may proceed to judgment. So long as the judgment is one within the general power of the court extending over all similar cases, and within the issues of the particular case, the judgment, when it shall have become final, is conclusive upon the parties and in regard to all matters adjudged, regardless of any error on the part of the court. It may be attacked for fraud by a suit in equity in which the burden of both

pleading and proving the fraud rests upon the complainant. *U. S. v. Throckmorton*, 98 U. S. 61, 25 L. Ed. 93; *Patterson v. Colorado*, 205 U. S. 454, 27 Sup. Ct. 556, 51 L. Ed. 879, 10 Ann. Cas. 689; *Central Land Co. v. Laidley*, 159 U. S. 103, 16 Sup. Ct. 80, 40 L. Ed. 91.

[4, 5] If there is fraud, or arbitrary action in excess of the jurisdiction of the court, either may be shown in a proper proceeding, unless the injured party has waived his rights by consent to the act or in some other way. These rules apply as well to assessment proceedings as to judgments of courts.

[6-8] The guaranty of the right to be heard does not necessarily require a determination in a court proceeding. The individual may be fully protected by an opportunity given to present to the local governing body his objections to an assessment such as is involved in this case. Its decision, in the absence of fraud, or arbitrary action amounting to fraud, may be as conclusive as the judgment of a court in a civil action. *Lambert v. Bates*, 137 Cal. 676, 70 Pac. 777. In the *Los Angeles Case* an appeal was made to the council, and its action in sustaining the assessment which it had procured to be made was so gross and arbitrary an action as to amount to fraud. In the present case the appellant did not appeal from the action of the superintendent of streets, who levied the assessment, to the city council. Fraud is never to be presumed. It cannot be assumed that if the defendant had just cause of complaint the council would not upon appeal have ordered the assessment corrected. In the *Los Angeles Case* the assessment was made without any exercise of official discretion, and the council arbitrarily refused to protect the property owner. In this case the discretion of the superintendent of streets was exercised, perhaps erroneously; but the property owner did not seek the protection of the council. In effect, she permitted a default judgment to be entered against her by a tribunal having jurisdiction of her cause.

On the trial, over the objection of the plaintiff, evidence was received showing that the appellant's four lots were assessed for taxes in the aggregate of \$1,650. Evidence was also introduced showing that the superintendent of streets levied the assessment upon the lots by the exercise of a discretion in a manner which may have been erroneous but which involved the examination and determination of the comparative benefits he believed would flow to the respective lots by reason of the work. This examination and determination was essentially judicial in its nature. If either his method or conclusions were erroneous, the statute furnished a means for the property owners to protect themselves. At any time within 30 days after the date of the warrant issued upon the making of the assessment, the owners aggrieved may in writing, state their objections to the assess-

ments. Thereafter, and upon notice, the council is required to hear such objections and may remedy and correct any of the acts or determinations of the superintendent of streets, confirm, amend, set aside, alter, modify, or correct the assessment in such manner as to it shall seem just, directing the superintendent of streets to correct the warrant, assessment, or diagram in any particular or to make and issue a new warrant, assessment, or diagram to conform to the decision of the council. All decisions and determinations of the council upon notice and hearing in this regard are made final and conclusive upon all persons entitled to appeal under the provisions of the section as to all errors and irregularities which the council might have avoided or remedied or which it can then remedy. The section continues:

"No assessment, warrant, diagram or affidavit of demand and nonpayment, after the issue of the same, and no proceedings prior to the assessment, shall be held invalid by any court for any error, informality, or other defect in the same," where the resolution of intention shall have been passed and posted in such manner as to give the council jurisdiction to order the work to be done. *Street Improvement Act of 1911*, § 26; *Stats. 1911*, p. 745.

If an appeal to the council had been made and it had fraudulently or arbitrarily affirmed an erroneous assessment or had refused the property owner a hearing, the courts would have been open for a direct attack on the action of the council, or on suit being brought to enforce the assessment, the rule in the *Los Angeles Case* might have been applied. In this case it does not appear from the face of the assessment that it was void, or not in entire accord with the law. It was sought to show by the evidence on the trial that the superintendent of streets erred in his judgment. This evidence would have been proper and might have been conclusive upon an appeal to the council. The fact that it was relied upon here shows the assessment was not void on its face, else it would have been unnecessary in support of the appellant's position. The case is akin to one where a collateral attack is made on a judgment regular on its face. If in a suit in ejectment the court should give such a judgment as could only be given in a suit in unlawful detainer, the judgment would be void because of matters appearing on the face of the record. If, in such a case, a judgment was entered regular on its face, after it became final it could not be invalidated by evidence that the court had mistaken the facts or misapplied the law.

[9, 10] The defaulting defendant in a civil action, after his property has been taken on execution of a judgment regular on its face and rendered after jurisdiction had been perfected, could not be heard in a federal court to say the taking was in violation of the provisions of the Constitution of the United

States regarding due process of law. To support such a suit it would be necessary for the plaintiff to allege and prove that he was not in default, and that the judgment was invalid by reason of fraud or such a gross abuse of judicial power apparent on the face of the record as to amount to fraud. Similarly, if a property owner, having a right to defend against an erroneous assessment for work ordered after jurisdiction has been established, fails to assert that right in an administrative tribunal which is vested with power to correct the error, he may not be heard, either as a plaintiff or defendant, in any litigation involving the assessment, to assert its invalidity, without showing either fraud or the exercise of arbitrary and harmful power on the part of the administrative tribunal. As the violation of the law by a referee to take evidence would not invalidate a judgment entered by a court on his report, neither would an erroneous, arbitrary, or even a fraudulent assessment render it void after the council approved it, either actually upon hearing or impliedly, because no protests were made. The failure to protest to the council in the one case has the same effect as the failure to object to the referee's report in the other. The law helps those who are vigilant. Silence under such circumstances amounts to a consent to the act. Civ. Code, §§ 3515, 3516. It is possible a case may arise where an appeal to the council from the nature of things might be futile and the assessment void, as, for instance, if an assessment should be levied to pay for work not included within the resolution, or to pay for work which had never been done, but no such conditions confront the court in this case.

[11, 12] The mere fact that the amount assessed against the appellant's four lots, situated as they are, exceeded the amount at which they had theretofore been appraised for taxation, does not necessarily lead to the conclusion that the assessment was confiscatory. In support of the regularity and honesty of the action of the municipal authorities and of the judgment of the trial court, it might well be presumed that the improvement in the block, in which the appellant's four lots occupied the entire frontage on both sides of the street, and the improvement in the crossing, upon which two of the appellant's corner lots abutted, so benefited them as to warrant an increased valuation more than equal to the amount of the assessment to be placed upon them. It is not necessary for the determination of this appeal to rest the decision upon any inferences in support of the judgment. The appellant, by reason of her failure to appeal to the local council for the correction of the assessment, neither pleaded nor proved facts sufficient to warrant a judgment in her behalf. Because of this failure of both plead-

ing and proof in the matter essential to support a judgment adverse to the assessment, the evidence concerning the method in which the superintendent of streets exercised the function intrusted to him the evidence in regard to the assessed valuation for taxation purposes of the appellant's lots had no considerable weight.

The judgment is affirmed.

We concur: LANGDON, P. J.; HAVEN, J.

(76 Okl. 55)

DURANT v. BLACK et al. (No. 9998.)

(Supreme Court of Oklahoma. Oct. 7, 1919.)

(Syllabus by the Court.)

APPEAL AND ERROR \S 1012(1)—QUIETING TITLE \S 44(3)—JUDGMENT OF COURT WITHOUT JURY NOT AGAINST WEIGHT OF EVIDENCE SUSTAINED.

Where the only error complained of is, in effect, that the judgment of the court is contrary to the weight of the evidence, the same being a nonjury case and tried before the court, the rule adopted by this court is, if the judgment of the court is not clearly against the weight of the evidence, the same will not be disturbed on appeal. *Held*, from an examination of the record, the judgment of the trial court is not clearly against the weight of the evidence.

Appeal from District Court, McIntosh County; R. W. Higgins, Judge.

Action to quiet title by William Durant, a minor, by his guardian, M. B. Castle, against E. L. Black and others. Judgment for defendants, and plaintiff brings error. Affirmed.

Joseph P. Rossiter, of Henryetta, for plaintiff in error.

J. L. Maynard, of Okmulgee, and Walter & Hilpirt, of Oklahoma City, for E. L. Black.

McCrory, Johns & Shackelford, of Okmulgee, for Sue Gaines.

MCNEILL, J. This action was instituted by William Durant, a minor, by his guardian, M. B. Castle, against E. L. Black, M. C. Gaines, et al., for possession of, and to quiet title to, 160 acres of land in McIntosh county. The petition alleged that William Durant was a minor, and a freedman citizen of the Creek Nation, and the owner of the land in question, and further alleged that the defendants were in possession of the same, and claimed some right, title, and interest therein; the nature of said claim being unknown to plaintiff.

The defendants Black and Gaines answered, alleging that on May 20, 1912, E. L. Black obtained from Edmund Durant, guardian of William Durant, a minor, through the county

court of Okfuskee county, a certain oil and gas lease on said premises, which oil and gas lease was approved by the county court of Okfuskee county on the 20th day of May, 1912, and that the same was owned by Black and Gaines, and that they had fully complied with all the terms of the lease, and had paid all the rentals and royalties due thereunder, and were in possession of the same. The plaintiff replied admitting at the time the lease was executed to E. L. Black, to wit, May 20, 1912, that Edmund Durant was the guardian of William Durant, and further alleging that the consideration purported to be paid for said lease was \$80, but that the same was not paid, and there was no consideration paid for said lease, but alleged that a check was given for \$50 as payment on said lease, but said check was not paid for the reason of insufficient funds in the bank to pay the same, and further alleged that defendants had never complied with the terms of said lease. Plaintiff further alleged that on July 15, 1912, Edmund Durant, as guardian of William Durant, executed a second oil and gas lease to E. L. Black for a consideration of \$200 upon the same land, and upon the same terms and conditions as the first lease, except the bonus money, which was \$200 instead of \$80. This lease was also approved by the county court of Okfuskee county on the 15th day of July, 1912. The plaintiff alleges by reason of said facts both leases were merged, and the first lease became null and void, and was rescinded and was superseded by the second lease; that said second lease provided, if no well was completed within six months, that a certain rental would be due thereunder, and payable to the lessor or deposited to his credit in the First National Bank of Tulsa; and alleged that the payments had not been complied with. There was a further allegation that the lease of May 20, 1912, was acknowledged by Cunningham, a notary public of Okfuskee county, in Tulsa county; but this question is not argued on appeal.

There were numerous other parties and issues in the case, but none of the questions pertaining to their rights are before this court on appeal, and the issues there involved will not be referred to in the opinion.

After the case had been instituted, G. W. Gaines died, and Sue Gaines was appointed administratrix of the estate of G. W. Gaines and the case revived in her name.

Upon the trial of the case, a jury was waived, and the court found the issues in favor of the defendants and against the plaintiff. While the court made no findings of fact, the court found that the lease executed May 20, 1912, was in full force and effect, and that the defendants had fully complied with all the terms of said lease.

From this judgment plaintiff has appealed to this court, and for assignments of error allege that the court erred in rendering judg-

ment for the defendants and against the plaintiff, and the court erred in overruling plaintiff's motion for a new trial. While the assignments of error are very indefinite and uncertain, but conceding them sufficient, plaintiff argues the first proposition in his brief as follows:

"The lease of May 20, 1912, never ripened into a contract, and is void, because the consideration in the sum of \$80 was never paid to the lessor, and this was sufficient to authorize the court to order a resale under section 6388 of the Laws of 1910. This is especially true when they concurred in the resale by bidding in the lease and by taking credit for \$80 which they claim was paid by them on the first lease."

This may be considered upon the questions: First, did the court err in holding the lease of May 20, 1912, valid, and is such finding of the court contrary to the weight of the evidence? Second, was the lease of May 20, 1912, rescinded and superseded by the lease of July 15, 1912, and therefore became inoperative and of no force and effect after July 15, 1912.

There is very little conflicting evidence in the case. Practically all of the facts are admitted, except as to a few minor details surrounding the taking of the second lease. The facts as we gather from the record are that William Durant was a negro minor, and his father, Edmund Durant, was his guardian. It further appears that E. L. Black in 1912 went to Weleetka to obtain an oil and gas lease on this particular land. He was directed by some of the officers of a bank at Weleetka to see a man by the name of I. H. Cunningham who could direct him to Edmund Durant, guardian of the minor. He went to see Cunningham, and was advised by him that an oil and gas lease could be obtained on the land for \$20, but that it would take a week or ten days in order to procure the same. Black instructed Cunningham that he would pay that amount for the lease. He testified that he went home, and afterwards Cunningham informed him either by letter or telephone that the lease could be obtained for \$50. Black informed Cunningham that he would pay that amount for the lease. Thereafter Cunningham again informed Black that other parties had offered \$80 for the lease, and he was again informed by Black that he would pay that amount for said lease. The evidence disclosed that Cunningham had obtained the lease in Black's name, signed by Edmund Durant, as guardian for William Durant, and that Edmund Durant had acknowledged the lease before I. H. Cunningham as notary public; the acknowledgment appearing to be taken in Okfuskee county. Upon advise from Cunningham that the lease was ready, Black went to Weleetka on the 20th day of May 1912, and he and Cunningham appeared before the county court with the lease. Black signed the lease as the lessee, and the same was presented to the

county court and approved by the county court on said day.

In the presence of the county court, Black gave Cunningham a check for the money due on the lease, to wit, the sum of \$80. The court made an inquiry regarding the sufficiency of Edmund Durant's bond. Cunningham advised the court that he was on the bond and the same was sufficient. The lease was delivered to Black, and the same was filed for record. Edmund Durant, the guardian, was not present at this time. The record further disclosed, and it is not disputed, that E. L. Black had fully complied with all the terms of this lease. A well had not been drilled within the first six months as provided in the lease, but that he paid the rental required in said lease by depositing the same in the First National Bank of Weleetka to the credit of Edmund Durant. All these payments were made as required by the terms in said lease, and there was no default therein. The evidence discloses that Cunningham on that day paid Edmund Durant \$30 in cash and on May 9, 1912, gave him a check for \$50. This check went to protest. Exactly when it was presented to the bank and protested does not appear. Thereafter, and, it appears, without the knowledge and consent of E. L. Black, Edmund Durant met Cunningham, and presumably to get the \$50 on the check, which had not been paid, and Cunningham informed him that the lease which had been given to Black and approved, was invalid for the reason that he as notary public had taken the acknowledgment in Tulsa county and not in Okfuskee county, and that he would fix a new lease, and he would raise the bonus \$100. The new lease was drawn and taken in the name of E. L. Black and dated July 15, 1912, and approved by the county court on July 15, 1912. Black was not present, at this time. Cunningham and Durant both testified that this was a payment on the second lease. Cunningham stated that he was not positive, but he thought the \$70 was to pay on the second lease. As to what became of this lease, the evidence is not clear; at least, the same was never filed for record. Black testified that he never knew such lease was in existence until after this suit was filed and a deposition taken when said lease was exhibited; that he had never authorized any one to take it, and did not know it was taken. As to where Cunningham got the \$70 to pay for the second lease does not appear, although he testified he had paid Durant \$200 on this lease. This lease provides that, if no well was drilled within six months, the rental might be paid to the lessor or deposited to his credit in the First National Bank at Tulsa.

Some time after taking the last lease, Edmund Durant was removed as guardian, and M. B. Castle appointed as guardian of William Durant. Cunningham was asked whom

he was representing at the time of taking the lease dated July 15, 1912, and he answered he presumed he was acting for E. L. Black; but there is no testimony that he was ever instructed to take the lease for Black, or that he ever communicated any of these facts to Black, but did testify he sent the second lease to Black. There is no evidence that Black was ever informed that the lease dated May 20, 1912, which Cunningham had taken, was signed and acknowledged in Tulsa county and not in Okfuskee county. There was some evidence that one of the parties to this action had talked to Mr. Gaines asking him which lease he and Black were claiming under, and Gaines stated the first lease. As to whether this evidence was admissible, in view of the fact that Gaines was dead at the time of the trial, is not necessary for us to determine, as the most it would only make the evidence in the case conflicting, and by considering said evidence the court found that the first lease was in full force and effect, and that the terms thereof had been complied with, and that the same was not rescinded or superseded by the second lease. We think this finding is not clearly contrary to the weight of the evidence, but is supported by the weight of the evidence. There is no allegation of agency alleged in the petition that Cunningham represented Black in the taking of the second lease or that Black knew that said lease was being taken, except what is stated above.

Upon the issue of quieting title, this would be a nonjury case, and triable before the court, and the rule followed by this court in nonjury cases is:

"If the judgment of the court is not clearly against the weight of the evidence, the judgment of the court will not be disturbed." Board of Com'rs of Woodward County v. Thyfault, 43 Okl. 82, 141 Pac. 409, and an unbroken line of decisions of this court holding to the same effect.

We must therefore conclude that the judgment of the court, wherein he found, first, that the lease dated May 20, 1912, approved by the county court of Okfuskee county, is a valid and binding lease, and that the defendants Black and assigns have complied with all the terms and conditions thereof, is not clearly against the weight of the evidence; second, that the finding of the court that the lease of May 20, 1912, was not rescinded or superseded by the lease dated July 15, 1912, is also not clearly against the weight of the evidence.

The other questions argued by plaintiff in error become immaterial, as the findings upon these two questions settle all the issues in the case.

For the reasons stated, the judgment of the district court will be affirmed.

OWEN, C. J., and RAINEY, KANE, JOHN-
SON, PITCHFORD, and HIGGINS, JJ.,
concur.

(76 Okl. 62)

MILAM v. MILAM. (No. 10537.)

(Supreme Court of Oklahoma. Oct. 7, 1919.)

*(Syllabus by the Court.)***DIVORCE** ¶181—PROCEEDINGS IN ERROR MUST BE BROUGHT WITHIN FOUR MONTHS FROM DECREE.

Proceedings in error for reversal or modification of a judgment decreeing a divorce must be begun in this court within four months from the date of the decree appealed from. Section 4971, Rev. Laws 1910.

Error from District Court, Haskell County; W. H. Brown, Judge.

Action by C. D. Milam against May Milam for divorce. Judgment for plaintiff, and defendant brings error. Dismissed.

E. O. Clark, of Stigler, for plaintiff in error.

Holley & Means and Guy A. Curry, all of Stigler, for defendant in error.

PER CURIAM. It appears, on motion to dismiss this action, that plaintiff in error failed to commence proceedings in this court within four months from the date of the decree appealed from, as required by section 4971, R. L. 1910. The motion to dismiss the appeal must be sustained. *Linkugel v. Linkugel*, 183 Pac. 55; *Callahan v. Callahan*, 47 Okl. 542, 149 Pac. 135.

It is so ordered.

(76 Okl. 60)

ST. LOUIS & S. F. RY. CO. v. STATE et al. (No. 9377.)

(Supreme Court of Oklahoma. Oct. 7, 1919.)

*(Syllabus by the Court.)***1. CARRIERS** ¶39, 117—DUTY TO RECEIVE AND CARRY GOODS TENDERED FOR TRANSPORTATION.

The general rule is that it is the duty of every common carrier to receive for carriage and to carry goods of any person tendered to it for transportation, provided the goods are such as it holds itself out as willing to carry; and it is ordinarily the duty of the common carrier to furnish vehicles suitable in every respect for the safe transportation of the various kinds of property which are usually carried by it, and any failure to observe its duty in this regard will render it liable for loss or injury caused thereby.

2. CARRIERS ¶40—NOT REQUIRED TO FURNISH TANK CARS.

Where articles of an extraordinary character are offered, a carrier is not bound to accept them, or provide facilities of a different kind from those usually furnished for transportation; hence a railroad company was not required, under section 18, art. 9, of the Constitu-

tion, to furnish tank cars to carry the oils of a refinery.

Appeal from Order of Corporation Commission.

Complaint by the Lawton Refining Company against the St. Louis & San Francisco Railway Company to enjoin it from withdrawing certain tank cars, and praying that it be required to furnish additional tank cars. From an order of the Corporation Commission, requiring the Railroad to furnish certain tank cars, it appeals. Reversed, with directions to dismiss the complaint.

W. E. Evans, of St. Louis, Mo., and R. A. Kleinschmidt, of Oklahoma City, for appellant.

S. P. Freeling, of Oklahoma City, for the State.

B. M. Parmenter, of Lawton, for appellee Lawton Refining Co.

OWEN, C. J. The refining company, a corporation doing business at Lawton, Okla., buying, selling, and shipping crude and refined oils, complained that the railroad company heretofore had furnished four tank cars for the use of the refining company in transporting its merchandise, both crude and refined oils, but had given notice that such cars would be withdrawn from its use, and the volume of business would require the use, not only of these four cars, but additional tank cars, and prayed the railroad company be restrained and enjoined from taking the four cars out of its use, and be required to furnish additional tank cars. The Corporation Commission made an order requiring the railroad company to furnish the refining company the tank cars as requested.

[1, 2] The railroad company contends the Corporation Commission was without jurisdiction or authority to make the order, or to make any order respecting the subject-matter of the complaint. The question necessary for determination is whether it was the duty of the railroad company, under section 18, art. 9, of the Constitution, to furnish tank cars to be used by the refining company in the transportation of its products over the railroad company's tracks.

The general rule is well settled that it is the duty of every common carrier to receive for carriage and to carry the goods of any person tendered to it for transportation, provided the goods are such that it holds itself out as willing to carry. 10 C. J. 65; *Covington Stock-Yards Co. v. Keith*, 139 U. S. 128, 11 Sup. Ct. 461, 35 L. Ed. 73; *Elliott on Railroads*, § 1465. Subject to some exceptions, it is also the duty of the common carrier to furnish cars suitable in every respect for the safe transportation of the various kinds of property which are usually carried by it. Special cars must be furnished in

some instances for transportation of perishable products, refrigerator cars for vegetables and meats, and other cars particularly adapted for the goods transported, as stock cars for cattle, and any failure to observe its duty in this regard will render the carrier liable for loss or injury caused by such failure. 10 C. J. 85; *Hutchinson on Carriers*, § 505; *Atl. Coast Ry. Co. v. Geraty*, 91 C. C. A. 602, 166 Fed. 10, 20 L. R. A. (N. S.) 310. This general rule, however, is not without exception and qualification. *Elliott on Railroads*, § 1474; *United States v. Pennsylvania Ry. Co.*, 242 U. S. 209, 37 Sup. Ct. 95, 61 L. Ed. 251; *C., R. I. & P. Ry. Co. v. Lawton Refn. Co.*, 253 Fed. 705, 165 C. C. A. 299. In the case of *United States v. Pa. Ry. Co.*, supra, tank cars were held to be an exception to the general rule. It was also held the Interstate Commerce Commission was without authority or power to require the common carrier to furnish such cars, and that case was followed by the Circuit Court of Appeals in the case of *C., R. I. & P. Ry. Co. v. Lawton Refn. Co.*, supra, where it was said:

"Where articles of an extraordinary character are offered, a carrier is not bound to accept them, or provide facilities of a different kind from those usually furnished for transportation; hence a railroad company was not required to furnish tank cars to carry the oils of a refinery."

In *Re Private Cars*, 50 Interst. Com. Com'n R. 652, the Interstate Commerce Commission found there are 59 varieties of liquids regularly transported in tank cars, and that cars used for transportation of one kind of liquid ordinarily cannot be used for transportation of another of the varieties, many of these liquids requiring especially constructed cars, with special fittings. In that case, among other things, it was said:

"It is more economical and more efficient for the refiner to furnish a tank car, either owning it or leasing it from some concern, than for the railroad company to own it. A refiner producing two kinds of oil, gasoline and residuum, requires two kinds of cars. Another refiner, producing all grades of oil, from the lighter oil down to coke, will require several kinds of cars."

Counsel rely upon the case of *Atl. Coast Ry. Co. v. Geraty*, supra, where the railroad company was held liable in damages for a failure to furnish refrigerator cars for transportation of vegetables; but the facts of that case easily distinguish it from the instant case. There the railroad company had induced plaintiff, and other vegetable growers in that region, to plant certain crops, expecting that, if they raised vegetables, refrigerator cars necessary for such vegetables would be obtained, and under these facts it was held the plaintiff was entitled to recover damages sustained by the carrier's refusal to furnish refrigerator cars on reasonable demand for

transportation of plaintiff's cabbages. It was said:

"Where plaintiff, owning a farm in a truck region, was induced to plant a large quantity of cabbages by assurance of defendant railroad company that refrigerator cars would be furnished to transport the cabbages to market, which it refused to do on reasonable demand, plaintiff was entitled to recover for unharvested cabbage which spoiled because of defendant's refusal to furnish refrigerator cars. * * *"

In the instant case, the action is not for damages, but one to compel the common carrier to furnish tank cars under an alleged duty resting upon the common carrier and not by virtue of any contract. Counsel also rely upon the case of *State v. C. W. B. Ry. Co.*, 47 Ohio St. 130, 23 N. E. 928, 7 L. R. A. 319, but the question involved there was a discrimination in the rates charged. No such question is presented in this case. The Corporation Commission was without authority to make the order.

The case is therefore reversed, with directions to dismiss the complaint.

HARRISON and BAILEY, JJ., did not participate.

The other Justices concur.

(76 Okl. 70)

STEWART et al. v. RIDDLE et al.
(No. 9179.)

(Supreme Court of Oklahoma. Oct. 7, 1919.)

(Syllabus by the Court.)

1. DAMAGES §123—MEASURE ON SUBSTANTIAL COMPLETION OF BUILDING CONTRACT.

The measure of damages for defects in the construction work of a building, substantially completed according to the plans and specifications, is the cost of repairing the defects, and not the difference in the value of the building as constructed and what it would have been if constructed according to the plans and specifications.

2. APPEAL AND ERROR §1002—VERDICT ON CONFLICTING EVIDENCE NOT REVIEWED.

Where the evidence is conflicting, the verdict of the jury will not be disturbed if there is any evidence reasonably tending to support the same.

3. WITNESSES §55, 56(1)—WHEN HUSBAND COMPETENT AS WITNESS FOR HIS WIFE.

A husband is a competent witness for his wife concerning transactions in which he acted as her agent, or when he is a joint party and has a joint interest in the action.

Error from District Court, Oklahoma County; John W. Hayson, Judge.

Action by J. B. Riddle and another against A. F. Stewart and Dave Wilderson, partners

doing business under the firm name and style of Stewart & Wilderson. Verdict and judgment for plaintiffs, and defendants bring error. Affirmed.

Fulton, Shirk & Danner, of Oklahoma City, for plaintiffs in error.

M. S. Singleton, of Oklahoma City, for defendants in error.

RAINEY, J. This is an action for the alleged breach of a building contract. The cause was tried to a jury, resulting in a verdict for the plaintiffs in the sum of \$713.75.

The first two assignments of error are as follows:

"First. The court erred in admitting, over the objections and exceptions of plaintiffs in error, incompetent, irrelevant, and immaterial testimony.

"Second. The court erred in holding that defendants in error could recover as damages what it would cost them to have the building repaired and put in the same condition as the Enoch's bungalow."

And under these assignments of error it is contended that the proper measure of damages for the defective construction of a building under a building contract is the difference in the value of the building as constructed and in what the value would have been had it been constructed according to the contract. According to the plaintiffs' evidence, which we must consider as true since the verdict of the jury was in their favor, the foundation to the building was so insecure and defective that it would have to be rebuilt to prevent the house from becoming a wreck and to make it suitable for occupancy as a home. The record further shows that these defects could be remedied at substantially the cost awarded the plaintiff by the verdict of the jury.

[1] An examination of the adjudicated cases discloses that the method of ascertaining the damages sustained by the owner from the defective performance of a building contract varies according to the nature of the defects, and that different elements frequently enter into the consideration in different cases. After a careful examination of *Wiebener et al. v. Peoples*, 44 Okl. 32, 142 Pac. 1036, Ann. Cas. 1916E, 748, and the cases collected in the note to *J. A. Graves v. Allert & Fuess*, 104 Tex. 614, 142 S. W. 869, in 39 L. R. A. (N. S.) 591, we have concluded that the rule applied by the great weight of authority may be briefly stated as follows: Where the building is constructed and substantially completed according to the plans and specifications, the measure of damages for defects in the construction work is the cost of repairing the defects; but where the defects are such that they cannot be remedied without the destruction of some substantial part of the benefit which the owner's property has received by reason of the contractor's work, or where the

cost of remedying the defect will not fully compensate the owner for damages suffered by him, the measure of damages is the difference in the value of the building as constructed and what it would have been if constructed strictly according to the plans and specifications.

The instant case is not similar to one where the building is constructed substantially according to the contract, except that the rooms are not of the dimensions contracted for, or there is some other defect that does not render the building substantially unfit for the owner's use. On account of the defective and insecure foundation, the house built for the plaintiffs in this case, according to the evidence, cannot be used by them for the purposes for which it was erected. The defects, however, can be remedied without reconstructing the entire building, and without any change in the plans, for it is shown by the evidence that it is feasible in its present condition to prop it up and place a secure foundation thereunder. Under the circumstances, we think the proper measure of damages in this case was the cost of remedying the defects, and that the evidence was not improperly admitted.

[2] Under the third assignment of error, it is contended that the evidence does not support, or reasonably tend to support, the verdict of the jury and the judgment of the court. It would serve no useful purpose to discuss the evidence. It is sufficient to say that we have examined the same and find that it reasonably tends to support the verdict of the jury and meets the test required in cases of this character.

[3] Under the fourth and fifth assignments of error it is urged that the court committed material error in permitting plaintiff J. B. Riddle to testify as a witness in the case, over the objection of the defendants, for the alleged reason that it was shown that he was the husband of the plaintiff Ruth Peery Riddle, and that he was not acting as her agent and did not have a joint interest with his wife in the action. This objection is without merit in the light of the third subdivision of section 5050, Rev. Laws of 1910, which provides:

"The following persons shall be incompetent to testify: * * *

"Third. Husband and wife, for or against each other, except concerning transactions in which one acted as the agent of the other, or when they are joint parties and have a joint interest in the action; but in no case shall either be permitted to testify concerning any communication made by one to the other during the marriage, whether called while that relation subsisted, or afterwards."

It appears from the evidence that the contract was entered into by and between the plaintiff Ruth Peery, and A. D. Stewart and Dave Wilderson, partners, but that at said time J. B. Riddle and Ruth Peery were en-

gaged and expected to be married, and intended making the house constructed by the defendants their home. Soon thereafter they did marry, and after the house was completed accepted it as their home. The defendants were informed of all the circumstances and knew that Mr. Riddle was furnishing the money for the construction of the house. Moreover, plaintiffs' petition alleged that the interest of J. B. Riddle was that of one of the joint owners of the property and "that in all of the negotiations covering the making of said contract the said J. B. Riddle acted for himself and as the agent of the said Ruth Peery, now Ruth Peery Riddle." The allegation of agency was not denied under oath and stands as admitted. It follows that the court did not err in permitting him to testify.

We have examined the instructions of the court and find that they fairly and fully cover the law of the case, and, from an examination of the entire record, we cannot say that any slight error, if any there may be therein, has probably resulted in a miscarriage of justice. Section 6005, Rev. Laws of 1910.

Finding no reversible error in the record, the judgment is affirmed.

All the Justices concur, except HARRISON and BAILEY, JJ., absent.

(76 Okl. 62)

PINE et al. v. BAKER, County Treasurer, et al.

In re ROAD CONSTRUCTION, OKMULGEE COUNTY.

(Nos. 10097, 10851.)

(Supreme Court of Oklahoma. Oct. 7, 1919.)

(Syllabus by the Court.)

1. HIGHWAYS \S 107(1)—ON CONSTRUCTION OF PERMANENT ROADS ESTIMATE OF COST FILED WITH COUNTY CLERK.

The estimate provided for in section 1, chapter 28, Session Laws 1916, in relation to constructing permanent roads should be an itemized statement of the cost of said road, and filed with the county clerk with the plans and specifications.

2. HIGHWAYS \S 107(1)—CONSTRUCTION OF SECTIONS OF HIGHWAY EXCEEDING ESTIMATE ENJOINED.

Section 1, chapter 28, Session Laws of 1916, provides: "No contracts shall be let by the board of county commissioners at a price exceeding the estimate made and approved by the consulting engineer." Where the only estimate prepared estimates the cost of the grading and the paving separately, upon each section of road to be built and constructed, and the combined contracts for the grading and paving of each section of the road exceed the total cost as contained in the estimate for said

grading and paving, the enforcement of said contracts for each section, which exceed the gross estimate of said section, will be enjoined.

3. HIGHWAYS \S 99 $\frac{1}{4}$, New, vol. 14 Key-No. Series—PROCEEDS OF BONDS FOR PERMANENT ROADS CANNOT BE USED TO GRADE ROADS.

Where bonds are voted by a county to build permanent roads, the proceeds cannot be used by the county to simply grade roads, but must be used for the purpose of constructing permanent roads, and for no other purpose.

4. STATUTORY DEFINITION OF "PERMANENT ROADS."

Section 2, chapter 30, Session Laws of 1916, defines permanent roads as follows: "Permanent roads are defined to mean roads surfaced with crushed rock, gravel, macadam, brick, concrete, asphalt-macadam, or any other hard surfacing material."

5. HIGHWAYS \S 107(1)—ENFORCEMENT OF CONTRACTS FOR COUNTY ROADS IN VIOLATION OF STATUTE ENJOINED.

In an action by certain taxpayers to enjoin the county treasurer from paying out funds derived from the sale of road bonds, and to declare certain contracts entered into by the county commissioners for the construction of certain roads illegal and void, for the reason that no estimate had ever been prepared and filed as provided by law, where upon the trial of the case it is shown that contracts for the construction of the road were entered into on December 20, 1917, and that no estimate was filed with the county clerk, but the testimony of the county clerk was that some time in January, 1918, one of the county commissioners gave to the county clerk what purported to be an estimate of the cost of said work, though not itemized, nor approved by said consulting engineer, which statement or purported estimate had never been marked "Filed" by the clerk, and the evidence in the case discloses that the contracts entered into by the county commissioners are in excess of the purported estimate, the same being the only estimate that was in existence, *held*, said contracts are in violation of section 1, chapter 28, Session Laws 1916, and the enforcement of the same will be enjoined.

Error from District Court, Okmulgee County; R. W. Higgins, Judge.

Proceeding by W. B. Pine and others, citizens and taxpayers, to compel the county attorney to appeal to the district court from the action of the Board of County Commissioners of Okmulgee County in awarding certain contracts for permanent roads. On his refusal to appeal, the citizens perfected an appeal, and in the district court the county attorney's motion to dismiss the appeal was sustained, and from the judgment the citizens and taxpayers bring error. Action by W. B. Pine and others, citizens and taxpayers, to enjoin J. Will Baker, as County Treasurer of Okmulgee County, the Board of County Commissioners of Okmulgee County, Harry Hart and others, as County Commissioners

and others, from paying out money on certain contracts for road building made by the County Commissioners, and to enjoin the enforcement of such contracts. Injunction denied, and petition dismissed, and plaintiffs bring error. Cases consolidated on appeal, and judgment reversed and remanded, with directions to declare a certain contract void and to enjoin its enforcement, and to enjoin the performance of certain other contracts.

Frank F. Lamb, A. L. Beckett, G. R. Horn-er, W. M. Matthews, George James, Fred M. Carter, C. B. McCrory, and W. A. Hiatt, all of Okmulgee, for plaintiffs in error.

L. A. Wallace, W. W. Witten, and Carter & Dickson, all of Okmulgee, R. B. F. Hummer, of Henryetta, Jas. M. Head, of Boston, Mass., and G. A. Paul, of Oklahoma City, for defendants in error.

MCNEILL, J. This controversy involves certain proceedings of the board of county commissioners of Okmulgee county, where contracts were entered into by the county commissioners to build certain permanent roads. In November, 1916, a bond election was held in Okmulgee county. The question submitted was: Should the county commissioners issue bonds in the sum of \$800,000 to build and construct 118 miles of permanent roads? The election resulted in authorizing the issuance of said bonds. Thereafter the bonds were issued and sold or contracted for.

The firm of Harrington, Howard & Ash, of Kansas City, were employed as consulting engineers to prepare surveys, estimates, plans, and specifications. Thereafter certain purported plans and specifications of said improvement were prepared and filed with the county clerk. According to the plans and specifications, the highway to be improved was to be 18 feet wide and the pavement was to have a base 8 inches thick. The plans and specifications divided the 118 miles of road into 19 separate and distinct sections or divisions. Each section was designated by a certain number. The county commissioners advertised for bids for each section separately, but provided the bidder might include as many sections as he desired in one bid. Bids were submitted to the board of county commissioners on December 17, 1917. Several bids were filed, and the board of county commissioners on December 20, 1917, awarded the contract for grading 16 sections of said highway to the J. J. Harrison Construction Company, and three sections to S. P. Romans. The paving contract for 10 sections of the highway, or about 60 miles of the same, was awarded to the Western Paving Company. No contract was entered into for the paving of the remaining 9 sections of said road. The county commissioners awarded the contracts on each section

of the road separately, and embraced in one contract the several sections of road awarded to each successful bidder.

After the county commissioners had entered into said contract, certain citizens and taxpayers filed a notice with the county attorney, demanding that he appeal to the district court from the action of the board of county commissioners in awarding said contracts. The county attorney refused to appeal and the citizens perfected said appeal themselves. In the district court the county attorney filed a motion to dismiss the appeal, which motion was sustained. From the judgment dismissing said appeal, an appeal was taken to this court by the citizens and taxpayers. Thereafter the citizens and taxpayers instituted an action, alleging that the contracts were fraudulent, and also set out numerous irregularities, alleging that by reason of said irregularities the county commissioners acquired no jurisdiction to enter into said contracts, and by reason of said irregularities the contracts were null and void, and asked that the county treasurer be enjoined from paying out money on said contracts, and the enforcement of the contracts also be enjoined.

On the trial of the case in the district court the injunction was denied, and the petition dismissed, and from said judgment the plaintiffs appealed. By agreement of the parties the two cases have been consolidated, and briefed and argued as one case. For grounds of reversal, the plaintiffs allege numerous assignments of error.

Among the assignments of error briefed by plaintiffs in error is the following:

"Where the law prescribes the mode which the board of county commissioners must pursue in the exercise of all the powers granted them, it excludes all other methods of procedure."

[1, 2] Under this assignment of error plaintiff relies upon the following reasons for a reversal:

First. That no estimate was prepared and filed with the county clerk as required by law. In the petition the plaintiffs charge the following:

"That the board of county commissioners failed to require from the county engineer or proper officials, and the county engineer failed to perform his duties in making, a preliminary survey of the proposed roads to be improved, or of the work of paving to be done thereon, or to make and file with the county clerk an estimate of the costs in the manner as required by law of the proposed grading or improvements, all of which is essential and required by law prior to the exercise of any authority upon the part of the board to the letting of any contract, or contracts, for the grading or building of permanent roads with the proceeds of bonds."

The section of the statute relating to the estimate, plans, and specifications is section

1, chapter 28, Session Laws 1916, and is as follows:

"It shall be the duty of such consulting engineer to supervise the making of all surveys, estimates, plans and specifications for the improvement proposed, and no money shall be paid out on such improvement until such consulting engineer shall have first inspected and approved the items as conforming to the requirements set forth in the adopted plans and specifications, which shall be of record as provided by law.

"No contracts shall be let by the board of county commissioners at a price exceeding the estimate made and approved by the consulting engineer. * * *

It is the contention of the plaintiffs in error that no estimate was ever made and filed with the county clerk as provided by law, and therefore the proceedings and contracts made thereunder are void.

As to whether any estimate of the cost of this improvement was ever filed with the county clerk, the record is not clear. The county clerk testified that one of the county commissioners, to wit, Mr. Hart, sometime in January, 1918, after the contracts were entered into, gave her an instrument which was marked as "Exhibit 4" and designated as "Calculations for Summary Cost of Okmulgee County Roads." This exhibit is copied on the letter head of Harrington, Howard & Ash, consulting engineers, and is as follows:

Harrington, Howard & Ash, Consulting Engineers,
Kansas City, Mo. Made by H. G. H. Date, Nov.
16, 1917. Job No. ———. Checked by ———. Date,
———. Sec. No. ———. Back-checked by ———.
Date, ———. Sheet No. ———.

Calculations for Summary of Costs, Okmulgee
County Roads.

Road	Grading	Cost of Pavement 18' wide.
Section.	Cost.	Bit. Macadam. Permanent Type.
No. 1.	\$20,205.	\$11,340. \$169,420.

The exhibit then continues with 19 different sections of road, and opposite each particular section of road is an estimated cost of the improvement of said section in the same form as section 1. The county clerk testified as follows:

"Q. Are there any estimates in your office relating to these permanent roads? Was there ever one filed in your office, excepting this, which purports to be an estimate? A. No, sir; that is the only one."

An assistant of the consulting engineer, a Mr. Hunter, testified that he had copied this exhibit from one in the office of the consulting engineer in Kansas City, but was not positive when he did this; that he thought it was some time about the time the contracts were entered into. He delivered the same to Mr. Hart, one of the county commissioners. The county engineer testified that he made no estimate for paving. The estimate that he made was for dirt roads, and when asked the question, "You mean by grading the dirt roads, to be used as dirt roads?" answered,

"Yes." He was then asked the question, "Was there any one in your office that made such an estimate?" and he answered, "No." With the records in this condition, we know of no testimony offered by Mr. Hart to contradict the positive testimony of the county clerk—none by the consulting engineer that he had ever prepared an estimate. This is the only evidence, as we recall, except the evidence of Mr. Hunter, which is in substance as quoted above, and our attention is not directed to any other evidence. The records of the county commissioners on the date of December 17, 1917, contains the following statement:

"Be it resolved, that the estimate of costs for the construction of permanent state roads of Okmulgee county, as provided for in bond issue heretofore carried and heretofore presented and filed, be and the same are hereby approved."

Counsel for defendants in error in their brief say:

"Under the provisions of section 7605 of the Revised Statutes of 1910, we take it that there is nothing that requires the disclosure of the matters contained in the preliminary estimate, and if it is filed, and the contract price is within the provisions of the estimate, then the time of filing of the details of the same would be merely directory, and not mandatory, and would not constitute a jurisdictional defect in the contract, which was awarded within the provisions of the estimate."

But, if we examine the sections of the statute, we find they contain the following excerpts:

Section 7605, Revised Laws 1910, in relation to the estimate is as follows:

"Said engineer shall file with the county clerk in a formal report preliminary estimates of the cost of the improvement of said highway with the notes of the surveys thereof within ten days from the time of his appointment for such work where the surveys and estimates cover not more than eighteen miles of highway and within a proportionate time for greater mileage. * * *

Section 7607 provides as follows:

"* * * And shall order the engineer to prepare plats, surveys, plans, specifications, and all necessary data with itemized estimate of constructing the roadway to be built or improved, the original of which shall be filed with the county clerk."

Section 7610 provides as follows:

"Within five days from the filing of the surveys, plans, specifications and estimates, the county clerk shall advertise for bids for the building or improving of the highway in accordance therewith. * * *

These sections of the statutes in plain terms provide that an itemized estimate of the cost of the constructing of the improvement should be prepared, and the original

should be filed with the county clerk five days before the advertisement for the improvement. The record clearly discloses that this was not done. This case, then, is within the rule announced by this court in the case of *City of Muskogee v. Nicholson* (not yet officially reported) 171 Pac. 1102, where the court said:

"The failure to have made by the city engineer and submitted to the council or commissioners of a city an estimate of the cost of a street improvement, as required under the provisions of section 602, Rev. Laws 1910, renders a contract for such street improvement, entered into in the absence of such preliminary estimate of cost, void, and the assessments against the abutting property to pay the cost of improvements so contracted for are likewise void."

But as counsel suggests that this might only be an irregularity, admitting for the sake of argument that Exhibit 4 was filed on the day the bids were received, still the same is not in conformity with section 7607, which requires that the estimate shall be itemized. The plans and specifications make provision for paving with five different classes of pavement. These are designated:

- No. 2. Bituminous macadam pavement.
- No. 3. Asphaltic concrete pavement No. 1 (bitulithic).
- No. 4. Asphaltic concrete pavement No. 2.
- No. 5. Concrete pavement.
- No. 6. Brick pavement.

This purported estimate places an estimate only on macadam pavement and permanent type, and does not attempt to itemize the cost of the different items that are included in each class of pavement or necessary for grading.

The engineer prepared a form for the different bidders to use in bidding upon this improvement. For grading the roads the form specifies the proposed "approximate quantities," as they are designated, that go to make up the necessary work to be done, and material to be furnished to grade said roads. And as to the grading of each section he divided the "approximate quantities" into 14 different divisions or items. Some of the items and the amount of the same are designated in road section 1, as follows:

- 1. Excavation—Solid rock, cu. yds. 700.
- 2. Excavation—Intermediate, cu. yds. 6,400.
- 3. Excavation—Common, cu. yds. 19,000.
- 8. Culvert—Pipe 24-30 in dia. lin. ft. 95.

There are 14 of these different items in each road section. The notice for bids provides that bidders on this work might bid on each item separately, or might bid upon the total of the work. The bids for grading submitted were bids upon each item separately, which was so much per yard, or foot, or whatever the same might be. The notice also provided that the county might award the contracts for any one item to one person,

and one item to another, or might embrace them all in one contract to one person. The form contained 34 separate items. Items 15 to 34, as appears in the form, refer to the pavement. Some of them are as follows:

- 15. Total pavement, sq. yds. 78,800.
- 16. Lower course paving base stone macadam pavement base, cu. yds. 17,500.
- 19. Larger sized broken stone macadam pavement surface, cu. yds. 6,500.
- 26. Broken stone for brick pavement, cu. yds. 11,200.
- 31. Cement for brick pavement, bbls. 11,800.
- 32. Cement for concrete pavement, bbls. 25,000.
- 33. Paving brick, M. 2,840.

Some of the bids in regard to the paving were submitted for different classes of paving at so much per yard. Others bid on certain items as specified in the form designated as approximate quantities at so much a yard or foot, or however designated. This form discloses that the materials to make up the different classes of pavement are all very different. Still the engineer gave to the county commissioners no estimate of the cost of any of the items that go to make up the different kinds of pavement, but only submitted a gross estimate, and designated the same as the cost of permanent type. As to whether that includes all type of pavement we do not know. This estimate does not meet the requirements of the statute.

The force and effect of this objection to the estimate is not briefed by either side, and we know of no case where our court has passed upon this question, but the general rule is: If the statute requires a detailed or itemized estimate of the cost, an estimate of the gross cost is not sufficient. This rule is announced in 28 Cyc. 987, and the case of *Hentig v. Gilmore*, 33 Kan. 234, 6 Pac. 304, holding to the same effect. The case of *Olson v. City of Topeka*, 42 Kan. 709, 21 Pac. 219, holds that, where the statute requires a detailed estimate, the statute is complied with if the estimate states the surface to be paved, the kind of pavement, cost per yard, the aggregate cost, the number of lineal feet of curbing, its character and cost per foot, and the aggregate cost. This estimate does not come within this provision of the statute. We then have an estimate not filed or itemized as required by the statute; but, even conceding for the sake of argument that defendants in error's contention is true, that these would only be irregularities, and if the contracts come within the provisions of the estimate, they should not be enjoined, nor declared null and void.

This invites the court's attention to the question that the court requested both sides to brief in this case, to wit:

"Do the contracts come within the estimate or are they in excess of the estimate?"

Counsel for defendants in error raise the question that the contracts were never attacked for this reason, and that this question was not raised in the court below, and therefore cannot be made an issue in this court. That is true, but counsel's position appears to be in his brief:

"Conceding that the estimate was not prepared or filed as provided by law, then the contracts should not be enjoined if they come within the provisions of the estimate."

This is the identical question the court asked for additional authorities upon. Counsel certainly could not now complain, after taking the position he has in his supplemental brief, that the contracts should not be enjoined if they come within the estimate, and then suggest to the court that the court should not look to the estimate to determine this question. Even conceding that this purported estimate would be sufficient to give the county commissioners jurisdiction to enter into said contracts, we are then confronted with the argument that the contracts entered into exceed the estimate as shown by this exhibit. It is true this question was not presented to the court below, nor made an issue in the case below, nor briefed in this court, until the attention of both sides was called to the same by this court. The evidence does not disclose when the plaintiffs in error were advised there was such an estimate as the purported estimate in existence. It would not do to say that the engineer or county commissioner would be permitted to carry an estimate around in their pocket, and when their proceedings are attacked for the reason that no estimate was prepared and filed as required by law, and at the trial such an estimate appears, and if it appears the contracts are in excess of the estimate, raise the plea that said question was not pleaded or relied upon in the lower court for reversal. True, the trial court did not pass upon this question; but if the consulting engineer had performed the duties imposed upon him by the statute, that is, prepared an itemized estimate of cost, filed it with the county clerk, and if the contracts were in excess of the estimate, this no doubt would have been made an issue, and the trial court would no doubt have passed upon this question.

[3-5] From an examination of the exhibit, the estimate designates certain pavement as permanent type, as the most expensive pavement, and, conceding that the contract covers that type of pavement, it will then be necessary to look to the estimate, and see what the cost of improving road section 1 was estimated at. The estimate for cost of grading is \$20,205. Cost of "permanent type," \$169,420. The number of yards to be paved, on road section 1, as disclosed by the form upon which all bids were submitted, states the

same to be 78,800 square yards. If we divide the number of square yards into the estimate, we will find that the cost of paving was estimated at \$2.15 per square yard. It is not only true of section 1, but is equally true of each section of the road. The bid of the Western Paving Company was \$2.28 per square yard. The total amount of this bid on road section 1 as tabulated by the engineer, introduced in evidence as Exhibit 7, is \$179,664, or an excess of a little over \$10,000 upon this section of the road for the paving alone.

On the 10 sections of the road the contract price of the Western Paving Company exceeds the estimate cost as made by the consulting engineer between \$30,000 and \$90,000. This is taken from the estimate filed as Exhibit 4, and the tabulations made by the engineer, appearing in Exhibit 7. If we take the combined cost of road section 1, we have cost of grading, \$20,205; cost of paving, \$169,420; or a total estimated cost of \$189,625. The contracts entered into as tabulated by the engineer and by the Harrison Construction Company upon this section of the road is as follows: Grading contracts, \$17,362; paving contract, \$179,664; total contract cost, \$197,026, or an excess of \$7,401 upon this particular section of the road. This same ratio pertains to each of the other 9 sections. The cost as entered into by the contracts exceed the estimated cost on the 10 sections of the road over \$60,000.

Counsel for defendants in error suggest that the only testimony introduced in the case was that of the assistant engineer, Hunter, and appears to be testimony elicited by the defendants in error, and he was asked the following question:

"Q. Did you make a comparison of the bids with the estimates filed by the consulting engineer, to ascertain whether or not all the bids of the contractors are within the estimate of the engineer? A. Yes.

"Q. Are they? A. Yes; they are.

"Q. In each instance? A. Of the successful bidder or all bidders?

"Q. The successful bidders. A. The successful bidders.

"Q. In other words the contracts are all within the estimate? A. Yes, sir.

"Q. Both Harrison, Romans, and Western Paving Company? A. Yes, sir."

But this is not the only testimony. This is the only testimony of a witness upon this point; and while counsel suggests that, if the matter had been gone into, it would have been a very easy matter to have explained the comparison of cost with the estimate. It does not seem to us that it is very difficult to explain, nor should it take a civil engineer to tell whether the contract price is within the estimate. It does not require expert evidence to ascertain, in a case where it is estimated there will be 78,800 square yards to

pave, and the cost of paving such area is estimated at \$169,420, that the cost per yard will be \$2.15. The bid on the paving as approved in the contract let is for \$2.28 per square yard, and the engineer tabulates the amount to be \$179,664. We do not think that it is necessary, or would be necessary, to call an engineer to state whether \$2.28 per square yard was more than \$2.15, or whether \$179,664 is more than \$169,420.

Counsel for defendants in error have suggested in their brief that it is customary for the estimate not to be filed, so the bidder will not know what the estimate is; but we think that such an argument should have no application to an engineer who fulfills his duty to the county that pays him for doing his work. If he complies with the law, the county commissioners and general public will know what the costs of the improvement are supposed to be, and in what way and manner the engineer figured the cost of the improvement. If he files only a slip of paper, as in the case at bar, the county commissioners will receive no benefit from it, nor will the general public. They will have no idea of how he estimated the cost. If an engineer will simply do his duty, make his itemized estimate of the cost, and not guess at it, the public will be protected, and so will the bidders. This was the intent of the Legislature. Of course, if the engineer has just guessed at the cost of the improvement, or files an excessive estimate, or fails to ascertain what it will cost to lay the foundation of paving, what it will cost for the surface, or what it will cost to grade the road, the argument might be plausible. He is employed for the reason he is supposed to be able to ascertain quite accurately the material necessary to be used, the yards to be excavated, the number of yards constituting the paving, and the cost of each item. If he fails to give this information to the county, he is then receiving money for work which he has failed to do, and gives the county nothing in return for his money received. The county commissioners could easily guess at the cost of the improvement. His estimate should be more than a guess; it should be sufficiently accurate, so, if contracts are entered into within his estimate, they will not be excessive.

Neither will the argument that you cannot tell whether the contract price exceeds the estimate until the work is completed, for the reason this work is done on the yardage basis, be of any avail. It is true it is done upon the yardage basis, and to say you could not tell whether the contract is going to be within the estimate until the work is completed would be to say that the Legislature, not only of Oklahoma, but of nearly every state in the Union that has passed such statutes, wherein they provide the contract shall not exceed the estimate, has only been passing useless legislation. With this we cannot

agree. It is easy to tell that \$2.28 per square yard is more than \$2.15; and, if you reduce the number of yards to be completed, the estimate would be reduced in the same proportion.

Counsel further suggests that you cannot tell whether the contracts exceed the estimate, as the estimated cost of the engineer was \$1,400,000; but with this we cannot agree, as the estimated cost of the engineer upon this 118 miles of road amounts to approximately \$3,000,000. The contracts entered into by the county commissioners call for the expending of approximately \$1,700,000, with only \$800,000 to pay for the same. Instead of this being an argument in favor of the defendants, it seems to us it would be an argument against the defendants in error, for the reason they are contracting to expend money which they do not have. This would tend to support the contention of the plaintiffs in error that the county commissioners have entered into this contract without any knowledge upon their part as to how much road can be paved, how much will be paved, how wide the road shall be, how much shall have an eight-inch base, and how much shall have a five-inch base, and instead of being an argument in support of defendants in error's contention, we think it would only be an argument in support of plaintiffs in error's contention that the commissioners have entered into said contract without any knowledge upon their part as to how much money is to be expended or how much they can expend.

The Harrison Construction Company in one of their supplemental briefs suggest that their contracts for each section of road are all within the estimates for the grading of each section. This is true; but they submit no authorities, nor do they attempt to construe the statute, as to whether it means the combined contracts for the grading and paving of each section should determine whether the contracts are in excess of the estimate, or whether, if one bid is within the estimate of a particular item, such bid could be accepted and a contract entered into for the same, and would the same be legal? The statute provides that no "contracts," using the plural, shall be entered into at a price exceeding the estimate. This section of the statute, when construed with the section of the statute that provides for the estimate to be itemized, must be construed to mean the combined contracts of the improvement, for each section of the road should not exceed the gross estimate of the cost for improving such section. The record plainly discloses, notwithstanding the testimony of the assistant engineer, that the contracts entered into are in excess of the estimate as to each 10 sections of the road. The contracts entered into on the 10 sections of road, when construed together, are in direct

violation of section 6, chapter 28, Session Laws of 1916. This court has held in the case of *Morrow v. Barber Asphalt Paving Co.*, 27 Okl. 247, 111 Pac. 198, and *Bowles v. Neely*, 28 Okl. 556, 115 Pac. 844, that a contract for public improvements entered into by a municipality in excess of the estimated cost submitted with the plans and specifications is void.

As to the sections of the roads where no contracts were entered into for paving, a somewhat different situation might prevail. Neither side has raised or presented this question, but it was testified to without contradiction that the county commissioners could not pave to exceed 50 or 60 miles of road, being that portion of the road covered by the contracts, and no doubt would be unable to pave all of that. The bonds were voted solely for the purpose of building permanent roads, and could not be used simply for grading the roads, when it is admitted the funds available are insufficient to pave the same after the grading has been done.

Section 2 of chapter 30, Session Laws of 1916, defines permanent roads as follows:

"Permanent roads are defined to mean roads surfaced with crushed rock, gravel, macadam, brick, concrete, asphalt-macadam, or any other hard surfacing material."

The bonds were issued for the purpose of constructing permanent roads, and the commissioners could not enter into a contract to use this money for any other purpose. This court in the case of *Town of Afton v. Gill*, 57 Okl. 36, 156 Pac. 659, said:

"Where it is shown that funds derived from the sale of bonds about to be issued will be devoted to unlawful purposes, and where it is further shown that said funds may not properly be applied to the purposes for which they were voted, the issuance of the bonds will be enjoined."

We are now confronted with the following objections:

First. That there is no evidence to show that any estimate was ever approved by the consulting engineer.

Second. That none has ever been filed with the county clerk, although there may be some evidence that on the date bids were received one had been delivered to the county clerk.

Third. That it was not filed as required by the statute.

Fourth. That the purported estimate is not itemized as required by the statute.

Fifth. If the purported estimate is sufficient to comply with the law as being an estimate, and the filing and approving of the same would only be an irregularity, then the contracts for the improvement exceed the estimate of the cost for said improvement.

The record contains some 2,500 pages, and charges numerous irregularities and fraud, practically all of which pertains to the con-

tract of the Western Paving Company. The principal ones are:

First. That there were material changes in the plans and specifications upon which the bids were invited, and were thereafter changed by the board of county commissioners or consulting engineer and after the bonds were received.

The changes are alleged to have been:

First. A change of base of road from 8 inches to 5 inches.

Second. A concession of freight rates made on account of war conditions.

Third. Change in the manner of payment upon the work done.

Fourth. A change from hand-crushed to machine-crushed stone.

Fifth. There was also a change that the duties of the board of county commissioners had been delegated to the consulting engineer, which was contrary to law.

Sixth. That the plans and specifications were so drawn as to prevent open, free, and competitive bidding for the work.

Seventh. That the commissioners adopted a patented pavement, and that no statement was filed by the holder of the patent, as required by the former decisions of this court, with the county commissioners.

Eighth. That the kind and character of pavement adopted was of no value.

As to these questions, under the view taken by the court, it will be unnecessary to pass upon the same, as the conclusion already reached requires a reversal of the case. It would be sufficient to say that if the questions were not jurisdictional, the questions would all present irregularities. These irregularities have all been pointed out to the county commissioners, and we cannot presume that in their further proceedings the irregularities will again occur. There should be no necessity for them again occurring. If the consulting engineer will be as careful in the protection of the county's interest as he has been to see that the plans and specifications were so adroitly drawn that they included all the necessary requirements to come within the patented pavement controlled by Warren Bros., there should be no future difficulty in this case.

It appears from the evidence that the Harrison Construction Company and Romans have performed some labor and done some work under their contracts. This court will not say as to whether by proper procedure the board of county commissioners might not enter into a contract or contracts for the paving of certain sections of the road partially graded, where such paving contracts combined with the contracts of Harrison Construction Company and Romans, would not exceed the estimate. As to whether this could be done would raise numerous legal questions, none of which are briefed by either side, and the court does not feel it should assume the responsibility of deciding them un-

der those conditions. It is sufficient to say that the Legislature, in framing the law for building roads, wherein they state that "no contracts shall be entered into that exceed the estimate," must be interpreted to mean that each section of the road upon which an estimate is filed, anticipates that the county will enter into contracts for the completion of each section, and while contracts may be let to different parties for the different portions of the work, the total contracts of each section must be for the completion of one section, and within the estimate.

Under the state of facts as they now exist, the fulfillment and the enforcement of the contracts, when taken as a whole, will be enjoined.

For the reasons stated the judgment of the district court will be reversed and remanded, with directions to declare the contract of the Western Paving Company null and void, and to enter a permanent judgment against the enforcement thereof, and that an injunction be issued against the enforcement and fulfillment of the contract of Harrison Construction Company and S. P. Romans in the form they now are.

OWEN, C. J., and RAINEY, PITCHFORD, and JOHNSON, JJ., concur.

(76 Okl. 146)

MISSOURI, K. & T. RY. CO. et al. v. ZUBER.
(No. 10053.)

(Supreme Court of Oklahoma. Oct. 7, 1919.)

(Syllabus by the Court.)

1. CARRIERS \S 307(2)—CONDITIONS OF PASS THAT BEARER SHALL ASSUME RISK NOT AGAINST PUBLIC POLICY.

When a railroad company gives gratuitously, and a passenger accepts, a pass, the former waives its rights as a common carrier to exact compensation, and, if, the pass contains a condition to that effect, the latter assumes the risk of ordinary negligence of the company's employes. The arrangement is one which the parties may make, and no public policy is violated thereby; and if the passenger is injured while riding on such a pass gratuitously given, which she has accepted, the company is not liable therefor, in the absence of gross negligence, fraud, or willful wrong of itself or its servants.

2. CARRIERS \S 291—LEAVING OPEN SWITCH "GROSS NEGLIGENCE."

The leaving open of a switch leading to a side track at a time when a passenger train may be expected momentarily, without ascertaining the location of the train, is "gross negligence," where the statute defines such negligence to be the want of slight care and diligence.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Gross Negligence.]

3. TRIAL \S 295(1) — INSTRUCTIONS MUST BE CONSIDERED TOGETHER.

Instructions must be considered together, and while an instruction, standing alone, may be subject to criticism, yet if the instructions, when taken in their entirety, fairly submit the issues to the jury, reversible error is not committed.

Error from District Court, Washington County; R. B. Boone, Judge.

Action by Hannah L. Zuber against the Missouri, Kansas & Texas Railway Company and the Atchison, Topeka & Santa Fé Railway Company. Verdict and judgment for plaintiff, and defendants bring error. Affirmed.

Clifford L. Jackson, W. R. Allen, and M. D. Green, all of Muskogee, for plaintiff in error Missouri, K. & T. Ry. Co.

Cottingham & Hayes, of Oklahoma City, for plaintiff in error Atchison, T. & S. F. Ry. Co.

Twyford & Smith and A. H. Meyer, all of Oklahoma City, for defendant in error.

PITCHFORD, J. This case was originally instituted in the district court of Washington county on July 14, 1915, by the defendant in error against the plaintiffs in error. The parties will hereafter be referred to as they appeared in the court below.

The plaintiff was a resident of the city of Sharon, Pa. The defendant, Missouri, Kansas & Texas Railway Company, hereafter referred to as the "Katy," owns and operates a line of steam railroad, which runs from the city of St. Louis, in the state of Missouri, to the city of Oklahoma City, in the state of Oklahoma, which line of steam railroad runs through the city of Bartlesville, in Washington county, state of Oklahoma. The defendant, Atchison, Topeka & Santa Fé Railway Company, hereafter referred to as the "Santa Fé," owns and operates a line of steam railroad, which runs from the city of Independence, in the state of Kansas, to the city of Tulsa, in the state of Oklahoma, and through the city of Bartlesville, in Washington county, state of Oklahoma. At a point approximately 2 miles north and east of the city of Bartlesville, in Washington county, the line of railway of the Katy runs into and connects with the railway line of the Santa Fé, and for a distance of some 2 or 3 miles from the said point, and to a point which is some 8 or 10 blocks south and west of the passenger station of the Santa Fé in the city of Bartlesville, the Katy uses the tracks and roadbeds of the Santa Fé. The portion of the line of railway belonging to the defendant Santa Fé between said points, as aforesaid, and all switches and side tracks connected therewith between said points, belong to the Santa Fé and are under its ex-

clusive control. The Santa Fé had permitted the Katy to move and propel its trains over that portion of its tracks for some time prior to the date of the injury. On the 24th day of August, 1914, the defendant Katy issued and delivered to plaintiff a certain trip pass, entitling the plaintiff to one trip from St. Louis, Mo., to Oklahoma City, Okl. Thereafter, on the 23d of September, 1914, plaintiff boarded one of the defendant Katy's regular passenger trains at St. Louis, Mo., en route to Oklahoma City, Okl. On the 24th day of September, at about 10:30 o'clock a. m., the train upon which plaintiff was a passenger reached a point a short distance north and east of the Santa Fé passenger station in Bartlesville, Okl. Said passenger train was moving south and west at a speed of approximately 30 miles per hour, and ran into an open switch, which branched off from the main line of the Santa Fé track and near said point. The passenger train was wrecked and the plaintiff was injured. On the morning of the wreck, a crew or a gang of section men in the employ of the defendants had been working on and repairing the tracks and side tracks of the Santa Fé at said point, and were engaged in repairing the same at the time said passenger train arrived at the switch.

The Katy filed an answer, alleging that it issued to the plaintiff, as the mother of E. B. Zuber, brakeman in the employ of the Baltimore & Ohio Railway Company, a free pass, entitling plaintiff to free transportation on the lines of the defendant from St. Louis, Mo., to Oklahoma City, Okl., and return, and that at the time of the alleged injury to the plaintiff she was being transported on one of defendant's passenger trains under and by virtue of said pass issued to the plaintiff as aforesaid; that said pass was issued to and received by the plaintiff and honored by the defendant under the terms and conditions printed thereon—that the person accepting and using said pass assumed all risk of accident, injury, and damage, whether resulting from the negligence of the servants and agents of the said defendant, or otherwise; and that the plaintiff is now barred from maintaining this action. The answer filed by the Santa Fé was practically the same as that filed by the Katy. The jury in the court below returned a verdict in favor of the plaintiff for \$3,000. The defendants appeal.

The assignments of error are numerous, but the main points relied upon by the defendants for reversal are: First, that the plaintiff, in accepting the pass over the defendant road, having thereby assumed all risk of accident, injury, and damage, whether resulting from the negligence of the servants and agents of the company or otherwise, is not entitled to recover; second, that the court erred in giving instructions Nos. 5, 6, 9, 10, and 13.

[1] The pass upon which the plaintiff was

being transported contained the following condition:

"This pass is not transferable and must be signed in ink by the holder thereof. The person accepting and using it thereby assumes all risk of accident, injury, and damage whether resulting from the negligence of the servants and agents of the companies, or otherwise. It will be forfeited if presented by any other than the undersigned. I am not prohibited by federal or state laws from receiving free transportation, and this pass will be lawfully used. * * * Accept it on the above conditions."

This pass was issued to the plaintiff as the dependent mother of a son who was in the employ of the Baltimore & Ohio Railway Company, and was a character of pass authorized by the acts of Congress relating to interstate commerce, the particular act in question being entitled:

"An act to create a commerce court, and to amend the act entitled 'An act to regulate commerce,' approved February fourth, eighteen hundred and eighty-seven, as heretofore amended, and for other purposes," approved June 18, 1910 (36 Stat. 539), which provides (section 7, page 546 [Comp. St. § 8563]):

"No common carrier subject to the provisions of this act shall, after January first, nineteen hundred and seven, directly or indirectly, issue or give any interstate free ticket, free pass, or free transportation for passengers, except to its employes and their families: * * * Provided, that this provision shall not be construed to prohibit the interchange of passes for the officers, agents, and employes of common carriers, and their families."

A case in many respects similar to the instant case was decided by this court in *A. T. & S. F. Ry. Co. v. Smith*, 38 Okl. 157, 132 Pac. 494, Ann. Cas. 1915C, 620. There the plaintiff was riding on a free pass at the time the injury occurred, which was delivered to her in the state of Kansas, of which state she was a citizen, and under whose laws the railroad corporation was organized. The pass was good for the round trip between Wellington, Kan., situated a short distance north of the Oklahoma state line, to Perry, Okl., situated about 53 or 54 miles south thereof. The injury occurred in Oklahoma, while the plaintiff was on the return trip. On the back of the pass was the following provision signed by the plaintiff:

"This pass is not transferable, must be signed in ink by the holder thereof, and the person accepting and using it thereby assumes all risks of accidents and damages to person and baggage, under any circumstances, whether caused by negligence of agents or otherwise. * * * I accept the above conditions."

There the court held that the plaintiff was not entitled to recover. Justice Kane, in the third paragraph of the syllabus, said:

"When a railroad company gives gratuitously, and a passenger accepts, a pass, the former

waives its rights as a common carrier to exact compensation; and, if the pass contains a condition to that effect, the latter assumes the risks of ordinary negligence of the company's employé. The arrangement is one which the parties may make, and no public policy is violated thereby, and if the passenger is injured or killed while riding on such a pass gratuitously given, which he has accepted with knowledge of the conditions therein, the company is not liable therefor either to him or to his heirs, in the absence of willful or wanton negligence."

In the case of *Smith v. A., T. & S. F. Ry. Co.*, 194 Fed. 79, 114 C. C. A. 157, the syllabus is as follows:

(1) "Whether a waiver of liability for injuries, printed on the back of a pass delivered to an employé, was valid, so as to constitute a defense to an action for injuries resulting from the carrier's ordinary negligence, depended on the law of the place of the accident, and not on the law of the place where the pass was delivered, since the rule that a contract will be interpreted according to the law of the place of its execution and delivery does not apply to actions of tort."

(2) "The Oklahoma statute (Comp. Laws 1909, § 428) providing that a carrier of persons without reward must use ordinary diligence for their safe carriage was only applicable in the absence of contract, and did not apply to an employé traveling on a pass, who had signed a waiver of liability for any injuries that might occur, which waiver was valid both in Oklahoma and in the federal courts."

In the opinion, it is stated:

"The courts have uniformly held that a contract exempting a carrier from liability for negligence, valid at the place of its execution and delivery, will not avail as a defense when the injury occurs in a state by whose laws such contracts are declared to be void as against public policy. Having adopted that rule when the law of the place of the injury would impose a liability upon the carrier, can a contrary rule be adopted when such law would protect the carrier by enforcing the contract? We think not. The contract is by its terms tied to the tort, and the same law should be applied to the one as to the other."

In the case of *Boering v. C. B. Ry. Co.*, 193 U. S. 442, 24 Sup. Ct. 515, 48 L. Ed. 742, the action was brought to recover damages for personal injuries sustained by Mrs. Boering while riding upon a free pass, which contained the following stipulation:

"The person accepting and using this pass thereby assumes all risk of accident and damage to person and property, whether caused by negligence of the company's agents or otherwise."

The contention of the plaintiff in that case was that the company was liable in any event for injuries caused by its negligence, because it did not appear that Mrs. Boering knew or assented to the stipulation. The testimony showed that the husband had secured the transportation, and that they had traveled on these passes before, and plaintiff insisted

that the exemption from liability for negligence resulted only from a contract therefor; that there could be no contract without knowledge of the terms thereof and assent thereto, and that she neither had knowledge of the stipulation, nor had she assented to its terms; that, therefore, there was no contract between her and the company exempting it from liability for negligence. The court there held that the plaintiff in accepting the free pass was bound to know the conditions thereof, and that she could not through the intermediary of an agent obtain the privilege—a mere license—and then plead that she did not know upon what conditions it was granted. It was further held that a carrier is not bound, any more than any other owner of property who grants the privilege, to hunt the party to whom the privilege is given, and see that all conditions attached to it are made known; that the duty rested rather upon the one receiving the privilege to ascertain those conditions. While the case just quoted is relied upon by the defendants as strongly tending to support their contention, yet we fail to see wherein there is any similarity between this case and the case at bar.

The case of *N. P. Ry. Co. v. Adams*, 192 U. S. 440, 24 Sup. Ct. 408, 48 L. Ed. 513, relied upon by defendants, was an action brought by the widow and son of the deceased. The deceased was traveling on a free pass containing the following:

"The person accepting this free ticket agrees that the Northern Pacific Railway Company shall not be liable, under any circumstances, whether of negligence of agents or otherwise, for any injury to the person, or for any loss or damage to the property, of the passenger using the same. I accept the above conditions."

The facts in that case are as follows: On November 13, 1898, the deceased started on one of the Northern Pacific trains from Hope, Idaho, to Spokane, Wash. Shortly after leaving Hope, Adams, then in the smoking car, went to the dining car for cigars. To reach the dining car he passed through the day coach to the tourist sleeper. After buying the cigars, he left the dining car and went forward. This was the last seen of him. His body was found the next day opposite a curve in the railway track about 6 miles west of Hope. There was no direct testimony as to how he got off the train, whether by an accidental stumble, or being thrown therefrom through the lurching of the train, which was going at a high rate of speed. The road from Hope to the place where the body was found is in Idaho. There was a verdict in favor of the plaintiffs for \$14,000, which was sustained by the Circuit Court of Appeals for the Ninth Circuit (54 C. C. A. 196, 116 Fed. 334), and thereupon the case was brought to the United States Supreme Court. Justice Brewer, in delivering the opinion, among other things said:

"The question, then, is distinctly presented whether a railroad company is liable in damages to a person injured, through the negligence of its employes, who at the time is riding on a pass given as a gratuity, and upon the condition, known to and accepted by him, that it shall not be responsible for such injuries. It will be perceived that the question excludes injuries resulting from willful or wanton acts, but applies only to cases of ordinary negligence. The facts of this case certainly do not call for any broader inquiry than this. The specific matters of negligence charged are the placing of a non-vestibuled car in a vestibuled train, and the high rate of speed at which the train passed around the curve at the place of injury. But nonvestibuled cars are in constant use all over the country—were the only cars in use up to a few years ago—and further the deceased, having passed over the open platform, knew exactly its condition. As the court charged the jury, 'Mr. Adams must be presumed to have known that it was not vestibuled and to have acted with perfect knowledge of the fact.' The rate of speed was no greater than is common on other trains everywhere in the land, and the train was, in fact, run safely on this occasion. We shall assume, however, but without deciding, that the jury were warranted, considering the absence of the vestibuled platform and the high rate of speed in coming around the curve, in finding the company guilty of negligence; but clearly it was not acting either willfully or wantonly in running its trains at this not uncommon rate of speed, and all that can at most be said is that there was ordinary negligence. Is the company responsible for injuries resulting from ordinary negligence to an individual whom it permits to ride without charge on condition that he take all the risk of such negligence?"

In the case of *C. & W. C. Ry. Co. v. Thompson*, 234 U. S. 578, 34 Sup. Ct. 964, 58 L. Ed. 1476, Mr. Justice Holmes, delivering the opinion, said:

"The main question is whether when the statute permits the issue of a 'free pass' to its employes and their families it means what it says. The railroad was under no obligation to issue the pass. It may be doubted whether it could have entered into one, for then the services would be the consideration for the duty and the pass and by section 2 [Hepburn Act] it was forbidden to charge 'a greater or less or different compensation' for transportation of passengers from that in its published rates. The antithesis in the statute is between the reasonable charges to be shown in its schedules and the free passes which it may issue only to those specified in the act. To most of those enumerated the free pass obviously would be gratuitous in the strictest sense, and when all that may receive them are grouped in a single exception we think it plain that the statute contemplates the pass as gratuitous in the same sense to all. It follows, or rather is saying the same thing in other words, that even on the improbable speculation that the possibility of getting an occasional free pass entered into the motives of the employé in working for the road, the law did not contemplate his work as a conventional inducement for the pass, but, on the contrary,

contemplated the pass as being what it called itself, free."

The contention of the plaintiff in the case just cited was that the pass, being given to one of the employes of the defendant company, was really not a free pass, but was issued upon consideration of the services of the employé as an incident to the right to issue a free pass to an employé or his family, and conceded that the carrier had the right to impose upon the issuance, acceptance, and use of a free pass the condition that the carrier shall not be liable in damages for personal injury to the recipient in consequence of its ordinary negligence, but that this exemption would not apply to employes. The question of gross negligence was not there raised by the plaintiff, or considered by the court.

[2] It is conceded by the plaintiff in the instant case that if the injury complained of resulted from ordinary negligence on the part of the defendants, she would not be entitled to recover, but that the provision in the pass exempting the defendants from liability was not intended to, nor did it, have the effect of protecting the defendants from injury resulting from gross negligence.

We have seen in the case of *Smith v. A., T. & S. F. Ry. Co.*, supra, that in an interstate pass the carrier may relieve itself from negligence, except in case of willful negligence. As to what constitutes gross or willful negligence, the authorities seem to be divided. Our statutes define the various degrees of negligence. Section 2916, R. L. 1910, gives three degrees of care and of diligence, namely, slight, ordinary, and great; the latter includes the former. Under section 2917, Id., slight care or diligence is defined to be such as persons of ordinary prudence usually exercise about their own affairs of slight importance; ordinary care or diligence is such as they usually exercise about their own affairs of ordinary importance; and great care or diligence is such as they usually exercise about their own affairs of great importance. Section 2918, Id., gives three degrees of negligence, namely, slight, ordinary, and gross; the latter includes the former. These degrees of negligence are defined by section 2919, Id., as follows:

"Slight negligence consists in the want of great care and diligence; ordinary negligence, in the want of ordinary care and diligence; and gross negligence, in the want of slight care and diligence."

If the negligence complained of in the instant case was only ordinary negligence, the defendants would not be liable. Whether or not defendants were guilty of gross negligence was left for the jury to decide under the court's instructions defining the degrees of negligence. They found that the defendants were guilty of gross negligence. Wheth-

er or not acts surrounding a particular injury would constitute ordinary or gross negligence would depend upon all the circumstances surrounding the accident. We can conceive of many instances where the negligence would only be ordinary, and, on the other hand, we can conceive of cases where the negligence would be gross. As long as the English language is spoken, we shall hear acts constituting negligence denominated as defined by our statutes. Defendants cite many respectable authorities seeming to hold that the negligence contemplated in the issuance of passes means any negligence, and that it is impossible to define negligence as being ordinary, gross, or willful, and that when it is said the carrier is relieved from negligence, it clearly means all kinds of negligence. There is some conflict of opinion in the several states of the Union as to what is covered by the stipulation in a free pass exempting the railroad from liability for injury caused by its negligence. There are a number of opinions holding that such a stipulation is valid and binding on the passenger, precluding a recovery for injuries, whether caused by the carrier's negligence or otherwise, and attempting to abolish degrees of negligence. Other courts, while conceding the validity of such exemptions in case of ordinary negligence, hold the carrier responsible in cases of willful, wanton, or gross negligence, and in Oklahoma it is declared by section 797, R. L. 1910:

"A common carrier cannot be exonerated, by any agreement made in anticipation thereof, from liability for the gross negligence, fraud or willful wrong of himself or his servants."

The California statute is identical with the above section. In the case of *Walther v. So. Pac. Co.*, 159 Cal. 769, 116 Pac. 51, 37 L. R. A. (N. S.) 235, the wreck was caused by the passenger train running into an open switch. The court uses the following language:

"In her complaint she alleged that the accident and consequent death of deceased were caused by the 'gross negligence' of defendant, and these allegations were found by the trial court, which tried the case without a jury, to be true. * * * We think that the question of public policy in regard to such contracts of exemption, even as to passengers carried gratuitously, has been settled in this state by legislative enactment. Section 2175 of the Civil Code provides: 'A common carrier cannot be exonerated, by any agreement made in anticipation thereof, from liability for the gross negligence, fraud, or willful wrong of himself or his servants.' Aside from the question of the meaning of the term 'gross negligence' as used in this section, it is earnestly contended that the section has no application in the case of one carried without consideration of any kind, and that as to such a passenger the carrier is not a common carrier at all. We are of the opinion that the question of consideration cuts no figure in determining the applicability of the section. Section 2168 of the Civil Code, contained

in the same chapter, which is entitled 'Common Carriers in General,' declares that: 'Every one who offers to the public to carry persons, property, or messages, excepting only telegraphic messages, is a common carrier of whatever he thus offers to carry.' And, of course, the defendant was, under this definition, a common carrier of persons. As such, under other provisions of the same chapter and other chapters, it was entitled to refuse to carry any person except upon compliance with certain requirements, including the payment of a prescribed reasonable compensation, but, at the time of this accident at least, it could legally waive any of these requirements on the part of the passenger, and could receive and carry him for a reduced or different consideration, or altogether without consideration.

"But on whatever terms a common carrier of persons voluntarily receives and carries a person, the relation of common carrier and passenger exists. This is recognized by some of the authorities upholding the exemption from liability for negligence provision in the case of a passenger carried gratuitously. See *Rogers v. Kennebec Steamboat Co.*, 86 Me. 281, 29 Atl. 1069, 25 L. R. A. 491. The sole inquiry in this regard is, as has been said, whether the person was lawfully on the vehicle (see *Ohio & M. R. Co. v. Muhling*, 30 Ill. 9, 81 Am. Dec. 336), has been voluntarily received by the common carrier on any terms for the purpose of carriage and is not, as was the case in *Sessions v. Southern Pacific Co.*, 159 Cal. 599, 114 Pac. 982, a mere trespasser on the vehicle. The voluntary waiver of all claim for compensation for carriage of a person does not take away from the status of the carrier as a common carrier so far as the person carried is concerned, any more than would a special reduction in the amount of compensation charged or a special concession as to some other authorized requirement accomplish such effect. The carrier is still a common carrier as to such person, with all the obligations of a common carrier, except in so far as those obligations are limited by contract provisions which are not inhibited by law. Other sections of our Civil Code permit such limitations as to certain matters not here involved, but section 2175 expressly prohibits limitations of liability for gross negligence on the part of the common carrier or his servants, whatever, as we read the various sections bearing upon this matter, may be the terms upon which it receives and undertakes to carry a passenger.

"This brings us to a consideration of the question of the meaning of the term 'gross negligence,' as used in section 2175 of the Civil Code, for under the views already stated the exemption provision in the pass of deceased was not effectual to free defendant from liability for damages resulting from 'gross negligence' of the defendant or its servants, within the meaning of the term 'gross negligence,' as used in said section. The contention of learned counsel for defendant is that these words, in the connection in which they are used, imply something in the nature of willful wrong, and do not include anything in the nature of a mere omission to exercise care without knowledge that such omission will probably result in injury to others. Section 2175 was, as it now stands, a part of the original Civil Code adopt-

ed in the year 1872. This Code contained two sections declaring that there are three degrees of care and diligence, slight, ordinary, and great, and three degrees of negligence, slight, ordinary, and gross. Slight care was defined as that 'which is such as persons of ordinary prudence usually exercise about their own affairs of slight importance,' and gross negligence was defined as that 'which consists in the want of slight care and diligence.' Sections 16 and 17. These sections were repealed outright in 1874, but such repeal cannot affect the question of the construction of the words 'gross negligence' in section 2175 of the Civil Code, as it is the intention of the Legislature at the time of the adoption of the latter section that must control.

"We see no warrant for holding that the term 'gross negligence' as used therein was intended to mean other than the 'gross negligence' defined in section 17 of the same act 'to establish a Civil Code,' which was simply 'the want of slight care and diligence.' This must necessarily have been the view of this court in *Donlon Bros. v. Southern P. Co.*, 151 Cal. 763, 766, 11 L. R. A. (N. S.) 811, 91 Pac. 603, 12 A. & E. Ann. Cas. 1118, for an examination of the record shows that there could have been no other ground for the expression of opinion 'that there was sufficient evidence in the case warranting the jury in finding that the defendant was guilty of gross negligence occasioning the loss and injury complained of.' * * * Accepting this definition of 'gross negligence,' it cannot reasonably be contended that the evidence was not legally sufficient to support the finding of the trial court that the deceased was killed by the gross negligence of defendant's servants."

In the case of *C., R. I. & P. Ry. Co. v. Stone*, 34 Okl. 364, 125 Pac. 1120, L. R. A. 1915A, 142, the plaintiff at the time of the injury was a trespasser upon a regular passenger train of defendant company. The accident occurred in the west end of the railway yards of Yukon. The train on which he was riding was running at the rate of about 30 miles an hour when approaching the west end of the passing track at Yukon station. On this passing track were some 12 or 15 cars which in some way not clearly shown were permitted to run down grade to the switch block and onto the main track, and collide with the incoming passenger train, on which the plaintiff was riding. These loose freight cars struck the passenger car, thereby causing the injury complained of. Commissioner Sharp, in delivering the opinion, said:

"To leave a string of freight cars on such siding, not under control, and where the same, either by momentum or gravitation, might run down grade to where the siding connected with the main line, and then upon the said main line, * * * even though in the daytime, and at a time when a regular passenger train was due, would be proof to show such gross and wanton negligence and recklessness as would manifest a disregard of all consequences."

In *Lake Shore & Mich. S. Ry. Co. v. Bode-mer*, 139 Ill. 596, 29 N. E. 602, 32 Am. St. Rep. 218, the facts were that the train which committed the injury was traveling at a speed of 35 or 40 miles an hour in the crowded city of Chicago, over street crossings upon unguarded tracks, so connected with the public street and so apparently a continuation of the public street as to be regarded by ordinary citizens as to be located in the public street along a portion of the city tracks, where persons are known to be passing and crossing every day, in conceded violation of the city ordinance as to speed and without warning of the approach of the train by the ringing of the bell. It was said by the court:

"This conduct tended to show such a gross want of care and regard for the rights of others as to justify the presumption of willfulness."

In the case of *N. P. Ry. Co. v. Adams*, supra, we find the following:

"It will be perceived that the question excludes injuries resulting from willful or wanton acts, but applies only to cases of ordinary negligence."

If the court in the *Adams Case* was not of the opinion that there were degrees in negligence, why use the language quoted? There has been nothing said or indicated by the United States court, since the *Adams Case*, so far as we have been able to find, to the effect that the provision in a free pass, waiving claims against the carrier for negligence, was intended to include every degree of negligence.

In *Ill. Cent. R. R. Co. v. Geo. D. Read*, 37 Ill. 484, 87 Am. Dec. 260, the first paragraph of the syllabus is as follows:

"A passenger, while traveling in the cars of a railroad, received injuries to his person occasioned by a collision of trains. At the time of the accident, the passenger was traveling under a free pass given him by the company, upon the back of which was this printed indorsement: 'The person accepting this free ticket assumes all risks of accidents, and expressly agrees that this company shall not be liable under any circumstances, whether of negligence of their agents, or otherwise, for any injury to the person, or for any loss or injury to the property, of the passenger using the ticket.' In an action on the case against the company to recover damages for the injuries thus received by the passenger, it was held that this agreement did not exempt the company from liability for the gross negligence of its employes, but it did exempt it from liability for any other species or degree of negligence not denominated gross, or which might have the character of recklessness. For such unavoidable accidents, as will happen to the best managed railroad trains, this agreement would be a perfect immunity to the company."

To the same effect see *Toledo, Wab. & W. Ry. Co. v. Harvey Beggs*, 85 Ill. 80, 23 Am. Dec. 613. In *Ind. Cen. Ry. Co. v. Mundy*, 21 Ind. 48, 83 Am. Dec. 339, the court said:

"Where a person traveling on a railroad receives from the company a free pass, upon which is indorsed a statement that 'it is agreed that the person accepting this ticket assumes all risk of personal injury and loss or damage to property whilst using the same on the trains of the company,' such indorsement or agreement does not cast upon such person any risks arising from the gross negligence of the servants of the railroad company in running the train; and it would seem that such agreement does not cast upon such person any risks arising from any negligence of the servants of the railroad company in running the trains."

To the same effect see *Philadelphia & Reading Ry. Co. v. Derby*, 14 How. 468, 14 L. Ed. 502; *The Steamboat New World v. King*, 16 How. 469, 14 L. Ed. 1019.

The evidence introduced at the trial in the case at bar tended to show that the car upon which plaintiff was riding could not have gotten onto the side track without the switch being open. The section foreman of the Santa Fé had a key to the switch, and the trainmen had a key, and the evidence further tends to show that the foreman of the concrete gang working at the switch on the date of the accident also had a key. The train upon which plaintiff was riding was due at Bartlesville about 11 o'clock a. m. The question whether the action of the defendants, in leaving open the switch at that time, knowing that a passenger train might be expected at that hour, without ascertaining the location of the train, and without having any one looking after the switch, would be considered gross negligence, was a matter to be submitted to the jury under proper instructions. Under the evidence in the case, we are of the opinion that the jury was justified in finding the accident resulted from gross negligence on the part of defendants.

We recognize the rule is well established that the right of the carrier to stipulate for exemption from liability for its own negligence in regard to an interstate pass is not a local question, but is a matter for the federal courts. As we understand, the rule as enunciated in the case of *M. P. Ry. Co. v. Castle*, 224 U. S. 541, 32 Sup. Ct. 606, 56 L. Ed. 875, is as follows: A statute of the state where the injury occurred can be applied until Congress has acted in the matter. In the above case, the plaintiff based his right to recover upon a Nebraska statute, which undertook among other things, to take away the defense of contributory negligence in cases of that character, when the negligence of the employer was gross in comparison to that of the employé, but the damages were to be diminished according to the negligence of the employé. The railroad company there contended that in respect to interstate transactions this legislation could not control as the same violated the commerce clause of the Constitution. In delivering the opinion,

Chief Justice White, uses the following language:

"The repugnancy of the statute to the commerce clause of the Constitution was also averred on the ground that 'the plaintiff at the time he received the injuries complained of was engaged as an employé of an interstate railroad engaged in commerce between the states of Missouri, Kansas and Nebraska,' and the statute of Nebraska 'attempts to regulate and control, as well as create, a cause of action and remedy, imposing upon the defendant company a liability inconsistent with and repugnant to the action of the Congress of the United States on said subject.' * * * And as, at the time the plaintiff received the injuries complained of, there was no subsisting legislation by Congress affecting the liability of railway companies to their employes, under the conditions shown in this case, the state was not debarred from thus legislating for the protection of railway employes engaged in interstate commerce."

If Congress has ever enacted a statute relative to interstate free passes, defining the degrees of negligence, we have been unable to find the same, nor have we been cited to any by counsel; therefore we see no reason why the Oklahoma statute, that a "common carrier cannot be exonerated by an agreement from liability for gross negligence," etc., would not be applicable to the case at bar. Certainly the decisions of the federal court, quoted supra, clearly seem to contemplate that even in the absence of any state statute the common carrier could not be exonerated by any agreement as against the gross negligence, fraud, or willful wrong of itself or its servants.

The defendants complain of instructions Nos. 5, 6, 9, 10, and 13, which are as follows:

(5) "Under the law of this state, gross negligence, as is used in these instructions, is defined as the want of slight care and diligence. It is the doing of some act or thing which a person of ordinary prudence and intelligence would not do under the circumstances, or the failure to do some act or thing which a person of ordinary prudence and intelligence would do under like circumstances. Should such conduct or acts be of such a nature as to amount to a gross want of care and regard for the rights of others, it amounts to willfulness, and it is not necessary, in order to raise an inference of such negligence, to prove that the defendant's servants were actuated by ill will directed specially towards the plaintiff, or to have known that she was in such position as to be likely to be injured."

(6) "Slight care and diligence as used in these instructions is such care and diligence as persons of ordinary prudence usually exercise about their own affairs of slight importance."

(9) "You are instructed that the defendants owed to the plaintiff the duty of conveying her from St. Louis, Mo., to Oklahoma City, Okla., using ordinary care and prudence to so maintain and operate their trains, lines of railroad, and roadbed, switches, and yards, as to make them reasonably safe for travel by the public in general, without regard to whether the plaintiff was riding on a pass or not."

(10) "You are instructed that the acts of Congress relative to interstate commerce authorize and permit carriers to issue free passes to dependent members of the family of employees of railroad companies, and to stipulate in such passes that the person using the same for transportation shall assume all risks of accident, injury, and damage, whether resulting from the ordinary negligence of the servants and agents of the company issuing the pass, or otherwise; but in this connection, you are instructed that the law does not permit the defendants to contract against injury resulting from the acts of their employees amounting to gross negligence, or a wanton disregard of the rights of others."

(13) "You are therefore instructed that, should you find from the evidence in this case, by a fair preponderance thereof, that the plaintiff was riding upon a passenger train of the Katy Railroad Company on the 24th day of September, 1914, over the railroad line of the defendant Santa Fe Railroad Company, and that the servants, agents, or employees of the defendants, or either of them, were not in the exercise of slight care and diligence to keep the lines and appliances in and about the yard in the city of Bartlesville in a reasonably safe condition for traffic, but were guilty of gross negligence, as defined by these instructions, in opening and permitting to remain open a certain switch, and that said train ran into said open switch and collided with a freight train standing upon said switch or side track, and that thereby plaintiff was injured, it will be your duty to find for the plaintiff, and, if you fail so to find, you will return a verdict for the defendants."

[3] The court may have been in error in giving instruction No. 9, but it is a settled rule in this jurisdiction that instructions must be construed as a whole and together, and it is not necessary that any particular paragraph thereof contain all the law of the case. It is sufficient if, when taken together and considered as a whole, they fairly present the law of the case, and there is no conflict between the different paragraphs thereof, and while an instruction, standing alone, may be subjected to the criticism of being indefinite and uncertain, yet, if other instructions fairly submit the material issues to the jury, reversible error is not committed. *Ponca City Ice Co. v. Robertson*, 169 Pac. 1111; *Lonsdale v. Schlegel*, 171 Pac. 330; *Newton v. Allen*, 168 Pac. 1009.

The judgment of the trial court is affirmed. All the Justices concur.

(76 Okl. 215)

ROGERS et al. v. HARRIS. (No. 9035.)
(Supreme Court of Oklahoma. Oct. 21, 1919.)

(Syllabus by the Court.)

1. FRAUD §12—GIST OF FRAUD IN PROMISE TO PERFORM IN THE FUTURE IS INTENT NOT TO PERFORM.

In an action for fraud predicated on a promise to be performed in the future, the gist

of the fraud is, not the breach of the promise, but the fraudulent intent of the promisor at the time of making the promise not to perform the same, and the intent to deceive the promisee by such false promise. To render nonperformance fraudulent, the intention not to perform must exist when the promise is made, and, if the promise is made in good faith when the contract is entered into, there is no fraud, although the promisor subsequently changes his mind and fails or refuses to perform.

2. APPEAL AND ERROR §854(1)—TRIAL §393(1)—OPINION OF TRIAL COURT NOT "FINDINGS OF FACT."

The opinion of the trial court, delivered in announcing judgment, does not constitute "findings of fact," as contemplated under section 5017, R. L. 1910, and may not be considered as such, or to vary the judgment of the court as contained in the journal entry; but, when properly incorporated in the case-made, may be considered in determining the correctness of the conclusion on which the judgment is based.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Finding of Fact.]

3. FRAUD §58(1)—BURDEN OF PROOF IN ACTION FOR FRAUD IN PROCURING WRITTEN INSTRUMENT.

Ordinarily, where an action is predicated on fraud in the procuring of a written instrument, the proof must sustain the allegations by a preponderance so great as to overcome all opposing evidence and repel all opposing presumptions of good faith.

4. MINES AND MINERALS §55(2)—CONSTRUCTION OF CONTRACT IN PURCHASE OF INTEREST IN OIL LANDS AND LEASES.

O. purchased the interest of H. in certain oil lands and leases, in the possession and under the management of O., including cash on hand and credit due H. A check previously issued and delivered to R., a joint payee, in payment of credits due H. and R., but not delivered to H. and of which he had no actual notice, was recalled from R. and canceled, treating the amount represented by the check as cash on hand. *Held*, the sale included cash on hand as shown by credits due and unpaid, delivery of the check to R. in the circumstances of this case amounted to payment, and H.'s interest in the check was not included in the sale.

5. MINES AND MINERALS §55(8)—JUDGMENT FOR PLAINTIFF FOR FRAUD IN PROCURING CONVEYANCE OF LAND NOT SUSTAINED BY EVIDENCE.

This cause being one of purely equitable cognizance, the evidence reviewed, and *held*, the judgment of the trial court is clearly against the weight of evidence.

Error from Superior Court, Tulsa County; M. A. Breckinridge, Judge.

Action by Vernon V. Harris against Harry H. Rogers and others to cancel conveyance of certain land and oil leases by plaintiff to the McMan Oil Company and by it to defendant Rogers. Judgment for plaintiff, and defendants bring error. Reversed and re-

manded, with directions to enter judgment for plaintiff against defendant Oil Company.

West, Sherman, Davidson & Moore, of Tulsa, and Cottingham & Hayes, and Burford, Miley, Hoffman & Burford, all of Oklahoma City, for plaintiffs in error.

H. B. Martin and A. F. Moss, both of Tulsa, and Stuart, Cruce & Cruce, of Oklahoma City, for defendant in error.

OWEN, C. J. Harris alleges Chapman and Rogers conspired together to defraud him of his interest in partnership property, with the intention of purchasing same for Rogers, and that Rogers induced him to sell his interest for an inadequate consideration, by falsely representing that he (Rogers) was selling for a like amount, and by concealing the real value of the property.

Chapman denies he conspired with Rogers or practiced any fraud on Harris, or purchased his interest for the use and benefit of Rogers. He alleges he purchased the Harris interest in good faith for the McMan Oil Company, and that the sale to Rogers was an independent, bona fide transaction, subsequent to the purchase from Harris.

Rogers denies he concealed or fraudulently misrepresented the value of the property, or conspired with Chapman, or in any manner practiced fraud on Harris. He alleges he acquired the Harris interest subsequent to the conveyance of the same to the McMan Oil Company as a separate and independent transaction, without intent to defraud Harris.

The salient facts appear to be that Harris and Rogers formed a partnership during the year 1907 to practice law, with offices at Holdenville and Wewoka, and as partners acquired certain tracts of real estate and oil leases. Rogers accepted employment with the McMan Oil Company, and removed to Tulsa in January, 1913. It was agreed that Harris would continue to look after the joint interests of the firm during the year 1913, Rogers to pay him a portion of the salary received from the oil company. Rogers, under the terms of his contract, was to have an opportunity to acquire such interest as he might desire to take in properties acquired by the oil company, and it was agreed between Rogers and Harris that Harris would share these interests with Rogers. This relation continued until October, 1914, when Rogers and Harris agreed to dissolve the partnership and divide their holdings. A division was made of some of their properties, but it was found impractical to divide all holdings, and no settlement was made of the lands and leases involved in this action.

In the development of the properties involved, the interest owned by Harris and Rogers was charged with a proportionate cost of development and credited with a proportionate share of profits. These profits were paid when the oil was sold by the oil

company; payments being made to Rogers, and he, in turn, paying one-half to Harris.

About the 5th of August, 1915, the McMan Oil Company made a proposition to Harris to purchase his interest, offering \$60,000. Harris wanted \$100,000. Negotiations were carried on until about September 9th, when Harris offered to sell for \$80,000. In the meantime he had received a dividend of \$7,500. This offer was accepted and this amount paid by Chapman acting for the McMan Oil Company.

Harris understood he was selling his entire interest, including cash on hand and credits due him from the Harris and Rogers interest, for the sum of \$80,000, but claims he understood from Rogers that he would sell for a like amount and that the credit due the partnership interest was about \$15,000, when in truth and in fact Rogers did not sell and the credit was something over \$30,000.

It appears Harris is a bookkeeper and an expert accountant, formerly engaged in the banking business, and kept the books of the Rogers and Harris partnership, receiving monthly statements of the amount of oil to the credit of this interest. By mere calculation he could have ascertained the exact amount due. The statements were something like two months behind, but no effort was made by Harris to ascertain the exact amount; no contention is made that he was ever denied or refused a statement of the amount on hand to the credit of his interest. It appears Rogers guessed the credit to be about \$15,000. Harris said at that time he thought it was probably \$20,000 to \$25,000.

Counsel contend that Chapman and Rogers conspired together to defraud Harris by inducing him to sell for an inadequate consideration, and that the sale to the oil company was a mere subterfuge for the use and benefit of Rogers, and in this connection insist that Harris would not have agreed to sell for \$80,000 had he known the property had earned a credit of more than \$30,000. This contention is not supported by the evidence. The evidence is to the effect that Harris had considerable experience in dealing in oil lands and leases in which Rogers had no interest. A representative of the McMan Oil Company purchased some of these leases from him about the 5th of August, 1915, and at that time made him the offer of \$60,000 for his interest in the property in controversy. Rogers was then in California, and there is no proof or intimation that he inspired the offer or had any knowledge concerning it. Harris at that time offered to take \$100,000, according to his own testimony. The testimony of witness Barnard is that he offered to take \$80,000, but later, the price of oil having increased, stated he did not believe he would take \$80,000, wanted \$100,000, but said he would talk to Rogers about it. On Rogers' return to the state, Harris went to

Tulsa, and while there received \$7,500 from Rogers as profits from their joint interest. Harris consulted him concerning the offer he had received, and Rogers stated he would like to sell his interest and get out of the oil business and would be willing to sell for \$80,000. Harris a few days later authorized Rogers to submit a proposition to Chapman to sell Harris' interest for \$80,000. Rogers complied with the request, and Chapman, acting for the company, accepted the offer on September 9th. Rogers communicated this fact to Harris over the telephone, and it was agreed that Harris would write Chapman a letter setting out the contract as he understood it. On that date Harris wrote a letter to Chapman in which he stated:

"I made a verbal proposition to you through Harry, to sell my interest in all oil leases, and land in Creek county, in which you or the McMan Oil Company are interested, for the consideration of \$80,000, to be paid cash, and Harry reported that you had accepted the offer. I write this letter to put the offer in writing. I think it well to refer specifically to the tracts of land, an interest in which I understand I am offering you."

After describing the land it was further stated:

"You are to assume all obligations that I may have for my part of drilling operations on the land, or leases or anything of the kind. You are to have all oil accounts, notes, cash now on hand from leases above mentioned."

Counsel contend that Harris, reposing great confidence in the judgment of Rogers as to values, agreed to sell only because he believed Rogers was selling, and that, because Rogers did not sell, this amounted to fraud and was sufficient to vitiate the entire transaction.

Harris appears to have been uncertain whether the offer of \$80,000 was a good proposition, and to have been influenced to some extent by the apparent willingness of Rogers to accept a like amount for his interest. But the evidence does not support the contention that Rogers fraudulently represented he was selling and that Harris would not have sold, but for such false representations. On the contrary, the proof is that Rogers was willing to sell his interest for \$80,000.

[1] At the time Rogers advised Chapman of Harris' offer to sell for \$80,000, he told Chapman he would like to sell his interest for a like amount; but Chapman, desiring to retain his services as attorney for the company, persuaded him not to sell, and, as an inducement to remain with the company, suggested to him they would increase his interest and share of the profits by selling him the Harris interest on a credit. As a result of such negotiations, Rogers decided to remain with the company and to purchase the Harris interest. Therefore, the

rule relied upon which will vitiate the sale where one partner is induced to sell by reason of false and fraudulent promises and representations made by the other partner has no application. It was said by this court in the case of McLean v. S. W. Casualty Ins. Co., 159 Pac. 660:

"There is a wide distinction between the non-performance of a promise and a promise made mala fide, and without any intention at the time of making it to perform it."

The gist of the fraud in such instances is, not the breach of the promise, but the fraudulent intent of the promisor at the time of making the promise not to perform the same, and the intent to deceive the promisee by such false promise. To render nonperformance fraudulent, the intention not to perform must exist when the promise is made, and, if the promise is made in good faith when the contract is entered into, there is no fraud, although the promisor subsequently changes his mind and fails or refuses to perform. 12 R. C. L. 282. When the offer of \$60,000 was made to Harris about the 5th of August, and while Rogers was in California, there was no intimation that Rogers was selling his interest. At the time Harris talked it over with Rogers, he received a payment of \$7,500, and, when he agreed to accept \$80,000 for his interest, he was getting within \$12,500 of the price at which he had been willing to sell, according to his own testimony. Assuming he was influenced by Rogers' manifest willingness to sell for \$80,000, it falls far short of proving such false promise, or inadequacy of consideration, as to amount to fraud. As has been pointed out, Harris was not without experience in buying and selling oil leases, and the fact that he received a sum of \$12,500 less than the amount for which he first offered to sell does not furnish sufficient reason for canceling his sale to the oil company, which the trial court found was a bona fide transaction, not for the benefit of Rogers.

The fact that the price of oil continued to advance and the enterprise proved profitable to the oil company does not amount to fraud, and furnishes no ground for cancellation of the conveyances. Chapman and Rogers had no means of knowing the price of oil would continue to advance. The properties when developed proved of great value, but neither the advance in price of oil or the value of the properties after development are to be considered in estimating the value at the date of the sale, and in determining whether fraud was practiced so as to vitiate the transaction, these circumstances have no tendency to establish fraud. In the case of Sullivan v. Pierce, 125 Fed. 104, 80 C. C. A. 148, it was said:

"It requires conscious effort, when we attempt to estimate the value of the property at the date of the sale, to exclude from our minds

the effect of the great increase in value immediately following the sale. * * * The great advance in values made the complainant regret his sale, and probably sharpened his wits to discover badges of fraud."

In the case of Geddes' Appeal, 80 Pa. 461, where the facts were not dissimilar to the facts presented by this record, it was said:

"That the business was prosperous, enabling the parties to make large profits, and to pay for the shares out of the profits, is not to the purpose. We are not to judge this transaction by the light of subsequent events. It was consummated in the face of an uncertain future. The ebb and flow of the business tide in that future was concealed from human vision."

In announcing judgment the trial court delivered an oral opinion, which was transcribed by the reporter and without objection incorporated in the case-made, from which it appears the court concluded from the evidence that Chapman acted in good faith in purchasing Harris' interest for the McMan Oil Company, and that this sale was a bona fide transaction without notice. He also concluded that Rogers wanted to sell his interest, but was persuaded by Chapman not to do so, and subsequently purchased the Harris interest. The evidence supports these conclusions.

[2] The opinion of the trial court does not constitute findings of fact, as contemplated under section 5017, R. L. 1910, and may not be considered as such, or to vary the judgment of the court as contained in the journal entry (*James v. Coleman*, 166 Pac. 210), but may be considered in determining the correctness of the conclusions on which the judgment was based. Expressions of the trial court in rendering judgment have been considered repeatedly for that purpose. *C. v. R. I. & P. R. Co. v. Warren*, 163 Pac. 705; *Hennessey Oil & Gas Co. v. Neely*, 162 Pac. 214; *Rison v. Harris*, 50 Okl. 764, 151 Pac. 584. In the case of *James v. Williams*, 31 Cal. 213, it was said:

"The opinion of the judge who tried the cause, stating the evidence or his analysis of it or some portion of either, coupled with the reasons for his rulings, is always valuable."

And in the case of *Spoon v. Sheldon*, 27 Cal. 765, 151 Pac. 150, it was said:

"While the written opinion of the trial court, though contained in the transcript, is no part of the record and cannot perform the office of findings, the appellate court may look to it to ascertain the considerations arising from evidence in the record which influenced the trial judge in his decision."

In *Miller v. Marks*, 46 Utah, 257, 148 Pac. 412, the Supreme Court of Utah said:

"Where the opinion of the trial court is settled in the bill of exceptions, and made a part of the record, the court on appeal may look to it to ascertain the trial court's reason for its decision."

Notwithstanding the opinion of the trial court was that the sale from Harris to the McMan Oil Company was a bona fide transaction without notice, the judgment rendered was that this sale and the sale from the oil company to Rogers be set aside, the conveyances canceled, and Rogers and the oil company held as trustees.

[3] The action was predicated on fraud and aimed primarily at the cancellation of the sale to the McMan Oil Company, alleging this sale was fraudulent and a mere subterfuge for Rogers' benefit. To sustain this allegation the burden was on plaintiff to prove fraud. In the case of *Owen v. United States Surety Co.*, 38 Okl. 123, 131 Pac. 1091, Mr. Justice Kane, speaking for the court, said:

"In this jurisdiction, where fraud is alleged in the procuring of a written instrument, the proof must sustain the allegations by preponderance of the evidence so great as to overcome all opposing evidence and repel all opposing presumptions of good faith."

To the same effect are the cases: *Moore v. Adams*, 26 Okl. 48, 108 Pac. 392; *Limerick v. Jefferson Life Ins. Co.*, 169 Pac. 1080.

[4, 5] This is the applicable rule to the issues and theory on which the case was tried. The rule urged by counsel relating to partnership transactions, where one partner purchases from another, requiring the purchasing partner to prove the utmost good faith and fair dealing, has no application; for the reason the proof is, as the trial court found, the sale was not to Rogers or for his benefit. Harris alleged and undertook to prove that Chapman and Rogers conspired together to defraud him and by false and fraudulent representations induced him to sell to the McMan Oil Company, and that this sale was a mere subterfuge, not made for the use and benefit of the oil company, but for the use and benefit of Rogers. Had the proof sustained this allegation, the rule urged would apply; but the weight of evidence is against this contention and supports the conclusion of the trial court that this purchase was not made for the use and benefit of Rogers, but in good faith for the McMan Oil Company. The allegations of fraud against the sale to the company having failed, it necessarily fails against the subsequent sale from the oil company to Rogers.

When the trial court reached the conclusion that the evidence did not support the allegations and theory of plaintiff, but on the contrary did support the contentions made by defendants, that is, that the sale to the McMan Oil Company was a bona fide transaction, without fraud, for the use and benefit of the oil company; that Rogers, at the time he talked with Harris, was, in fact, willing to sell his interest for a like sum, but was afterward persuaded not to do so, and

subsequently purchased the Harris interest as an independent transaction—judgment should have been for Rogers.

The judgment appears to have been based on the transaction in which a check for \$30,000 was returned to the McMan Oil Company. This check was issued September 2d and delivered to Rogers in payment of that amount of the credit due the Harris and Rogers interest. When the sale was consummated by the acceptance of Harris' offer on September 9th, this check was still in Rogers' possession, and Harris had not been advised of it. Chapman treated this check as cash on hand and canceled it. The trial court concluded from the evidence that no intentional fraud was practiced on Harris by either Chapman or Rogers in this transaction. The weight of the evidence supports this conclusion. We concur also in the conclusion of the trial court that this check ought not to have been returned to Chapman and canceled. It ought not to have been treated as cash on hand without calling it to Harris' attention. He understood that he was selling and Chapman understood he was purchasing the cash on hand and unpaid credits as of September 9th. None of the parties appear to have been particular in ascertaining the exact amount of credit due at that time. The practice had been, however, to issue checks and deliver them to Rogers; he, in turn paying Harris the one-half due him. Chapman was familiar with this practice, and, when he accepted Harris' offer on September 9th he was chargeable with notice that this check had been issued and delivered to the payees. Therefore the offer and acceptance did not properly include \$15,000, one-half of the check which was due Harris, and this amount should have been paid to Harris and not treated as cash on hand. While it is true the check itself did not operate as an assignment of the funds so as to bind the bank on which it was drawn (section 4239, R. L. 1910), its issuance and delivery, in view of the circumstances in this case, as between the drawer and payee should have been treated as an assignment and in payment of the credit due the Harris and Rogers interest. There was no such meeting of the minds of Harris and Chapman concerning this item as to include it among the assets in the contract of sale. But the circumstances do not amount to fraud and are not sufficient to vitiate the entire sale and warrant the cancellation of the conveyances.

The action being one of purely equitable cognizance, this court must consider and weigh the evidence, and, having done so, it is our opinion the judgment of the trial court is clearly against the weight of the evidence. The judgment of the lower court should have been for plaintiff against the defendant

McMan Oil Company for \$15,000, with interest from September 9, 1915.

The judgment is reversed and cause remanded (section 5258, R. L. 1910), with directions to enter judgment for the plaintiff against the defendant McMan Oil Company for \$15,000, with lawful interest from September 9, 1915.

KANE, J., concurs in reversing the judgment, but takes the view the cause should be remanded for a new trial.

RAINEY and MCNEILL, JJ., did not participate in the consideration.

The other Justices concur.

(76 Okl. 58)

HASKELL NAT. BANK v. STEWART et al.
(No. 9248.)

(Supreme Court of Oklahoma. Oct. 7, 1919.)

(Syllabus by the Court.)

1. APPEAL AND ERROR ¶1140(3)—EXCESSIVE VERDICT MODIFIED BY REMITTITUR AND AFFIRMED.

In an action for conversion of property, when plaintiff recovers judgment, and on appeal the only assignment of error upon the question of the conversion of the property is that the verdict of the jury, and judgment rendered thereon, in the sum of \$394, is excessive, because the uncontradicted evidence discloses the value of the property was only \$357, and the plaintiff admits that the verdict is excessive in the sum of \$37, and offers to remit said amount, the judgment will be modified to that extent, and affirmed, following the rule announced in the case of Mullen v. Robison, 30 Okl. 527, 120 Pac. 1099.

2. DAMAGES ¶91(1) — WHEN EXEMPLARY DAMAGES AUTHORIZED IN ACTION FOR TORT.

To entitle a plaintiff to recover exemplary damages in an action sounding in tort, the proof must show some element of fraud, malice, or oppression. The act which constitutes the cause of action must be actuated by or accompanied with some evil intent, or must be the result of such gross negligence—such disregard of another's rights—as is deemed equivalent to such intent.

3. TROVER AND CONVERSION ¶66—EVIDENCE INSUFFICIENT TO AUTHORIZE SUBMISSION TO JURY OF QUESTION OF EXEMPLARY DAMAGES.

The record examined, and *held*, there was no evidence introduced to support a plea for exemplary damages, or justify the submission of the question of exemplary damages to the jury.

4. APPEAL AND ERROR ¶1140(3) — WHEN AMOUNT OF VERDICT EXCESSIVE, REMITTITUR OF IMPROPER ITEMS WILL BE ALLOWED.

Where a verdict in a damage suit itemizes the damages allowed, and some of the amounts are not justified under any view of the evidence, but the other amounts allowed seem to have

been proper, the court being able to separate the legal from the illegal allowances, plaintiff will be offered the right to remit the amount he is not entitled to receive.

Error from District Court, Muskogee County; R. P. De Graffenreid, Judge.

Action by Missouri Stewart against the Haskell National Bank, of Haskell. Judgment for plaintiff for damages and exemplary damages, and defendant brings error. Affirmed, on condition of a remittitur; otherwise, reversed and remanded for a new trial.

Snider, Shipley & Gumm, of Haskell, for plaintiff in error.

Myron White and Ed Hirsh, both of Muskogee, for defendants in error.

McNEILL, J. This action was commenced in the district court of Muskogee county by Missouri Stewart against the Haskell National Bank, of Haskell, to recover the value of certain property claimed to have been converted by the Haskell National Bank, alleging said property to be of the value of \$394, and for \$1,500 for the wrongful detention of said property, and \$1,000 exemplary damages. The bank filed its answer, setting out that it had possession of all of said property except four hogs; that it had taken possession of the property in accordance with the terms of two chattel mortgages executed by John Stewart, the husband of the plaintiff herein, to secure an indebtedness of approximately \$600, and upon which said John Stewart had made default. The jury returned a verdict for \$394, the value of the property, and \$395 as exemplary damages. From said judgment in favor of the plaintiff, the defendant appeals.

[1] The first assignment of error relied on is that the verdict of \$394, being the value of the property, is excessive. Missouri Stewart, who testified as to the value of the property, enumerated the property taken and fixed the aggregate value at \$357. Plaintiff in error alleges this is the only evidence offered as to the value of the property. The defendant in error concedes this point, and admits the verdict is excessive in the sum of \$37, and therefore offers to remit said amount, and then asks to have said judgment affirmed for the \$357, being the value of the property as shown by the uncontradicted evidence. This meets the contention that the verdict is excessive, and, as this is the only error complained of as to this portion of the judgment, the same will be modified to this extent.

[2, 3] The next assignment of error relied upon is that the court instructed the jury upon the question of exemplary damages. To the giving of said instruction the defendant excepted. There is no contention that the instruction did not correctly state

the law, but it is contended there was no evidence authorizing such instruction, and therefore it was error to submit the question of exemplary damages to the jury.

The facts as disclosed by the record are that Missouri Stewart had been married prior to her marriage to John Stewart, and she claimed a certain portion of this property was the increase of property inherited from her first husband, and that part had been purchased by her since her marriage to John Stewart. She was married to John Stewart, and she and her children lived with him for practically six years, and farmed together. The evidence further disclosed: That in the year 1912 the defendant John Stewart had mortgaged a portion of this property to the International Bank; the location of the bank is not disclosed, but presumably at Haskell. Thereafter, in the spring of 1915, the Bank of Haskell paid off the mortgage to the International Bank and took a mortgage upon the same property, and some additional property, to secure certain indebtedness, amounting to about \$600. That in the fall of 1915 John Stewart absconded.

Evidence was introduced on behalf of the bank to the effect that, prior to the time the mortgages were taken from John Stewart, the agent of the bank went to the premises, examined the property which the mortgages were to cover, and that the plaintiff, Missouri Stewart, was present, and that she made no objection to the property being included in the mortgages, nor did she claim that she owned the same. All of this she denied. The uncontradicted evidence is that, after the note and mortgage were due, some one representing the bank went to the place where the property was kept; that the plaintiff was not at home, but was in Muskogee attending a lawsuit; and said agent took possession of all of the property covered by the mortgage that was at the home at the time, the plaintiff having a team at Muskogee. The agent of the bank returned to the home the next day (the plaintiff had again gone from home), and took possession of the two horses, which the plaintiff had driven to Muskogee the day before. There was no one present in charge of the stock, except some children. Nothing was done by the plaintiff immediately. A few days later, she went to the bank and demanded the property belonging to her; this the bank refused. This was the only evidence on this point introduced in the case. There is no evidence in the record that the bank had knowledge that the wife was claiming the property, prior to the bank taking possession thereof. There was no contention that the property taken was not all included in the mortgage of the bank, executed by the husband of the plaintiff. The question presented is: Was there any evidence to authorize an instruction, or submitting the question of exemplary damages to the jury?

The question of awarding exemplary damages is controlled by statute. Section 2851, R. L. 1910. What facts are necessary to be proved in order that exemplary damages may be awarded was stated by this court in the case of *Sale, Sheriff, v. Shipp*, 58 Okl. 598, 160 Pac. 502. The court announced the following rule:

"To entitle a plaintiff to recover exemplary damages in an action sounding in tort, the proof must show some element of fraud, malice, or oppression. The act which constitutes the cause of action must be actuated by or accompanied with some evil intent, or must be the result of such gross negligence—such disregard of another's rights—as is deemed equivalent to such intent."

This rule is also announced in the case of *Western Union Tel. Co. v. Reeves*, 34 Okl. 469, 126 Pac. 216; *Ft. S. & W. Ry. Co. v. Ford*, 34 Okl. 576, 126 Pac. 745, 41 L. R. A. (N. S.) 745.

This court in the case of *Waggoner v. Koon*, 168 Pac. 217, has defined the right of the mortgagee in obtaining possession of the property as follows:

"The only restrictions upon the mode by which the mortgagee secures possession of the mortgaged property, after breach of condition, is that he must act in an orderly manner and without creating a breach of the peace, and must not intimidate by securing the aid of an officer who pretends to act *colore officii*."

There was no evidence introduced to authorize an instruction on exemplary damages, and submitting such question to the jury was error.

[4] In the case of *St. L. & S. F. Ry. Co. v. Goode*, 42 Okl. 785, 142 Pac. 1185, L. R. A. 1915E, 1141, this court said:

"Where a verdict in a damage suit itemizes the damages allowed, and some of the amounts are not justified under any view of the evidence, but the other amounts allowed seem to have been proper, the court being able to separate the legal from the illegal allowances, plaintiff will be offered the right to remit the amount he is not entitled to receive."

Following this rule, we therefore conclude that if, within 15 days from the rendition hereof, the defendant in error shall file with the clerk of this court a remittitur in the sum of \$395 to cover the award for the exemplary damages, the judgment as to \$357, with interest from December 14, 1916, at 6 per cent., will be in all things affirmed; if the remittitur is not made within 15 days, the case to stand reversed and remanded for new trial.

OWEN, C. J., and RAINEY, KANE, JOHN-SON, PITCHFORD, and HIGGINS, JJ., concur.

(16 Okl. Cr. 461)

WELLS v. STATE. (No. A-3016.)

(Criminal Court of Appeals of Oklahoma. Oct. 21, 1919.)

(Syllabus by the Court.)

CRIMINAL LAW — 207(1), 945(1), 1063(3), 1129(1), 1159(2) — LARCENY — SUFFICIENCY OF EVIDENCE TO SUSTAIN CONVICTION.

The record in this case carefully examined, and found that the verdict of the jury is sufficiently supported by the evidence, and that no error prejudicial to the defendant was committed in the trial of the case.

Appeal from District Court, Washita County; Thomas A. Edwards, Judge.

Ebb Wells was convicted of grand larceny, and he appeals. Affirmed.

Smith, Jones & Smith, of Cordell, for plaintiff in error.

S. P. Freeling, Atty. Gen., and R. McMullan, Asst. Atty. Gen., for the State.

ARMSTRONG, J. The plaintiff in error, Ebb Wells, hereinafter called defendant, was, with A. J. Seimen, informed against jointly for grand larceny, both of them convicted, and the defendant sentenced to be confined in the state reformatory at Granite, Okl., for a period of three years. To reverse the judgment rendered he prosecutes this appeal.

The record does not disclose that A. J. Seimen was sentenced upon his conviction, or what disposition was made of the case as to him. The evidence in the case tended to show that B. P. Bird attended a dance in Canute, Okl., on the 15th day of February, 1917, and at the time owned and had upon his person a watch of the value of \$20, a \$5 bill, a little silver, \$2 or \$3, five Buffalo nickels, and a pocketbook in which was a check for \$5; that he knew the defendant and said Seimen, who were present at said dance; that said Bird was drinking and partly intoxicated, and after the dance, and at the instance of Seimen and defendant, and accompanied by them, started towards the depot in said town, and on their way there to the person of said Bird was felt over by said Seimen, to which Bird objected, and afterwards was knocked down and stamped by the defendant; that thereafter Bird discovered the loss of his said personal property, and complained thereof to a deputy sheriff, who accompanied him to the depot, and there found and searched the defendant and Seimen, but did not find any of said described personal property on the person of either one of them, but thereafter said pocketbook and check were found just without said depot and on the ground, and under the seat occupied by Seimen was found five Buf-

falo nickles, and on the floor nearby was found a watch, and said pocketbook and watch were identified by Bird as belonging to him.

There was also evidence tending to show that then defendant and Seimen, on the night of said dance in Canute sought to get one Miller to go to said depot with them, got hold of Miller's pockets, and turned them out; that Miller left them and went to said depot, and after he got to the depot Seimen came and said "he would have to go and find his partner," and went out, and shortly thereafter he and the defendant together returned to said depot; that on the same night they caught one S., and tore his coat, at which time the said Bird was with them, and thereupon S. said to Bird, "Ben, let's go home;" and Ben replied, "In a few minutes;" and defendant started after S. and made him run; and that the defendant and Seimen talked to the said deputy sheriff that night, and denied that they had seen the said Bird. There was also other evidence tending to circumstantially support the theory of the state that the defendant and Seimen were accomplices in the commission of the offense charged.

The defendant and Seimen each testified in their own behalf, and were the only witnesses introduced by them, or either of them, and each of them positively testified that they did not have any knowledge of, or any connection whatever with, the commission of the crime charged against them; admitted that they were at the said dance with Bird, and that they started to the depot with him, and that when en route to the depot that the defendant had a fight, and that they had gone to the depot for the purpose of going to another town.

The defendant filed a motion for a new trial upon the ground, among other grounds, of newly discovered evidence; the newly discovered evidence being contained in an affidavit made by said A. J. Seimen while in jail after his conviction, in which he fully refuted the evidence given by him on the trial of this case, and asserted that he alone, without the knowledge or assistance of the defendant, committed the larceny charged while at the dance, and completely exonerated the defendant from any complicity therein in any manner, and that he (affiant) had not communicated the facts stated in said affidavit to the defendant, or to any one, until after the trial in this case had been had. The court announced that it did not believe the averments of the said affidavit, overruled the motion for a new trial, and the defendant excepted.

The defendant most earnestly insists that the evidence is not sufficient to support the verdict rendered. With this contention we cannot agree. The undenied evidence is

that the larceny of the personal property described in the information was committed, and while the evidence is in part circumstantial as to the defendant being an accomplice therein, the evidence we think warranted the jury in finding that the defendant and Seimen acted jointly in the commission of the offense charged.

"All persons concerned in the commission of a crime, * * * and whether they directly commit the act constituting the offense, or aid and abet in its commission, though not present, are principals." Section 2104, Revised Laws.

"A conspiracy may be proved by circumstantial evidence." *Ex parte Hayes*, 6 Okl. Cr. 321, 118 Pac. 609; *Washmood v. United States*, 10 Okl. Cr. 254, 136 Pac. 184.

"In cases depending upon circumstantial evidence, where the circumstances proven are not only consistent with the guilt of a defendant, but are also inconsistent with his innocence, such evidence in weight and probative force may surpass direct evidence in its effect upon the court or jury." *Ex parte Jefferies*, 7 Okl. Cr. 544, 124 Pac. 924, 41 L. R. A. (N. S.) 749.

That the jury is the exclusive judge of the weight of the testimony is a well-established canon of law.

"The verdict of a jury will not be set aside for want of evidence to sustain it, when there is any evidence in the record from which the jury could legitimately draw the conclusion of the defendant's guilt." *Nowlin v. State*, 7 Okl. Cr. 27, 115 Pac. 625; *Arnold v. State*, 178 Pac. 897, not yet officially reported.

The defendant further complains that the preliminary court which committed the defendant was not an existing court, and insists that the verdict should be set aside on that account, but does not raise this question in his motion for a new trial, nor in his petition in error, and therefore such question will not be considered by this court.

"Errors occurring during the trial cannot be considered by this court, unless they were incorporated in the motion for a new trial, and thereby submitted to the trial court, and its rulings thereon excepted to, and afterwards assigned for error in this court." *Ledgerwood v. State*, 6 Okl. Cr. 105, 116 Pac. 202.

However, we deem it not improper to say that the attack upon the legality of the preliminary court which held the defendant to answer in this case is without the slightest merit; the said justice of the peace being at least a de facto officer, and his official acts binding upon the public and third persons.

"A person in undisputed possession of the office of justice of the peace and exercising the functions properly belonging thereto under color of title to such office is a de facto justice of the peace, and his official acts are binding on the public and third persons." *Ex parte Ed. Hand*, 13 Okl. Cr. 614, 166 Pac. 440.

Selmen on the trial of the case having testified that he had no knowledge of, or connection with the commission of the larceny charged, certainly no evidential weight could be given to the said newly discovered evidence, the averments in his affidavit "that he alone committed the crime charged, and did so without the knowledge or assistance of the defendant," and the court did not err in overruling the motion for a new trial.

The judgment of the trial court is affirmed.

DOYLE, P. J., and MATSON, J., concur.

(16 Okl. Cr. 716)

THOMPSON v. STATE. (No. A-3283.)

(Criminal Court of Appeals of Oklahoma.
Oct. 25, 1919.)

(Syllabus by Editorial Staff.)

1. INDICTMENT AND INFORMATION \S 110(11)
—INFORMATION IN LANGUAGE OF STATUTE
SUFFICIENT.

An information, charging that on or about a certain day in Garfield county, Okl., defendant then and there unlawfully and willfully kept and maintained a bawdyhouse, and house of prostitution and a place for persons to assemble for unlawful sexual intercourse, at about 104½ West Randolph street, in the city of Enid, drawn in the language of Rev. Laws 1910, \S 2467, sufficiently charged the offense.

2. CRIMINAL LAW \S 1159(4) — CONFLICTING
EVIDENCE—QUESTION FOR JURY.

Where the evidence, if believed, was sufficient to sustain conviction, although there was a sharp conflict between the testimony given by witnesses for the state and those for defendant, in a prosecution for keeping a disorderly house, it was for the jury to determine whom they would believe and whom they would disbelieve.

3. CRIMINAL LAW \S 789(1) — INSTRUCTION
ON REASONABLE DOUBT.

Trial courts should not give any instruction attempting to define the term "reasonable doubt."

4. CRIMINAL LAW \S 789(9)—INSTRUCTION AS
TO REASONABLE DOUBT NOT ERRONEOUS.

An instruction that, before defendant could be found guilty, the jury must have "a fixed abiding conviction of guilt," was not erroneous.

Appeal from County Court, Garfield County; E. L. Swigert, Judge.

Bessie Thompson was convicted of the crime of keeping a bawdyhouse, and her punishment fixed at a fine of \$100, and she appeals. Affirmed.

W. W. Sutton, of Enid, for plaintiff in error.

S. P. Freeling, Atty. Gen., and W. C. Hall, Asst. Atty. Gen., for the State.

PER CURIAM. This is an appeal from the county court of Garfield county, wherein the defendant was convicted of the crime of keeping a bawdyhouse, and house of prostitution, and place for persons to visit for unlawful sexual intercourse, and fined in the sum of \$100.

[1] The prosecution is based on section 2467, Revised Laws 1910, which provides as follows:

"Any person who keeps any bawdyhouse, house of ill fame, or assignation, or of prostitution, or any other house or place for persons to visit for unlawful sexual intercourse, or for any other lewd, obscene or indecent purpose, is guilty of a misdemeanor and upon conviction shall be fined in any sum not less than one hundred dollars nor more than five hundred dollars for each offense."

The charging part of the information alleges that—

"On or about the 1st day of August, 1917, in Garfield county and state of Oklahoma, one Bessie Thompson did then and there unlawfully and willfully keep and maintain a bawdyhouse, and house of prostitution and a place for persons to assemble for unlawful sexual intercourse, at about 104½ West Randolph street, in the city of Enid, said county and state."

The defendant demurred to the information on the ground that the same did not state facts sufficient to constitute an offense. The demurrer was overruled, and exception taken thereto, and it is here urged that the court erred in overruling the said demurrer to the information.

The information is drawn in the language of the statute, and in the opinion of the court is sufficient to charge the offense.

[2] It is also urged that the court erred in overruling the demurrer to the evidence and refusing to direct a verdict of not guilty after the conclusion of the state's evidence.

The court has carefully examined the evidence, and the conclusion is reached that the facts and circumstances detailed by the state's witnesses, if believed by the jury, was sufficient to sustain the conviction. While there was a sharp conflict between the testimony given by the witnesses for the state and those for the defendant, it was for the jury to determine whom they would believe and whom they would disbelieve.

[3, 4] The trial court also, over the objection and exception of defendant's counsel, gave an instruction defining the term "reasonable doubt." This court has repeatedly admonished trial courts against giving any instruction attempting to define the term "reasonable doubt." Gransden v. State, 12 Okl. Cr. 417, 158 Pac. 157; Nelson v. State, 5 Okl. Cr. 369, 114 Pac. 1124.

However, the jury was told that, before the defendant could be found guilty, the jury must have "a fixed abiding conviction"

of guilt. An instruction defining the term "reasonable doubt" similar to the one given in this case was approved by the Supreme Court of the United States in *Hopt v. Utah*, 120 U. S. 430, 7 Sup. Ct. 614, 30 L. Ed. 708.

This court is not authorized to reverse a judgment of conviction on the ground of a misdirection of the jury, unless the error complained of apparently resulted in a miscarriage of justice, or deprived the defendant of some constitutional or statutory right. Section 6005, Revised Laws 1910.

Finding no error in the record which resulted to the prejudice of the substantial rights of the defendant, the judgment is affirmed.

(16 Okl. Cr. 466)

MATHEWS v. STATE (No. A-2942.)

(Criminal Court of Appeals of Oklahoma.
Oct. 28, 1919.)

(Syllabus by the Court.)

1. HOMICIDE — 191 — SELF-DEFENSE — EVIDENCE.

Where in a homicide case self-defense is pleaded, specific acts of violence on the part of the deceased towards others than the defendant may, if known to the defendant prior to the homicide, be shown in evidence.

2. CRIMINAL LAW — 822(1) — REQUESTED INSTRUCTIONS — REVERSIBLE ERROR.

Paragraphs of instructions given and accepted to by the defendant must be considered in connection with all of the instructions given; and, unless when so considered prejudicial error appears, the paragraphs of the instructions complained of do not necessarily constitute reversible error.

3. HOMICIDE — 204 — DYING DECLARATIONS — ADMISSIBILITY.

When the deceased on the day he was shot, and within a very few hours thereafter (and who died the next day from the effects of said shot), told a rabbi to pray for his (deceased's) soul, saying "I know I will die," was a sufficient predicate to show that statements made by the deceased to such rabbi as to how such difficulty resulting in his being shot occurred were made under a sense of impending death, and such statements of the deceased are properly admitted in evidence.

Appeal from District Court, Creek County; Earnest B. Hughes, Judge.

Jack Mathews was convicted of manslaughter in the first degree, and he appeals. Reversed and remanded.

H. B. Martin and A. F. Moss, both of Tulsa, for plaintiff in error.

S. P. Freeling, Atty. Gen., and R. McMillan, Asst. Atty. Gen., for the State.

ARMSTRONG, J. The plaintiff in error, Jack Mathews, hereinafter referred to as defendant, was informed against for the murder of Sam Lyons, convicted of manslaughter in the first degree, and sentenced to be confined in the penitentiary at McAlester for a term of six years. To reverse the judgment rendered he prosecutes this appeal.

The undisputed evidence is that the defendant and deceased had a disagreement about some meters that were in a rooming house purchased by the defendant from the deceased; that the defendant went to a furniture store conducted by the deceased in the city of Sapulpa, and the defendant and deceased engaged in a quarrel, in which profane language was used, and both parties became angry; that the defendant left the store and stopped on the sidewalk in front of the store; that the deceased armed himself with a pistol and went out to where defendant was; and that the defendant shot the deceased, from the effects of which said shot the deceased died the following day; that the arm of the defendant, shortly before the homicide, had been broken, and that at the time of the homicide the defendant had not recovered from said disability, and that the deceased was a larger man than the defendant.

The evidence was in sharp conflict as to what occurred between the said deceased and defendant when they met on the sidewalk in front of said store, there being evidence on the part of the state tending to show that immediately prior thereto the defendant invited the deceased to come out of his store, and stating what defendant would do to him if he came out on the sidewalk; that the deceased picked up a gun and went to where the defendant was, and they engaged in a difficulty in which the deceased hit the defendant on the head with the gun, and that the defendant then shot the deceased; that the evidence on the part of the defense tended to show that prior to the homicide the defendant had legal authority to carry a pistol; that the defendant had known the deceased some eight or nine years, and during said time their relations had been friendly up to the time of the homicide; that after a controversy with the deceased in his store the defendant walked out of said store and stopped in front of said store, and the deceased came out with a gun in his hands, and with it hit the defendant on the head several times and staggered him; that then the deceased turned the gun around in his hand, with the barrel pointing toward the defendant, and that the defendant, thinking the deceased was going to shoot him, immediately drew his pistol and shot the deceased; and that the defendant did not invite the deceased to come out to the sidewalk where the defendant was.

The evidence further shows that the deceased was seen in a hospital at Tulsa, short-

ly after he was shot by defendant, and asked a rabbi present "to pray for his soul," saying "I know I am going to die," and immediately thereafter stated in the presence of said rabbi and others, and, in response to a question as to how the difficulty occurred, that Mr. Mathews called him over the phone and asked if he took out some meters; that he said he did, and that Mr. Mathews came over to the store and abused him and called him all kinds of vile names, and invited him outside; that he picked up a gun and followed him outside; that he hit the defendant with the gun, and the defendant shot him. The defendant objected to the admission of the statements made to said rabbi and others upon the ground that a proper predicate had not been laid showing that the same were dying declarations. The court overruled the objection, and the defendant excepted. The defendant offered to prove by himself "that prior to the homicide he heard from persons who claimed to have seen a difficulty between the deceased and Dr. Bone, a physician living in the city of Sapulpa, that the deceased had attacked Dr. Bone with a common ax and had run him away from his house," and also offered to prove by himself that he knew, by having heard of an assault made by the deceased upon a man by the name of S. N. Terry, a blacksmith who lives in Tulsa, "in which assault the deceased, by use of a deadly weapon, had run Mr. Terry out of his blacksmith shop." The court excluded said offered testimony, and the defendant excepted.

The defendant objected, and excepted severally to four paragraphs of the instructions given the jury by the court, which said paragraphs we deem unnecessary to set out.

[3] The defendant complains that the court erred in admitting in evidence, as dying declarations, the statements made by the deceased, after he was shot, to said rabbi and others as to how the difficulty in which he was shot occurred, and insists that a proper predicate was not laid for same, because it was not shown that said statements were made by the deceased under the sense of impending death, and this contention we think not well taken. The statement, "I am going to die," with the request to a rabbi that his soul be prayed for, together with the physical condition of the deceased at the time, and his early death thereafter from the wound inflicted upon him by the defendant, shows that at the time said statements were made that the deceased was under the sense of impending death, and was a sufficient predicate for

the admission of said statements as dying declarations, and the court did not err in admitting the same. *Paden v. State*, 13 Okl. Cr. 585, 165 Pac. 1155; *Williams v. State*, 13 Okl. Cr. 189, 163 Pac. 279.

[1] The defendant also complains that the court committed reversible error in excluding the offered evidence of the defendant of specific acts of violence on the part of the deceased towards others than the defendant, and with this contention we are in accord, and think that the trial court committed prejudicial error in excluding the evidence offered of said specific acts of violence.

In *Mulkey v. State*, 5 Okl. Cr. 75, 113 Pac. 532, it is held:

"In a homicide case, where the defense is justifiable homicide in self-defense, evidence was offered on behalf of the defendant to prove particular instances of violence and quarrelsome conduct on the part of the deceased, these acts of violence and misconduct being known to the defendant. Held competent for the purpose of showing the disposition of the deceased to become violent without provocation, and as tending to show his condition of mind, and violent temper on such occasions, and his disposition to use deadly weapons."

The holding in *Mulkey v. State*, supra, is in accord with the holding in *Sneed v. Territory*, 16 Okl. 641, 86 Pac. 70, 8 Ann. Cas. 354, which said case is quoted from with approval in *Mulkey v. State*, supra.

[2] We have carefully considered the paragraphs of the instructions given, and excepted to by defendant, and are unable to see that the defendant has discharged the burden that is upon him "to clearly point out error in any one of said paragraphs complained of, and support the same with argument and authority." *Penn v. State*, 13 Okl. Cr. 367, 164 Pac. 992, L. R. A. 1917E, 668.

The paragraphs of the instructions complained of must be considered in connection with all of the instructions given; and, when so considered, we are of the opinion that it is not apparent that the giving of said paragraphs "has probably resulted in a miscarriage of justice, or injuriously affected the substantial rights of the defendant." *Penn v. State*, supra; *Nutt v. State*, 8 Okl. Cr. 266, 128 Pac. 165.

For the error pointed out, the judgment of the trial court is reversed, and the cause remanded.

DOYLE, P. J., and MATSON, J., concur.

(32 Idaho, 450)

STATE v. McLOY et al.

(Supreme Court of Idaho. Oct. 8, 1919.)

1. CONSPIRACY §43(8) — INDICTMENT FOR CONSPIRACY TO COMMIT EXTORTION MUST NAME VICTIMS OF CONSPIRACY.

An indictment or information charging a conspiracy to commit the crime of extortion, in order to be sufficient, must charge that the conspiracy was against some person or persons designated by name, or class of persons, or the general public, or must state the reason why such designation is not made.

2. CRIMINAL LAW §1043(1)—SUFFICIENCY OF INFORMATION BEFORE COURT ON APPEAL.

Where defendants during the trial objected to the introduction of any evidence by the state because the information did not state facts sufficient to constitute a public offense, and assigned the overruling of the objection as error, the sufficiency of the information was properly before the Supreme Court on appeal, in view of Comp. Laws, § 7750.

Appeal from District Court, Fremont County; James G. Gwinn, Judge.

David McLOY and Ralph Zufelt were convicted of conspiring to commit extortion, and they appeal. Reversed.

L. Ivan Jensen, of Shelley, and Ralph W. Adair, of Blackfoot, for appellants.

Roy L. Black, Atty. Gen., and Alfred F. Stone, Asst. Atty. Gen., for the State.

BUDGE, J. Appellants were convicted of conspiracy to commit the crime of extortion. This appeal is from a judgment of conviction and from an order denying a motion for a new trial.

The charging part of the information upon which they were tried reads as follows:

"Did commit the crime of conspiracy, committed as follows, to wit: Did then and there unlawfully, wickedly and fraudulently conspire, combine, confederate and agree together and with one Marion A. Lufkin, by divers unlawful and fraudulent devices and contrivances to commit a crime, to wit, extortion, contrary to the form, force and effect of the statutes," etc.

[2] During the trial, appellants objected to the introduction of any evidence on the part of the state, one ground of the objection being that the information did not state facts sufficient to charge a public offense. The action of the court overruling the objection having been assigned as error, the sufficiency of the information is properly before us C. L. § 7750.

[1] It is contended by appellants that the information sets forth no public offense for the reason that it fails to specify the person who was the object of the conspiracy and extortion.

As will be observed, it is not alleged in the information that the conspiracy to commit the crime of extortion was directed against any designated person, or class of persons, or the public generally; nor is any reason therein stated why such designation is not made. Although the appellants may have had in mind a purpose to extort money, this purpose would be incomplete unless it contemplated being carried out by the selection of persons for victims.

The rule is well settled that an indictment or information charging a conspiracy to commit the crime of extortion, in order to be sufficient, must charge that the conspiracy was against some person or persons designated by name, or class of persons, or the general public, or must state the reason why such designation is not made. 1 Wharton, Crim. Ev. 283; 8 Cyc. 664; 12 C. J. 617; Commonwealth v. Andrews, 132 Mass. 263; State v. Mardesich, 79 Wash. 204, 140 Pac. 573.

It is apparent, therefore, that the information upon which appellants were tried is in this respect fatally defective. We do not wish to be understood as holding that the information is in other respects sufficient. Having found the information insufficient in this respect, it is unnecessary for us to discuss the remaining assignments of error.

The judgment is reversed.

MORGAN, C. J., and RICE, J., concur.

(32 Idaho, 407)

PIATT v. PIATT.

(Supreme Court of Idaho. Sept. 30, 1919.)

1. DIVORCE §130, 184(10)—EVIDENCE MUST SHOW NEUROUS MENTAL SUFFERING FROM EXTREME CRUELTY ALLEGED TO HAVE CAUSED IT.

Where a divorce is sought on the ground of extreme cruelty causing grievous mental suffering, the evidence must be sufficient to satisfy the trial court that the party at fault has been guilty of acts of cruelty which have caused grievous mental suffering to the complaining party. The finding will not be disturbed unless the evidence in support thereof is so slight as to indicate a want of good judgment and an abuse of discretion by the trial court.

2. DIVORCE §127(4)—CONFESSION OR ADMISSION OF DEFENDANT NOT CORROBORATION OF PLAINTIFF'S TESTIMONY.

A confession or admission by the defendant in a divorce case, though admissible, is not corroborating evidence of the testimony of the plaintiff; but where, from the whole record, it is apparent that there is no collusion between the parties, slight evidence in corroboration of the plaintiff, aside from the admissions of the defendant, is all that is required.

3. DIVORCE §298(1) — CUSTODY OF MINOR CHILDREN SHOULD BE AWARDED TO ONE PARENT UNLESS BOTH UNFIT.

In a divorce action the custody of the minor children of the marriage should be awarded to one of the parents, unless the court finds that both parents are either unfit or unable to properly care for the children.

4. DIVORCE §301—WHERE PARENTS UNFIT, CUSTODY OF MINOR CHILDREN GIVEN TO THIRD PERSON AFTER EVIDENCE.

In a divorce action, where there are minor children, and the parents are unfit or unable to properly care for them, the court must receive evidence as to the qualifications of a third person, to whom it is proposed to award the custody of the children.

5. DIVORCE §310—COURT CANNOT REQUIRE SUPPORT OF CHILDREN AFTER MAJORITY.

In a divorce action, the court has no power to require payment of funds for the support and maintenance of children of the marriage after they attain their majority.

Morgan, C. J., dissenting.

Appeal from District Court, Clearwater County; Edgar C. Steele, Judge.

Action for divorce by Florence Piatt against Edward I. Piatt. Judgment for plaintiff, with award of certain sums in settlement of property rights and for support of minor children, and awarding their custody to their maternal grandfather, and defendant appeals. Judgment granting a divorce and settling property rights affirmed, and the award of the custody reversed, and cause remanded, with directions, and order as to payments for support to be modified in discretion of the court below.

Clay McNamee, of Lewiston, for appellant.
S. O. Tannahill, of Lewiston, for respondent.

RICE, J. In this case respondent was granted a divorce from appellant upon the ground of extreme cruelty, and as incidental relief was awarded the sum of \$1,500, to be paid by appellant in full settlement of the property rights. The decree also required appellant to pay the sum of \$30 per month for the support, care, and maintenance of the two minor female children, issue of the marriage; payment of such sums to begin October 1, 1918, and continue until each of said children shall arrive at the age of 21 years, or until the further order of the court. The care, custody, and control of the children, aged 9 and 7 years, respectively, was awarded to R. L. Blevins, their grandfather, father of respondent. The decree also contained certain directions which were to control the grandfather in the matter of the education

of the children, and in exercising his right to their custody.

[1] Appellant attacks certain findings and conclusions of the court on the ground that there was not sufficient evidence in the case to warrant the court in finding that respondent had suffered cruel or inhuman treatment from appellant. Respondent alleged in her complaint that the acts of cruelty complained of caused her to experience grievous mental suffering. This assignment of error must be considered with reference to the following sections of our statute:

C. L. § 2649: "Extreme cruelty is the infliction of grievous bodily injury or grievous mental suffering upon the other by one party to the marriage."

C. L. § 2661: "No divorce can be granted upon the default of the defendant, or upon the uncorroborated statement, admission or testimony of the parties. * * *"

It is not necessary to summarize the testimony as it appears in the record. Suffice it to say that much of the testimony of respondent herself as to the specific acts of cruelty complained of is indirect. This is true, also, with reference to the effect of the acts complained of; that is, as to whether they caused her to experience grievous mental suffering. As to whether or not the conduct of appellant caused respondent grievous mental suffering must for the most part, on the record in this case, be inferred from the evidence.

There is but slight corroboration of respondent's testimony, either as to any specific acts of alleged cruelty, or as to their effect upon respondent. There was testimony as to certain admissions made by appellant to the effect that he had accused respondent of infidelity to him. The proof, however, of the admission of appellant, is not corroboration within the meaning of the statute. Under the terms of the statute, a defendant's admission in court is not of itself corroborating testimony, and proof of his admission out of court is entitled to no greater weight than if the admissions were made directly in the proceedings. The purpose of the statute requiring corroboration is to protect the courts from collusion between the parties. *Andrews v. Andrews*, 120 Cal. 184, 52 Pac. 298; *Blanchard v. Blanchard*, 10 Cal. 203, 101 Pac. 536; *MacDonald v. MacDonald*, 155 Cal. 665, 102 Pac. 927, 25 L. R. A. (N. S.) 45; *Tuttle v. Tuttle*, 21 N. D. 503, 131 N. W. 460, Ann. Cas. 1913B, 1.

[2] Proof of the admission of defendant is properly received in evidence (*Baker v. Baker*, 13 Cal. 87), and where from the whole record it is apparent that there is no collusion between the parties, and proof is made of admissions of misconduct on the part of defendant, slight evidence in corroboration of plain-

tiff, aside from the admissions of defendant, is all that is required. *Tuttle v. Tuttle*, supra; *MacDonald v. MacDonald*, supra.

I think there is in the record some corroboration within the rule laid down in *De Cloedt v. De Cloedt*, 24 Idaho, 277, 138 Pac. 664, and *Donaldson v. Donaldson*, 31 Idaho, 180, 170 Pac. 94, and the cases above cited; and the evidence, though not as convincing as it is in many cases, is sufficient to warrant the trial court, who heard the evidence and observed the demeanor of the parties and the witnesses on the stand, in finding as a fact that appellant was guilty of acts of cruelty which caused respondent grievous mental suffering.

In such cases this court will not disturb the findings, where it is not apparent that the evidence in support thereof is so slight as to indicate a want of ordinary good judgment and an abuse of discretion by the trial court. *De Cloedt v. De Cloedt*, supra; *Donaldson v. Donaldson*, supra; *MacDonald v. MacDonald*, supra.

[3-5] Appellant assigns as error that portion of the decree awarding the custody of the children to R. L. Blevins, their grandfather. C. L. § 2663, reads as follows:

"In an action for divorce the court may, before or after judgment, give such direction for the custody, care and education of the children of the marriage as may seem necessary or proper, and may at any time vacate or modify the same."

While this statute is very broad in its terms, we think the discretion thereby conferred upon the trial court must be exercised with due regard, both to the well-being of the children of the marriage and the rights of the parents. The rights of a parent to the care, custody, and control of his child is a natural right, and is recognized by our statutes. C. L. § 2699a, being one of the sections of the statute contained in the chapter entitled "Parent and Child," is as follows:

"The father and mother of a legitimate unmarried minor child are equally entitled to its custody, services and earnings. If either the father or mother be dead or be unable or refuse to take the custody or has abandoned his or her family, the other is entitled to the child's custody, services and earnings."

It is sometimes said that the welfare of the child is the only matter for consideration in making an order for its custody, but we think this expression is only qualifiedly true. The welfare of the child is perhaps of paramount importance, but it is not the only matter to be considered in determining to whom the custody of the child should be given. *Norval v. Zinsmaster*, 57 Neb. 158, 77 N. W. 373, 73 Am. St. Rep. 500. In a divorce

action, the custody of the children should be awarded to one or both of the parents, unless it be affirmatively shown that both parents are unfit to have such care or custody, or that they are unable to properly maintain them and provide for their proper training and education. Ordinarily poverty of a parent is not a sufficient reason for depriving him of the custody of his child. In the case of *Barnes v. Long*, 54 Or. 548, 104 Pac. 206, 25 L. R. A. (N. S.) 172, 21 Ann. Cas. 465, it is said:

"Of course, the court in the interest of the child may take it from the parents and make other provisions for it, but there must be some good cause for so doing."

See, also, *Clarke v. Lyon*, 82 Neb. 625, 118 N. W. 472, 20 L. R. A. (N. S.) 171; *Morin v. Morin*, 66 Wash. 312, 119 Pac. 745, 37 L. R. A. (N. S.) 585; *Farrar v. Farrar*, 75 Iowa, 125, 39 N. W. 226; *Fitch v. Cornell*, 1 Sawyer, 156, at page 169, Fed. Cas. No. 4,834. Some of the cases above cited were habeas corpus proceedings, but the principles laid down should govern the action of courts in awarding the custody of children in divorce proceedings.

In this case the court found that R. L. Blevins, grandfather of the said minor children, is a fit and proper person to have the care, custody, and control of the said minor children, Marie Piatt and Edna Piatt, and that it is to the best interest of the said minor children that their custody, care, and control be awarded to said R. L. Blevins. There is no other finding on which the decree awarding the custody of the children is based. In our opinion, this finding of the court is not sufficient to justify a decree awarding the custody of the children to their grandfather. In addition to this finding, the court must, before making such an order, also find as a fact, based upon sufficient evidence, that the parents are unfit persons to have the custody and control of the children, or on account of the circumstances surrounding them they are unable to give proper care, nurture, and training to the minor children.

It is to be noted in this case, also, that although the court found that R. L. Blevins was a fit and proper person to have the care and custody of the children, no evidence whatever is contained in the record upon which the finding was based. Before the court is justified in taking the children from the parents, and awarding them to a third person, not only must it find that the parents are unfit or unable to properly care for the children, but the fitness of the person to whom it is proposed to grant their custody and care must be the subject of inquiry in the action, founded upon proper pleadings, in order that either parent may introduce evidence, if any he has, touching the qualifica-

tions, or otherwise, of such person for the execution of his trust. Although parents may be unfit or unable to care for their own children, they may still have an interest in their welfare, and the environment in which they may be placed, and they have a right to be heard before the final award is made. It is their right that the children shall be placed in such a home, and surrounded by such influences, that they shall not be unnecessarily estranged from their parents, but, on the contrary, that the parents shall receive all the regard and respect of their children which it is possible for them to obtain under such unfortunate circumstances. *Farrar v. Farrar*, supra.

Appellant also specifies as error the action of the court in awarding alimony to the wife and providing for the payment of \$30 per month for the maintenance of the children until they are 21 years of age. From an examination of the record, we are not prepared to say that the court abused its discretion in the matter of adjusting the property rights between appellant and respondent; but in the matter of providing maintenance for the children the power of the court ends upon their attaining their majority. *Fitch v. Cornell*, supra, 1 Sawyer at page 169, Fed. Cas. No. 4,834; *Peck on Domestic Relations*, p. 240. Under our statutes, females attain their majority at 18 years of age. C. L. § 2601.

The judgment of the court below, awarding respondent a decree of divorce from appellant and settling the property rights, is affirmed. That portion of the decree awarding the custody of the minor children to R. L. Blevins is reversed, and the cause remanded, with directions to the trial court to take further proceedings in accordance with the views herein expressed, and the order relative to the payments required of appellant for the support of the children may be modified, in the discretion of the court, to correspond with its order for their disposition. Costs awarded to respondent.

BUDGE, J., concurs.

MORGAN, C. J. (dissenting). I am in accord with the rules of law announced in the foregoing opinion, but am unable, by a very thorough search of the record, to find any evidence corroborating the testimony of respondent, nor any testimony which amounts to proof of an admission by appellant that he accused respondent of infidelity to him. The judgment of the trial court should be reversed, because it is based upon the uncorroborated testimony of respondent, which testimony is insufficient, when measured by the provision of C. L. § 2661, quoted in the majority opinion.

STATE v. ASKEW.

(Supreme Court of Idaho. Oct. 11, 1919.)

1. HOMICIDE §127 — INFORMATION SUFFICIENT TO CHARGE MURDER.

An information in a criminal action, charging that the defendant "did then and there willfully, unlawfully, feloniously, and with premeditation and malice aforethought kill and murder one George T. Parks, a human being," is sufficient to charge the crime of murder.

2. CRIMINAL LAW §1159(2) — ON VERDICT SUPPORTED BY EVIDENCE, JUDGMENT WILL NOT BE REVERSED.

Where there is substantial evidence to support the verdict, the judgment based thereon will not be reversed on appeal.

3. CRIMINAL LAW §1186(4)—ERROR IN EXCLUSION OF EVIDENCE NOT PREJUDICIAL TO ACCUSED HARMLESS.

Though the action of the trial court in sustaining objection to a question asked a witness on cross-examination is erroneous, the judgment will not for that reason be reversed, where it appears that the action of the court did not prejudice the substantial rights of appellant.

4. WITNESSES §330(1)—STATUTORY METHOD OF IMPEACHMENT MUST BE FOLLOWED.

The statutory method of impeaching a witness must be followed.

5. WITNESSES §370(1), 374(1) — RELATIONS OF WITNESS TOWARD DEFENDANT AND HIS VICTIM MAY BE SHOWN.

In a criminal case it is proper to show the relations of a witness with, or his feelings toward, a defendant, or the victim of the alleged crime, or the prosecuting witness; and the inquiry may extend to particular facts showing witness' hostility toward, or his bias or prejudice for or against, such persons.

6. CRIMINAL LAW §656(2)—REMARKS OF TRIAL COURT NOT OBJECTIONABLE AS INVASION OF PROVINCE OF JURY.

In a trial of several for homicide, where evidence was admitted as to appellant's purchase of a revolver and as to his conversation with another with reference thereto, the court's remark, in ruling on defendants' motion that testimony be not considered, except as against appellant, that purchase might stand as relating to guilt or innocence of all the defendants, was not objectionable as suggesting that an inference should be drawn from the evidence.

Appeal from District Court, Jefferson County; Edward A. Walters, Judge.

George Askew and others were jointly charged with murder. The other defendants were acquitted, and the named defendant was convicted of voluntary manslaughter. From the judgment, and an order denying his motion for a new trial, he appeals. Affirmed.

Perky & Brinck, of Boise, and Arthur W. Holden, of Idaho Falls, for appellant.

Roy L. Black, Atty. Gen., Alfred F. Stone, Asst. Atty. Gen., and A. C. Cordon, Pros. Atty., of Rigby, for the State.

RICE, J. By the information in this case the appellant was charged with the crime of murder, committed jointly with his son, Albert W. Askew, and his daughter, Mary A. Parks. The jury which tried the case returned a verdict acquitting the son and daughter of appellant, and finding appellant guilty of the crime of voluntary manslaughter. From the judgment of conviction, and from the order of the court overruling appellant's motion for a new trial, this appeal is taken.

[1] It is contended that the information, which is similar in form to that upheld by this court in the case of *State v. Lundhigh*, 30 Idaho, 365, 164 Pac. 690, is insufficient, in that it fails to state facts constituting a public offense. We are urged to reconsider the question of the sufficiency of the information. The information in this case differs from that under consideration in the *Lundhigh* Case, in that in the instant case the information charges that the crime was committed with premeditation. After a reconsideration of the matter involved, and a careful consideration of the authorities relied upon by appellant in his brief, we are constrained to adhere to the rule announced by the majority of the court in the *Lundhigh* Case.

It is insisted further that the evidence shows that appellant acted solely in self-defense when he shot the deceased, and therefore fails to show that he was guilty of the crime of voluntary manslaughter, or of any crime. The deceased was killed in a room in a dwelling house. The only eyewitnesses to the killing were the three defendants in the case. Two other persons were in an adjoining room in the house at the time, and testified at the trial. There seems to be no necessity for reciting at length the testimony of the witnesses as to the facts and circumstances connected with the killing. The jury was entitled to consider all the facts and circumstances testified to by other witnesses in the case in connection with the narrative given by appellant on the stand, and when all the testimony is considered there is substantial evidence in the record to sustain the verdict of the jury.

The same question was presented to the trial court in considering the motion for a new trial. The trial court has greater latitude in its consideration of the weight and sufficiency of the evidence, when the question is raised on motion for a new trial, than has this court when the matter is presented on an appeal from the judgment, or from an order overruling motion for a new trial.

[2] Where there is substantial evidence to support the verdict and judgment, the appellate court will not reverse the judgment. *State v. Steen*, 29 Idaho, 337, 158 Pac. 499. The deceased was the husband of the defendant, Mary Parks. It appears that he had leased the premises which had been occupied by himself and wife, including the dwelling

house, to one J. W. Cromwell; that on the forenoon of the day on which the killing occurred Cromwell came to the dwelling house, bringing his household furniture, for the purpose of moving into the dwelling house; that an altercation arose between the deceased and his wife, Mary Parks, she demanding that Cromwell refrain from bringing his furniture into the house, and the deceased ordering him to bring the furniture in. Cromwell was a witness in the case, and testified as to the difficulty that occurred between the husband and the wife at that time. Appellant assigns as error the action of the court in sustaining the state's objection to the following questions asked witness Cromwell on cross-examination:

"Q. Now, in the light of that controversy between the husband and wife, you chose to take the side of the husband and move in against her will. Is not that correct?"

"Q. And you willingly obeyed them, did you not?"

The last question referred to orders by the deceased to the witness to move in.

[3] In a criminal case, it is proper to show the relations of a witness with, or his feeling toward, a defendant, or the victim of the alleged crime, or the prosecuting witness, and the inquiry may extend to particular facts tending to show his hostility toward, or his bias or prejudice for or against, such persons. 40 Cyc. 2667.

[3] But the action of the court in sustaining the objections to these questions was not prejudicial to appellant. The witness elsewhere in his testimony stated that he was on friendly terms with deceased all the time. It appearing that the erroneous action of the court did not prejudice the substantial rights of appellant, the judgment will not for that reason be reversed. C. L. § 8070; *State v. Gruber*, 19 Idaho, 692, 115 Pac. 1; *State v. Moon*, 20 Idaho, 202, 117 Pac. 757, Ann. Cas. 1913A, 724.

Appellant assigns as error the action of the court in sustaining the state's objection to the following question asked witness George Cromwell on cross-examination:

"Q. And during that conversation, that she was asking to come there and make her home, did Mr. Parks tell her that he had made any provision for her support or support of her children?"

The materiality of the evidence sought to be elicited is not apparent as against appellant. The evidence in the case clearly shows the attitude of the wife, both with relation to her husband and to her former home. Prejudicial error is not shown.

[6] Testimony was admitted with reference to the purchase by appellant of a revolver, and also concerning a conversation between appellant and another party with reference thereto. On behalf of defendants,

counsel moved that the testimony be not considered, except as against appellant. In ruling on this motion, the court said:

"The motion will be denied as to the purchase of the revolver. That will be permitted to stand in the case as testimony in relation to the inquiry as to the guilt or innocence of all the defendants at the present time."

Exception was taken to the remarks of the court. We think, however, that the remarks of the court are not subject to the criticism that the court was suggesting that an inference should be drawn from the evidence, or that the court invaded the province of the jury. The exception is without merit.

[4] The court sustained objections to the following questions asked on cross-examination of one of the witnesses for the state:

"Q. How many criminal cases have you been a witness in, in the last year?"

"Q. Have you been in the habit of testifying in criminal cases here?"

The objections were to the effect that the questions were incompetent and immaterial and not proper cross-examination. No error was committed by the court in refusing to permit the witness to answer these questions. They were clearly immaterial. The statute points out the method of impeaching a witness, and the statutory method must be followed. *Laronte v. Davidson*, 31 Idaho, 644, 175 Pac. 588; *Boeck v. Boeck*, 29 Idaho, 639, 161 Pac. 576.

Finding no reversible error in the record, the judgment will be affirmed.

BUDGE, J., concurs.

MORGAN, C. J. (concurring). My opinion as to the sufficiency of such an information as is here under consideration has not been changed since it was expressed in *State v. Lundhigh*, 30 Idaho, 379, 164 Pac. 690. The decision in that case, rendered according to the views of the majority of the court, announces the law of this state as it now is, and will continue to be until that portion of the case is overruled, or until we have some legislation upon the subject.

I am in accord with the foregoing opinion upon the other points discussed, and therefore concur.

(32 Idaho, 420)

PEDERSEN v. MOORE.

(Supreme Court of Idaho. Oct. 1, 1919.)

1. APPEAL AND ERROR §660(2) — MATTERS NOT RAISED BELOW NOT CONSIDERED ON SUGGESTION OF DIMINUTION OF RECORD.

Matters not properly a part of the judgment roll or of a bill of exceptions duly settled, and which were not raised in the lower court or

considered there, will not be considered on appeal when brought up on a suggestion of diminution of the record.

2. COURTS §35 — JUDGMENT §497(1) — JURISDICTION CONCLUSIVE AGAINST RECITAL IN FINDINGS SHOWING COLLATERAL ATTACK.

Where there is nothing in the record to indicate an absence of jurisdiction in the district court such jurisdiction will be presumed, and recitals in the findings of that court showing jurisdiction are conclusive against a collateral attack.

3. APPEAL AND ERROR §641—APPEAL FROM DENIAL OF MOTIONS DISMISSED WHERE NO SHOWING AS TO PAPERS CONSIDERED ON HEARING.

Where appeals are taken from an order denying motion for judgment notwithstanding the verdict and from an order denying motion for a new trial, and the record contains no certificate showing what papers were submitted to the trial judge and used by him on the hearing of such motions, said appeals will be dismissed.

4. JURY §19(7½) — WILLS §222 — ON CONTEST RIGHT TO JURY ON DEMAND IF AUTHORIZED BY STATUTE.

A proceeding to contest the probate of a will is in its nature equitable, but the parties to such proceeding have the right to demand a jury if authorized by statute.

5. TRIAL §345, 366—OBJECTION TO VERDICT ON SPECIAL INTERROGATORY MUST BE TAKEN ON ITS RENDITION.

Objection to irregularity or informality in a verdict or special interrogatory must be taken at its rendition and before the jury is discharged; otherwise, such objection will be deemed to have been waived.

6. WILLS §400 — EVIDENCE INSUFFICIENT TO AUTHORIZE PROBATE OF OLOGRAPHIC WILL.

Evidence on behalf of appellant examined, and held insufficient to justify disturbing the verdict of the jury and findings of the lower court.

7. APPEAL AND ERROR §971(5)—WITNESSES §240(2)—ALLOWANCE OF LEADING QUESTIONS IN DISCRETION OF TRIAL COURT.

The allowance of leading questions in the examination of a witness is a matter in the discretion of the trial court, and such action on its part will not be disturbed unless an abuse of discretion is shown.

Appeal from District Court, Canyon County; Ed. L. Bryan, Judge.

Proceeding by Priscilla Moore for the probate of an olographic will and a lost olographic codicil thereto of Henry T. Shaw, deceased, contested by Marrietta Pedersen. Will and lost codicil admitted to probate, with an order revoking letters theretofore granted to contestant as administratrix, and from a judgment of the district court on contestant's appeal and upon a trial de novo, reversing the order of the probate court, and

from orders denying motions for judgment notwithstanding the verdict and for a new trial, proponent appeals. Motion to dismiss appeal denied, appeal from orders dismissed, and judgment affirmed.

Finley Monroe, of Emmett, and Scatterday & Van Duyn, of Caldwell, for appellant.

R. E. Haynes, of Payette, and W. A. Stone and Eustace & Groome, all of Caldwell, for respondent.

REDDOCH, District Judge. Henry T. Shaw died on December 6, 1913, in Canyon county, Idaho, leaving estate therein. In July, 1904, the deceased executed an olographic will in favor of appellant and others, which was revoked by his subsequent marriage to the respondent on June 11, 1908. Shortly after decedent's death, M. F. Albert and his widow (Marrietta Shaw) were duly appointed administrators of his estate. On February 23, 1915, appellant filed in the probate court of Canyon county a petition for the probate of the will made in July, 1904, which appellant contends was revived by a lost olographic codicil executed subsequent to decedent's marriage. Respondent filed objections to the probate of said will and lost codicil, and appellant filed answer thereto. After a hearing had thereon, the probate court admitted the will and lost codicil to probate and issued an order revoking the letters of administration theretofore granted. Respondent appealed to the district court, where a trial de novo was had and the order of the probate court reversed, from which judgment and orders denying a motion for judgment notwithstanding the verdict, and for a new trial, this appeal is prosecuted.

Respondent moved to dismiss the appeal upon the ground that the judgment of the district court is not appealable. It is a judgment rendered on an appeal from an inferior court, and therefore appealable under C. L. § 4807. The motion to dismiss is denied.

[1] It is contended by appellant that the district court was without jurisdiction to try the case, basing this contention upon the ground that the appeal was perfected from the probate court to the district court before the entry by the clerk in the minutes of the probate court of the order admitting said will and lost codicil to probate. This question is raised by a certified copy of the orders of the probate court filed in this court pursuant to stipulation of counsel of a diminution of the record and an order of this court made in conformity to such stipulation. Appellant relies upon *Athey v. Oregon Short Line R. R. Co.*, 30 Idaho, 318, 165 Pac. 1116, and cases therein cited. Evidence of the entry of the order forms no part of the judgment roll, under C. L. § 4456, and the same is not shown by any bill of exceptions,

and its consideration by this court would permit the introduction of new matter which was not raised in or considered by the court below. This cannot be done. In *re Pichoir's Estate*, 139 Cal. 694, 70 Pac. 214, on rehearing 139 Cal. 694, 73 Pac. 604; 4 C. J. 509, 510.

[2] Where there is nothing in the record to indicate a lack of jurisdiction in the district court, it will be presumed. *Western Lumber & Mill Co. v. Merchants' Amusement Co. et al.*, 13 Cal. App. 4, 108 Pac. 891. The findings of the court below recite that the judgment appealed from was duly entered and are conclusive against a collateral attack. 4 C. J. 775 and 787; 38 Cyc 1987. We therefore conclude that the want of jurisdiction is not properly shown.

[3] The appeals from the order denying appellant's motion for judgment notwithstanding the verdict, and from the order denying the motion for a new trial, are dismissed, for the reason that the record does not contain a certificate showing what papers were submitted to the judge and by him used on the hearing of such motions, or either of them. *Walsh v. Niess*, 30 Idaho, 325, 164 Pac. 528; *Bumpas v. Moore*, 31 Idaho, 668, 175 Pac. 339; *Bell v. Stadler*, 31 Idaho, 568, 174 Pac. 129.

[4] Proceedings to contest the probate of a will are in their nature equitable, but one in which the parties, if authorized by statute, have the right to demand a jury. *Church*, New Probate Law & Prac. vol. 2, pp. 1664 and 1669; *Pine v. Callahan*, 8 Idaho, 684, 71 Pac. 473.

[5] Appellant contends that there was irregularity in the proceedings of the court and jury in that the court submitted, and the jury found, a verdict not responsive to the issues. We have examined the form of special verdict submitted and returned, together with the evidence introduced, and think it sufficiently responsive. If there was any objection to the form of the special interrogatory, it should have been raised in the court below before the jury was discharged and an opportunity given to correct it. 38 Cyc. pp. 1904 and 1932.

[6] It is next contended that the evidence is insufficient to justify the verdict. The burden was upon the appellant to establish to the satisfaction of the court and jury that the alleged lost olographic codicil was true and genuine. The 1904 will upon the trial was conceded to be the will of the deceased. Two half-brothers of appellant testified to seeing the lost instrument, distinctly remembering its contents, and one of them detailed its execution, custody, and loss. No one else ever saw it, and it was not sought to establish the same for more than a year after decedent's death. We have carefully examined the record and are convinced that the testimony offered in support of the alleged codicil is such that the jury and trial judge

were fully justified in rejecting it as proof of the existence of that instrument. They saw and observed the witnesses, and we do not feel justified in disturbing their findings.

[7] It is urged that the court erred in allowing respondent to cross-examine certain witnesses called by her in direct proof of her case. The trial court took the view that the case was one in which, under C. L. § 6077, the asking of leading questions should be permitted. The witnesses thus examined were the only ones who claimed to know anything about the lost codicil, its contents, making, and loss. We believe this a proper case for the court to exercise its discretion and permit the asking of leading questions. The allowance of leading questions is in the discretion of the trial court, and a case will not be reversed on this ground unless there is a manifest abuse of discretion. 40 Cyc. p. 2427; McLean v. City of Lewiston, 8 Idaho, 472, 69 Pac. 478.

We have examined the other assignments of error and find no reversible error therein.

The judgment appealed from is affirmed. Costs awarded to respondent.

MORGAN, C. J., and BUDGE, J., concur.

(32 Idaho, 415)

KLOEPFER v. FORCH.

(Supreme Court of Idaho. Sept. 30, 1919.)

1. ABATEMENT AND REVIVAL §55(3)—ASSIGNMENTS §24(3)—CAUSE OF ACTION FOR DAMAGE TO CROPS FROM FERTILIZER BOUGHT IS EX CONTRACTU AND SURVIVES.

A cause of action growing out of the purchase of sodium arsenate, represented by the vendor to be sodium arsenite, and the application thereof to crops which were destroyed thereby, is assignable, and, although stated in the complaint in form *ex delicto*, is, in fact, *ex contractu* and survives the death of a party to the action.

2. ACTION §50(1) — SEVERAL CAUSES OF ACTION FROM INJURIES TO PROPERTY MAY BE JOINED.

Several causes arising out of injuries to property, which affect all the parties to the action, may be united in the complaint although some or all of them are acquired by plaintiff by assignment.

Appeal from District Court, Canyon County; Ed. L. Bryan, Judge.

Action for damages by H. P. Kloefer against Jacob Forch. Judgment for defendant, and plaintiff appeals. Reversed.

Ira E. Barber and W. H. Davison, both of Boise, for appellant.

O'Connor & Anderson, of Nampa, and Charles F. Reddoch, of Boise, for respondent.

MORGAN, C. J. The complaint contains six causes of action, stated in separate counts, and it appears therefrom that appellant and five other persons, who were engaged in raising clover for seed, applied to Jacob Forch, a druggist, for sodium arsenite, a suitable poison to be used in compounding a spray for such crops for the purpose of destroying insect pests; that he sold and supplied them with sodium arsenate, and carelessly, negligently, falsely, and fraudulently represented to them that it was sodium arsenite, and they, not knowing the difference between said chemicals, used the same upon their crops and thereby destroyed them.

Appellant sued in the first count for the destruction of his own crop, and in the second, third, fourth, fifth, and sixth counts as assignee of the several owners of crops therein mentioned. Forch demurred to the complaint on several grounds, and the demurrer was sustained on the ground that several causes of action had been improperly united. Appellant declined to further plead, and judgment of dismissal was entered, from which this appeal was prosecuted. While the appeal was pending, Jacob Forch died, and appellant moved this court for an order substituting Rosina Forch, executrix of his estate, as respondent herein.

Two questions are submitted for our consideration which are so closely related they will be discussed and disposed of together: (1) Are the claims assignable? (2) Do the causes of action survive?

[1] As a general rule, in the absence of a statute providing otherwise, causes of action *ex contractu* survive, while causes *ex delicto* do not. However, there are well-recognized exceptions to both branches of the rule. As was said by the Supreme Court of Virginia in *Lee's Administrator v. Hill*, 87 Va. 497, 12 S. E. 1052, 24 Am. St. Rep. 666:

"The true test is, not so much the form of the action, as the nature of the cause of action. Where the latter is a tort unconnected with contract, and which affects the person only, and not the estate, such as assault, libel, slander, and the like, there the rule, '*Actio personalis*,' etc., applies. But where, as in the present case, the action is founded on a contract, it is virtually *ex contractu*, although nominally in tort, and there it survives."

See, also, *Booth v. Northrop*, 27 Conn. 325; *Cutter v. Hamlen*, 147 Mass. 471, 18 N. E. 397, 1 L. R. A. 429; *State v. Starkweather*, 40 N. Y. Super. Ct. 453; *Feary v. Hamilton*, 140 Ind. 45, 39 N. E. 516; *Boor v. Lowrey*, 103 Ind. 463, 3 N. E. 151, 53 Am. Rep. 519, and note; *Winston v. Gordon*, 115 Va. 899, 80 S. E. 756; *Williams v. Harris*, 193 S. W. 403; *Vragulizan v. Savings Union Bank & Trust Co.*, 31 Cal. App. 709, 161 Pac. 507; 1 C. J. p. 174, § 303; *Id.* page 186, § 342.

We have no statutory provision abrogating

the common-law rule of survival of causes of action above referred to. Applying that rule to this case, it may be said that while the action is, in form, *ex delicto*, the cause is, in fact, *ex contractu*. The injury for which recovery is sought grows out of the contract of purchase of sodium arsenate represented by the vendor to be sodium arsenite, and the application thereof to the crops of appellant and his assignors whereby those specific pieces of property were destroyed. These facts distinguish this case from those where recovery is sought for injury to the person or for torts resulting in damage to the estate, generally, and make these claims assignable and cause them to survive the death of a party to the action. The motion to substitute Rosina Forch, executrix, for Jacob Forch, as respondent herein, is granted.

[2] The remaining question is: Did the judge err in sustaining the demurrer to the complaint? Counsel for respondent contends that, even though the causes of action are assignable, they cannot be united in one complaint because they arise out of separate wrongful acts alleged to have been committed against appellant and his assignors severally. That is not the true test. The right to unite causes of action is statutory in Idaho and is conferred, and limited by C. L. § 4169, as follows:

"The plaintiff may unite several causes of action in the same complaint, where they all arise out of:

- "(1) Contracts, express or implied.
- "(2) Claims to recover specific real property, with or without damages for the withholding thereof, or for waste committed thereon, and the rents and profits of the same.
- "(3) Claims to recover specific personal property, with or without damages for the withholding thereof.
- "(4) Claims against a trustee by virtue of a contract, or by operation of law.
- "(5) Injuries to character.
- "(6) Injuries to person.
- "(7) Injuries to property: Provided, that where injuries to person and to personal property arise out of the same occurrence or transaction, causes of action may be united in the same complaint, and separate actions for such injuries are hereby prohibited.

"With the exception of the causes of action specified in subdivision 7 last preceding, the causes of action so united must all belong to one only of these classes, and must affect all the parties to the action and not require different places of trial, and must be separately stated; but an action for malicious arrest and prosecution, or either of them, may be united with an action for either an injury to the character or to the person."

These causes arise out of injuries to property, affect all parties to the action, do not require different places of trial, are separately stated, and, pursuant to subdivision 7, above quoted, may be united in one com-

plaint. *Kruger v. St. Joe Lumber Co.*, 11 Idaho, 504, 83 Pac. 696.

The judgment is reversed. Costs are awarded to appellant.

RICE and BUDGE, JJ., concur.

(56 Mont. 277)

RATE v. AMERICAN SMELTING & REFINING CO. (No. 4025.)

(Supreme Court of Montana. Oct. 7, 1919.)

1. ASSIGNMENTS \S 12—OF WAGES TO BE EARNED UNDER EXISTING CONTRACT VALID.

An assignment of wages to be earned in the future under an existing employment is valid.

2. BANKRUPTCY \S 418(1)—DISCHARGE RELATES BACK TO ADJUDICATION.

A discharge in bankruptcy, when granted, relates back to the date of the adjudication.

3. ASSIGNMENTS \S 78—LIEN OF ASSIGNMENT OF WAGES TO BE EARNED APPLIES ONLY AS THEY ARE EARNED.

An assignment of wages to be earned in the future creates no immediate lien, but one which comes into existence only as the wages are earned.

4. BANKRUPTCY \S 418(1), 433(1)—DISCHARGE EXTINGUISHES LIEN OF ASSIGNMENT OF WAGES EARNED AFTER ADJUDICATION.

A discharge in bankruptcy discharged the bankrupt's debt and extinguished the lien of assignments to the creditor as to all wages earned by the bankrupt after the date of the adjudication.

5. BANKRUPTCY \S 418(1) — DISCHARGE LEAVES DEBT EXISTING AS MORAL OBLIGATION.

A discharge in bankruptcy goes only to the remedy, and does not cancel the debt, which remains as an unenforceable moral obligation.

6. ESTOPPEL \S 90(3)—SERVANT NOT ESTOPPED TO RECOVER AMOUNTS DEDUCTED AFTER DISCHARGE FROM WAGES ON PRIOR ASSIGNMENTS.

Employé who had given assignments of wages, but was subsequently discharged in bankruptcy, after giving his employer formal notice of the proceedings and of his claim the assignments were revoked, *held* not estopped to recover from the employer amounts deducted from wages and paid the creditor after the discharge in bankruptcy on account of his acceptance of check in full payment of wages earned with knowledge that the amounts of the assignments had been deducted.

Appeal from District Court, Lewis and Clark County; R. Lee Word, Judge.

Action by George Henry Rate against the American Smelting & Refining Company. From judgment for plaintiff and an order

denying motion for new trial, defendant appeals. Affirmed.

C. E. Pew, of Helena, for appellant.

W. D. Rankin, of Helena, for respondent.

PATTEN, J. On February 12, 1914, respondent, being then in the employ of appellant, executed and delivered to the Flatow Mercantile Company, of East Helena, a series of assignments for the sum of \$15 each, to be paid successively, one each month, out of the wages to be earned by respondent, commencing with the month of February, 1914, and ending with the month of April, 1915. The assignments were given for the purpose of satisfying an indebtedness then owing by respondent to the Flatow Mercantile Company. Thereafter, on February 20, 1914, respondent filed his petition in bankruptcy in the District Court of the United States for the District of Montana, and on the same day was adjudged a bankrupt. The claim of the Flatow Mercantile Company was listed in his petition as one of his debts. Afterwards, on April 12, 1915, respondent was given his discharge as a bankrupt. On the 10th day of each month, commencing in March, 1914, and ending in May, 1915, respondent received his pay check from appellant for the previous month's wages, from each of which was deducted the \$15, and each check was indorsed by respondent before payment, and had printed above his signature the statement that the amount of the check was received by him in full payment for services rendered during the previous month. In March, 1914, respondent made and served on appellant his affidavit containing, among other things, notice that he had filed his petition in bankruptcy; that the Flatow Mercantile Company was included in the schedules as a creditor; and that the assignments previously given were revoked. The money withheld from respondent's checks was paid by appellant to the Flatow Mercantile Company. This action was thereafter commenced in the justice's court for Helena township to recover the amounts retained by appellant during said period, and on appeal to the district court of Lewis and Clark county, and after a trial in that court, judgment was entered in favor of respondent. The appeals are from the judgment, and an order denying appellant's motion for a new trial.

[1-4] 1. It is contended in behalf of appellant that an assignment of wages to be earned in the future, under an existing employment, is valid, and with this, as a general proposition of law, we agree. But the real question to be determined here is whether or not an assignment of unearned wages creates a lien upon them which is not affected by a discharge of the debtor in bankruptcy, made after the assignment is given. A discharge in bankruptcy, when granted, relates

back to the date of the adjudication. Collier on Bankruptcy (10th Ed.) p. 363. An assignment of wages to be earned in the future does not create an immediate lien, but one which comes into existence only as the wages are earned. As was said in the case of *In re West* (D. C.) 128 Fed. 205:

"The theory of a lien upon the earnings of future labor is not that it attaches to such earnings from the moment of contract of pledge or assignment, but from the moment of their existence. It is needless to say that there can be no lien upon what does not exist."

This, in effect, was held in *M. & M. Bank v. Barnes*, 18 Mont. 338, 45 Pac. 218, 47 L. R. A. 737, 58 Am. St. Rep. 588. While eminent courts have held the contrary (*Citizens' Loan Ass'n v. Boston & Maine R. R. Co.*, 196 Mass. 528, 82 N. E. 696, 14 L. R. A. [N. S.] 1025, 124 Am. St. Rep. 584, 13 Ann. Cas. 365; *Mallin v. Wenham*, 209 Ill. 252, 70 N. E. 564, 65 L. R. A. 602, 101 Am. St. Rep. 233), the weight of authority, based, as we think, upon the better reasoning, establishes the rule that the discharge in bankruptcy had the effect of discharging respondent's debt, and extinguishing the lien of the assignments as to all wages earned by respondent after the date of the adjudication in bankruptcy. Collier on Bankruptcy, p. 363; *In re West*, above; *In re Home Discount Co.* (D. C.) 147 Fed. 538; *In re Lineberry* (D. C.) 183 Fed. 338; *Levi v. Loevenhart*, 138 Ky. 133, 127 S. W. 748, 30 L. R. A. (N. S.) 375, 137 Am. Rep. 377; *Hupp v. Union Pac. Ry. Co.*, 99 Neb. 654, 157 N. W. 343, L. R. A. 1916E, 247; *Leitch v. Northern Pac. Ry. Co.*, 95 Minn. 35, 103 N. W. 704, 5 Ann. Cas. 63.

[5] It is true that the discharge goes only to the remedy, and does not cancel the debt, which remains as an unenforceable moral obligation (*Collier on Bankruptcy*, p. 362; *Citizens' Loan Ass'n v. Boston & Maine R. R. Co.*, above), and upon this is grounded the decisions which do not accept the rule above stated; but the effect, nevertheless, is to extinguish the lien of the assignments as to all wages then unearned. As to such wages, the lien has not come into existence, and by virtue of the discharge cannot subsequently attach thereto. In the absence of a lien, the assignments are without force or effect.

In the case of *Leitch v. Northern Pac. Ry. Co.*, above, it is said:

"If the plaintiff had a valid lien at the time of the debtor's discharge upon his wages thereafter to be earned as security for the payment of his debt, then the discharge would not affect such vested security. This conclusion follows from the admitted proposition that a discharge in bankruptcy only relieves the debtor from all legal obligation to pay the debt, and from all liability of having his future-acquired property and earnings seized to pay the debt; but all valid and existing liens on specific property or trusts therein securing the debt are not im-

paired by the discharge. * * * The rule on principle and deducible from the decisions of this court is that an assignment of wages to be earned in the future under an existing contract of employment to secure a present debt or future advances is valid as an agreement, and takes effect as an assignment as the wages are earned. * * * Tested by this rule, it logically follows that the plaintiff, when the debtor filed his petition in bankruptcy, and when he received his discharge, had no lien on or vested security in the wages of the debtor thereafter to be earned by virtue of his contract, which was to take effect as an assignment when the wages were earned."

2. What is said above also disposes of the further contention made by appellant that the wages were exempt under the provisions of section 67 of the Bankruptcy Act (Act July 1, 1898, c. 541, 30 Stat. 564 [U. S. Comp. St. § 9651]), and for that reason the assignment was not affected by the discharge. It is unnecessary to consider whether such wages were exempt, because the right of the Flatow Mercantile Company depended upon the existence of its lien thereon, and if, as to unearned wages, there was no lien by virtue of the debtor's discharge in bankruptcy, it would follow that it had no further claim upon them which could be asserted, and the question of exemption is immaterial. To quote further from *In re West*, above:

"The discharge in bankruptcy operated to discharge these obligations as of the date of the adjudication, so that the obligations were discharged before the wages intended as security were in existence. The law does not continue an obligation in order that there may be a lien, but only does so because there is one. The effect of the discharge upon the prospective liens was the same as though the debts had been paid before the assigned wages were earned. The wages earned after the adjudication became the property of the bankrupt clear of the claims of all creditors."

[8] 3. It is also contended that the acceptance of the checks by respondent in full payment of wages earned, with knowledge that the sum of \$15 had been deducted from each one in accordance with the assignments, would operate as an estoppel, and so preclude respondent from now recovering the amounts withheld. To establish an estoppel it was necessary for appellant to show that it was misled by respondent to its prejudice. It is undisputed that respondent was not informed that the money retained by appellant was being paid over to the Flatow Mercantile Company, and that the appellant had formal notice from the affidavit served on it in March, 1914, of the bankruptcy proceedings and of respondent's claim that the assignments were thereby revoked; so that we think it cannot be said that appellant was misled by respondent's acceptance of the checks.

The judgment and order appealed from are affirmed.

Affirmed.

BRANTLY, C. J., and HOLLOWAY, HURLY, and COOPER, JJ., concur.

(106 Kan. 343)

SCHOFIELD v. SCHOOL DIST. NO. 113,
LABETTE COUNTY. (No. 21508.)

(Supreme Court of Kansas. Oct. 11, 1919.)

(Syllabus by the Court.)

1. SCHOOLS AND SCHOOL DISTRICTS §78 — SCHOOL BOARD MAY CONTRACT FOR WELL FOR DRINKING WATER.

Under the statute authorizing a school board to provide the necessary appendages for a school-house, it may bind the district to pay for the drilling of a well in the school yard for the purpose of supplying drinking water, even although no suitable water is found, and the well is on that account entirely useless.

2. CONTRACTS §198(6)—CONTRACT TO DRILL WELL NOT GUARANTY THAT SUITABLE WATER WILL BE FOUND.

Language to the effect that a contractor agrees to drill a "water well," guaranteeing first-class work and a well produced by a machine of a specified make, payment to be made at the completion of the well, does not imply that he undertakes that water shall be found suitable for the use intended.

3. CONTRACTS §280(5) — WHAT CONSTITUTES COMPLETION OF CONTRACT FOR DRILLING WELL.

A well drilled under such a contract must be deemed to be completed, in such sense as to entitle the contractor to his pay, when it is made to appear that water of the kind sought cannot be found at a reasonable depth, and this condition must be regarded as established, so far as he is concerned, when the other party directs a discontinuance of the work.

(Additional Syllabus by Editorial Staff.)

4. SCHOOLS AND SCHOOL DISTRICTS §78 — POWER TO CONTRACT IS SUCH AS GIVEN BY STATUTE.

The power of a school district to contract is only such as is conferred by statute, expressly or by fair implication, and persons dealing with it are charged with notice of this limitation.

Appeal from District Court, Labette County.

Action by L. F. Schofield against School District No. 113, Labette County. Demurrer to plaintiff's evidence sustained, and he appeals. Reversed and remanded.

John Madden, John Madden, Jr., and C. E. Cooper, all of Wichita, for appellant.

W. D. Atkinson, of Parsons, and John T. Pearson, of Atchison, for appellee.

MASON, J. L. F. Schofield entered into a written contract with the board of school district No. 113 of Labette county to drill a well in the school yard; the purpose being to provide a supply of drinking water. No water suitable for the purpose was found, and by direction of the board the drilling was abandoned at the depth of 293½ feet. The price agreed upon for the work was \$1.25 a foot. The contractor, who had received \$100, brought an action against the district for the balance of the agreed price of \$1.25 a foot, also asking a further recovery on account of extra work, and delay occasioned by the fault of the board. A demurrer to his evidence was sustained, and he appeals.

The grounds on which the defendant's liability is contested, assuming the plaintiff's evidence to be true, are (1) that a school district has legal authority to pay for constructing a well only on the theory that it is a necessary appendage to the school house, and that a well which produces no water fit to drink is useless, and cannot be regarded as covered by that term; and (2) that the language of the contract made the plaintiff a guarantor that a supply of drinking water would be produced.

[4] 1. The power of a school district to contract is of course only such as is conferred by statute, expressly or by fair implication; and persons dealing with it are charged with notice of this limitation. 35 Cyc. 949, 951. The district board is authorized to "provide the necessary appendages for the school-house during the time a school is taught therein." Gen. Stat. 1915, § 8976. This court has held that the word "appendage," as used in the statute, should be construed broadly, so as to include a well on the school premises; its necessity in a particular case being a question of fact. *Hemmer v. School District*, 30 Kan. 377, 1 Pac. 104.

[1] The defendant, however, argued that a well which produces no water fit for drinking purposes, being absolutely useless, cannot fairly be considered an appendage to a school house, and certainly not as a necessary appendage. The argument has plausibility, but proceeds upon a quite literal interpretation, which we think would result in confining the discretion of the school board within too narrow limits. The evidence shows that a cistern holding rainwater had formerly supplied drinking water for the school, but was not considered sanitary. This obviously justified the officers of the district in making reasonable efforts to procure a more satisfactory supply. They could not be sure that sinking a well would answer the purpose, but they might naturally and reasonably suppose the chances were all in favor of it. The only way to find out was to make the attempt. We cannot say that as a matter of law they had no right to risk the money of the district in drilling the well, unless they were sure it would meet the purpose for

which it was intended. We think the authority to provide a well implied the authority to bind the district for the amount expended in an endeavor to construct one, following reasonable and usual methods, notwithstanding it resulted in a complete failure so far as practical results were concerned. Although in a particular case it might be possible to find a contractor who would carry the risk himself, this would presumably involve a considerable increase in the price, and the question as to whether that plan should be followed would be one calling for the exercise of sound business judgment. We conclude that the board had authority to make the contract, and the district was liable upon it if the contractor duly performed his part.

[2] 2. The material part of the contract read as follows:

"For and in consideration of one dollar and twenty-five cents (\$1.25) per foot, first party [Schofield] agrees to drill one water well on school yard east of schoolhouse. First party agrees to furnish dry pipe suitable for casing out all surface water. Dry pipe to be 6¾ inch, I. D. First party guarantees first-class work and a stra well. In case of objectionable water other than surface water, second parties [the district board] agree to furnish all necessary casing for completion of well. Payment for said well to be cash on completion of said well."

The evidence tended to show that at a depth of 24 feet surface water was found, which was not suitable for drinking and was cased out in accordance with the contract and the wish of the members of the board. At about 80 feet salt water was struck, and the board, after a delay to give opportunity for analysis, caused the plaintiff to proceed with the drilling, which was finally stopped by order of the director at 293½ feet; no usable water having been reached.

No explanation is offered of the combination of letters "stra" appearing in the contract. It may have been intended for "star," for the plaintiff testified that he used a Star drill machine. At all events, no force is attached to it by either party. The defendant argues that an undertaking on the part of the plaintiff that water should be produced is fairly implied from the agreement to drill a "water well," and from the stipulation that payment was to be made on its "completion." The expression "water well" might naturally be employed to distinguish the contemplated operation from an effort to reach oil or gas. "The use of the term 'well' * * * is not conclusive that a producing well was intended." *Betterment Co. v. Blaes*, 75 Kan. 69, 73, 88 Pac. 555, 556. Contracts for the digging or drilling of a well often provide that payment shall depend upon the obtaining of water; but to be given that effect such a purpose ought to be made to appear by express statement or very clear implication, especially where the contractor does not

choose the site. "If the agreement is executed without provision that a specific flow of water shall be obtained, * * * then the labor and materials must be paid 'or as per contract, be the flow of water little or much.'" *Omaha Consolidated Vinegar Co. v. Burns*, 49 Neb. 229, 233, 68 N. W. 492, 493. See also *Gregory and Bishop v. U. S.*, 33 Ct. Cl. 434; *Chapin v. L. Candee & Co.*, 14 Misc. Rep. 453, 35 N. Y. Supp. 1018. *Contra*, *Jarrard v. Hill*, 14 Ky. Law Rep. 575. Even a guaranty that water shall be produced has been held not to mean that the water shall be suitable for the purpose in view. *American Well-Works v. Rivers* (C. C.) 36 Fed. 880; *Blum v. Brown*, 11 Tex. Civ. App. 463, 83 S. W. 145; *Electric Lighting Co. v. Elder*, 115 Ala. 138, 21 South. 983. In a situation having some features similar to those here presented, this language has been used:

"Defendant founds his argument upon his construction of the word 'well'; that plaintiffs agreed to drill a 'well'; that a 'well' is a hole in the ground, containing water other than surface water; that, when plaintiffs agreed to drill a 'well' they contracted to furnish an article meeting that definition; and that, if they did not produce a hole in the ground containing water other than surface water, they did not drill a 'well,' and cannot recover. * * * The defendant himself selected the site for the proposed well. Nothing was said about plaintiffs undertaking to reach water. All that can be gleaned from the conversations of the parties is that plaintiffs were to dig a well. From this contract, and the circumstances, to construe an undertaking on the part of the plaintiffs to reach water or receive no pay seems to us to do great violence to language, and to the ordinary transactions of sane men. * * * When plaintiffs went to dig a well, when they took a site selected by defendants, when no guaranty of reaching water was made, when no price was fixed for performing the services or reaching water, can a court for a moment regard it as within the contemplation of the parties, as shown from their words or their acts, that they used the word 'well' as meaning a hole in the ground, containing water other than surface water? We think not. *Bouvier's Law Dictionary* defines a 'well' as 'a hole dug in the ground in order to obtain water.' This is, to our mind, the only practical view. The object of a well is to obtain water. The well may be unsuccessful. The object of a mining shaft is to develop a mine that will pay—an object not always attained. Under the circumstances of the case, we cannot construe the word 'well' as defendant insists." *Littrell v. Wilcox*, 11 Mont. 84, 27 Pac. 396.

The provisions of the contract relative to casing out water unfit for use serve to show that only water suitable for drinking was sought, but in our judgment do not further affect the question under consideration. They indicate that the finding of undesirable water at different depths was anticipated,

and the purpose of their insertion was obviously to determine upon whom should fall the cost of the additional material thereby made necessary.

[3] 3. Even under a contract to prosecute the work of boring a well until the other party should be satisfied, or until water was found, it has been said that no obligation was created to go beyond a reasonable depth. *Bohrer v. Stumpff*, 31 Ill. App. 139. Here we think the well contracted for must be regarded as completed, when it became apparent that good water could not be obtained within a reasonable depth—a condition established, so far as the plaintiff was concerned, by the order of the director to discontinue the drilling.

The judgment is reversed, and the cause is remanded for further proceedings.

All the Justices concurring.

(25 N. M. 442)

DE BACA v. PEREA. (No. 2190.)

(Supreme Court of New Mexico. Oct. 2, 1919.)

(Syllabus by the Court.)

1. APPEAL AND ERROR §597(1)—WAIVER OF OBJECTIONS TO TRANSCRIPT OF RECORD.

Where a party in the district court in his pleading makes the papers in another cause in such court a part of such pleading by reference, he will not be heard to object in the appellate court to the incorporation of such papers, so made a part of his pleading by reference, into the transcript of record.

2. APPEAL AND ERROR §248—EXAMINATION OF RECORD WITHOUT EXCEPTIONS TO DETERMINE JURISDICTIONAL MATTERS.

There is a well-recognized exception to the rule that the appellate court will not examine a record, unless exceptions have been taken and the error complained of called to the attention of the trial court, which is that the court will notice, without exception or presentation, jurisdictional and other matters which may render a case inherently and fatally defective and require a reversal.

3. APPEAL AND ERROR §267(1)—JUDGMENT ON ANSWER FAILING TO STATE DEFENSE JURISDICTIONAL MATTER, REVIEWABLE WITHOUT EXCEPTIONS.

Where a judgment is rendered on an answer which clearly fails to state facts sufficient to constitute a defense to a good complaint, such judgment is inherently and fatally defective, and no exception to the rendition of the same is necessary.

Error to District Court, Sandoval County; Reynolds, Judge.

Suit by Socino C. De Baca against Jacobo Perea, with counterclaim and cross-complaint by defendant. Judgment for defendant, dis-

missing the complaint on the merits, and plaintiff brings error. Reversed and remanded, with instructions to set aside the judgment and to grant defendant leave to amend his answer.

Marron & Wood, of Albuquerque, for plaintiff in error.

Neill B. Field, of Albuquerque, for defendant in error.

ROBERTS, J. Plaintiff in error sued defendant in error in the court below for contribution, alleging in substance that on the 30th day of June, 1915, plaintiff and defendant became joint sureties upon the note of Emiliano Lucero to the State National Bank of Albuquerque for the sum of \$3,000; that, the principal failing to pay the note, the bank demanded payment thereof from the sureties; that the defendant failed and refused to pay, and in order to prevent suit plaintiff was forced to and did pay the full amount of the note; that nothing had been paid to the plaintiff, except that a mortgage which had been given to the plaintiff and the defendant by Lucero to indemnify them against loss or damage because of having signed the note had been duly foreclosed, and the net amount realized from the foreclosure applied upon the claim, and that of the balance remaining unpaid, the equal one-half part, to wit, \$1,547.59, with interest, was due from the defendant to the plaintiff by way of contribution.

On the 11th day of July, 1917, the defendant appeared and filed a pleading denominated "Answer, Counterclaim, and Cross-Complaint." The first paragraph of the answer attempted to plead *res adjudicata*, and, after setting up the title and number of the case upon which the claim of former adjudication was based, the answer proceeded:

"This defendant prays leave to refer to the records and proceedings in said cause of *Socmo C. De Baca v. Emiliano Lucero, Luz E. Lucero, and Jacobo Perea*, No. 420 on the docket of this court, and that the same may be taken and considered as part of this answer with the same effect as if a certified transcript thereof had been attached to and made a part thereof."

The proceedings, pleadings, and judgment in the case referred to, which are incorporated into the transcript herein, clearly show that there was no foundation whatever for the claim that there had been a former adjudication. The second paragraph of the answer also failed to state facts sufficient to constitute a defense. The cross-complaint asked that an accounting be taken of the property purchased by plaintiff at the foreclosure sale, and that defendant be given the right to contribute to the expense incurred by the plaintiff therein and that he

receive the benefit upon the payment of one-half the amount paid by plaintiff as the purchase price of the property; it being his contention that plaintiff had purchased the property at much less than its value, and that he should be allowed to participate in the benefits. Plaintiff failed to demur or reply to the answer and counterclaim within the time limited by the statute, and defendant moved for judgment for want of a reply, serving notice of the same upon counsel for plaintiff. At the time noticed for the hearing plaintiff appeared and asked leave of court to file a demurrer to the first and second paragraphs of the answer and a reply to the counterclaim and attempted to excuse his default. The court properly held that the showing made was insufficient to excuse the default, refused the permission requested, and entered judgment for the defendant, dismissing the plaintiff's complaint on the merits. To review the action of the court in entering such judgment this appeal is prosecuted.

[1] The error here assigned is that the court committed error in entering judgment for the defendant, because the answer upon which the judgment was based was insufficient in law to constitute a defense to the matters and things set forth in the complaint. Defendant in error filed a motion to strike from the transcript of record the copy of the pleadings, proceedings and judgment in cause No. 420, upon which his plea of *res adjudicata* was based; it being his contention that because a copy of these pleadings, etc., was not attached to his answer as an exhibit that the same could not properly be considered by either the district court or this court. This motion will not, however, be sustained because defendant in error attempted to make these matters a part of his answer by reference and apparently had the benefit thereof in the district court, and in equity and good conscience he should not now be able to deprive the plaintiff of the benefit thereof. Where a party in the district court in his pleading makes the papers in another cause in such court a part of such pleading by reference, he will not be heard to object in the appellate court to the incorporation of such papers so made a part of his pleadings by reference into the transcript of record.

[2] In his brief here, defendant in error refuses to discuss with plaintiff in error the question as to the sufficiency of his answer to state a defense. He stands solely upon a question of practice, and contends that because plaintiff in error took no exception to the judgment in the lower court that he is precluded here from raising any question as to the sufficiency of his answer to warrant the judgment, contending that under section 37, c. 43, Laws 1917, which provides:

"Exceptions to the decisions of the court upon any matter of law arising during the progress of

a cause must be taken at the time of such decision and no exceptions shall be taken in any appeal to any proceeding in a district court except such as shall have been expressly decided in that court: Provided, that no exception shall be required to be reserved in the trial of equity cases or cases before the court in which a jury has been waived"

—the plaintiff in error is precluded from securing a review in this court. It is true this court has held in many cases that it will not examine a record, unless exceptions have been taken and the error complained of is called to the attention of the trial court. *Neher v. Armijo*, 11 N. M. 67, 66 Pac. 517; *De Baca v. Wilcox*, 11 N. M. 352, 68 Pac. 922; *Fullen v. Fullen*, 21 N. M. 212, 153 Pac. 294. There is a well-recognized exception to this rule, to the effect that the court will notice, without exception or presentation, jurisdictional and other matters which may render a case inherently and fatally defective and require reversal. This exception was stated in the cases above referred to, and also in the case of *Good v. Loan Co.*, 16 N. M. 461, 117 Pac. 856, and in 3 C. J. p. 894, the general rule is stated, and on page 905 of the same work will be found an exception, which is that the question whether the pleadings support and warrant the judgment is one which arises on the record proper, and may be tested by writ of error or appeal from the judgment without any exception.

[3] Where a judgment is rendered on an answer which clearly fails to state facts sufficient to constitute a defense to a good complaint, we think such judgment is inherently and fatally defective, and that no exception to the rendition of the same is necessary. In addition, the demurrer tendered by plaintiff in error to two paragraphs of the answer setting up the affirmative defenses, which was attached to the motion for leave to file the same, pointed out the insufficiency of the answer, and was sufficient to call the court's attention thereto, so that the trial court was not led into error by silence on the part of the plaintiff.

Plaintiff in error asks that a judgment be rendered in this court for the amount claimed by him. This will not be done, because defendant in error might desire to amend his answer, and is entitled to a hearing upon the matters set forth in his cross-complaint.

For the error committed by the court in entering judgment upon the answer, the cause will be reversed and remanded to the district court, with instructions to set aside the judgment and to grant defendant leave to amend his answer; and it is so ordered.

PARKER, C. J., and HOLLOMAN, District Judge, concur.

(25 N. M. 418)

KEMP v. NEW MEXICO ANNUAL CONFERENCE OF THE METHODIST EPISCOPAL CHURCH, SOUTH, et al.

KEMP LUMBER CO. v. SAME.
(Nos. 2245, 2246.)

(Supreme Court of New Mexico. Sept. 24, 1919.)

(Syllabus by the Court.)

RELIGIOUS SOCIETIES §7—MEMBERS OF ANNUAL CONFERENCE ON FORMATION OF CORPORATION NOT LIABLE FOR ITS DEBTS.

The fact that individuals were members of an annual church conference, which invited proposals from different communities of donations towards the erection of a denominational college, and received such proposals and accepted one, and thereupon voted that a corporation should be formed under article 4 of chapter 23, Code 1915, which authorizes the formation of a corporation for religious, benevolent, charitable, scientific, and literary purposes, without capital stock, and such corporation was thereafter formed, and the subscription contracts were assigned to such corporation, and the corporation thereafter, through its board of trustees, incurred indebtedness, does not render the individuals who attended the conference and approved the action taken liable for such debts so incurred by the corporation.

Appeal from District Court, Chaves County; McClure, Judge.

Actions by Edwin B. Kemp and by the Kemp Lumber Company, respectively, against the New Mexico Annual Conference of the Methodist Episcopal Church, South, B. P. Williams, and others. Dismissed as to defendant Williams, and judgments for the other individual defendants, and plaintiffs appeal. Causes considered together, and judgments affirmed.

Reid, Hervey & Iden, of Roswell, for appellants.

C. R. Brice and Tomlinson Fort, both of Roswell, for appellees.

ROBERTS, J. The facts and the rights of the parties in the above-styled cases being identical, except that Kemp's action was upon an open account and the action by the corporation was upon a promissory note, the cases will be considered together.

These actions were instituted in the district court against the appellees herein, the New Mexico Annual Conference, the General Conference Board of Education, and certain individuals, S. E. Allison, B. P. Williams, J. H. Messer, and J. K. Cochran, members of said conference. No service of process has ever been had upon the General Conference Board of Education, and therefore nothing is claimed against that corporation. The New Mexico Annual Conference, it is admitted by the appellants, is not such an entity

as can be sued and a judgment rendered against it. The appellants, however, do claim that, if a case is established, a judgment can rightfully be rendered against the individuals herein named.

The Methodist Episcopal Church, South, is governed by what is known as a General Conference, which is a national convention held every four years, which makes and promulgates certain rules, regulations, and by-laws for the government of the church, known as the Discipline. Under this Discipline it appears that each general division holds what is known as an "Annual Conference"; New Mexico and a part of Texas constituting a division. The Annual Conference is composed of all ministers and certain lay delegates elected by local and district conferences, churches, and congregations. This conference meets annually. At the Annual Conferences held in 1905, 1906, and 1907 the question of establishing a college in the division composed of New Mexico and a part of Texas was discussed, and in 1908 a committee was appointed for the purpose of receiving proposals from different communities and accepting funds that would be subscribed toward the establishment of such a college, and this committee decided to accept the proposal made by the citizens of Artesia, N. M., conditioned upon such citizens furnishing the ground upon which to erect the college buildings and \$45,000 represented by promissory notes of various individuals. The notes were to be collected by the local committee at Artesia and the proceeds turned over to the college. The committee reported to the next Annual Conference, and the conference voted that a corporation should be organized under the provisions of what is made the second subdivision of article 4 of chapter 23, Code 1915, which provides that five or more persons, a majority of whom shall be citizens of the United States and residents of New Mexico, may organize a corporation for religious, benevolent, charitable, scientific, or literary purposes, or for the establishment of colleges. Such corporations are not required to have capital stock and are given power to sue or be sued.

Following out the instructions of the Annual Conference, a corporation was formed, known as the Western College of the New Mexico Annual Conference of the Methodist Episcopal Church, South, and the articles were signed by nine individuals; the appellant Edwin B. Kemp being one of the signers. It appears that all the doings of the board of trustees of the college were reported to the Annual Conference from year to year, and that vacancies upon the board of trustees were filled upon recommendation by the Annual Conference. The defendants named as defendants in the two suits were members of the Annual Conference by virtue of the fact that they were ministers having

charges in the district. The college buildings were erected partly from the proceeds of the notes and \$20,000 which was borrowed from the Pacific Mutual Life Insurance Company; a mortgage on the real estate being given to secure the same. The loan was also further secured by a pledge of \$20,000 worth of the subscription notes. It was unable, apparently, to secure the money to finance the institution, and in 1913 it closed its doors. The mortgage referred to was foreclosed, and the property sold and bought in by the mortgagee. A deed conveying the equity of redemption was executed by the trustees. Between the time that the corporation was formed and the suspension of the college Edwin B. Kemp advanced certain moneys to pay interest on the loan from the Pacific Mutual Life Insurance Company, amounting to \$383.84. The suit of the Kemp Lumber Company was to recover the amount of a promissory note, dated May 1, 1912, "due 90 days after date, payable to the Kemp Lumber Company, for the principal sum of \$1,001.40," signed by the college corporation, by the proper officers. This was for materials furnished subsequent to the incorporation of the college.

The theory upon which a recovery was sought was that, the individuals named being members of the Annual Conference which authorized the formation of the college corporation, and having conducted the negotiations with the citizens of Artesia for the establishment of the college there, the corporation so formed was but the agent of the New Mexico Annual Conference; that the Annual Conference being an irresponsible association, though organized under the law as an entity, incapable of suing or being sued, the members of the conference were responsible for the debts created by the college.

No demurrer was filed to the complaint in either case, but an answer was filed, which denied liability of the individuals and set up the facts fully as to the creation of the corporation and its business and purposes. Upon issue joined the cause was submitted to the court, and as to B. P. Williams it was found that he was not a member of the conference and had nothing to do with the formation of the college corporation. He was dismissed from the case, and appellants did not question the propriety of the action of the lower court in this regard. The court made findings of fact, finding that the three other individuals named were not liable.

This finding was upon the theory that the corporation was created in good faith for the purpose of conducting a college, that the debts in question were created by the college corporation, and that the individuals who had participated in the steps leading up to the formation of the corporation were not liable for the debts afterwards incurred by such corporation.

As grounds for reversal appellants argue

that the individual defendants are personally liable for obligations incurred by the conference. This is readily disposed of, however, by the fact that the obligations in question were not incurred by the conference, but by the corporation created under the statute in good faith for the purpose of conducting an educational institution for the benefit of the church. If appellants' theory should prevail, then individuals who form a corporation for carrying out an object authorized by law would in all cases be liable for the debts incurred by the corporation so formed. That they are not liable in such cases, in the absence of fraud or other equitable ground, is universally recognized.

The next proposition urged is that the Western College was a mere agency created by the conference for carrying its purpose into effect. In other words, it is argued that it was a dummy corporation, and they say that it is a well-known rule of law, found under that branch of corporate law designated as "Dummy Corporations," that a court will not allow a corporation to be used to defeat the practice of justice, or to commit a fraud, or as a mere cover or dummy for individual acts, or allow individuals to escape responsibility for acts done for which they would be liable if individually done, merely because done under cover of corporate authority, citing *Cook on Corporations* (5th Ed.) vol. 2, §§ 663 and 664.

The trouble with this contention is that it nowhere appears in the record that this corporation was formed for the purpose of defrauding any one or resorting to any unlawful practice. It was created in good faith under the statute for the purpose of carrying out a laudable object. The appellants, when they contracted with it, were fully informed as to all its affairs, and, while it was domi-

nated by the members of the Annual Conference, it was not a dummy corporation, but was controlled and managed as are many of the great ecclesiastical colleges of the country.

The last contention urged is that the appellees are liable by reason of the fact that they were members of the conference which accepted the proposition of the citizens of Artesia, and that the conference agreed, in consideration of the compliance by the citizens of Artesia with their agreement to raise \$45,000 and do certain other acts, they would maintain a college there; that by reason of their failure to maintain the college the college corporation was unable to collect the subscription notes, the payment of which was contingent upon the establishment and maintenance of the college.

There is no merit in this contention, however, because it clearly appears that the citizens of Artesia failed to pay the notes at the time they were due, and there is no evidence to show that the failure to maintain the college was the fault of the General Conference. There was no evidence of misappropriation of funds or wrongdoing upon the part of either the Annual Conference or the trustees of the college. It was simply a case of inability to finance the institution which was occasioned by reason of the failure of the citizens of Artesia to promptly meet the obligation which they had incurred. We have carefully considered the record and briefs and find no legal liability on the part of the individuals named for the debts in question.

The judgment will be affirmed; and it is so ordered.

PARKER, C. J., and RAYNOLDS, J., concur.

(94 Or. 349)

OREGON HOME BUILDERS v. MONTGOMERY INV. CO.*

(Supreme Court of Oregon. Oct. 21, 1919.)

1. TRIAL §395(2) — FINDING OF FACTS BY JUDGE SPECIFIC AS IN SPECIAL VERDICT.

Where the parties to an action waive their rights to a jury, the findings of the trial judge are in the nature of a special verdict, and the judge must find the facts as particularly as is required in a special verdict returned by a jury.

2. TRIAL §355(3) — FINDING OF FACTS BY SPECIAL VERDICT.

A special verdict must find all the facts essential for a judgment, but ultimate and constitutive, rather than evidentiary, facts should be stated.

3. TRIAL §355(3) — ADEQUACY OF SPECIAL VERDICT STATING FINDINGS ON ISSUE DETERMINING CASE.

A special verdict must pass on all the material issues, yet will be adequate if it states sufficient findings on an issue ultimately determining the case and necessarily supporting the judgment rendered so that other issues become immaterial.

4. TRIAL §395(5)—FINDINGS OF JUDGE BEING ONLY CONCLUSIONS OF LAW INSUFFICIENT.

If the findings made by the trial judge are not in truth findings of fact, but only conclusions of law, the judgment cannot stand because it must be supported by a statement of ultimate facts.

5. TRIAL §395(5)—"EVIDENTIARY FACT" DEFINED.

An "evidentiary fact" is one that furnishes evidence of the existence of some other fact.

[Ed. Note.—For other definitions, see Words and Phrases, Second Series, Evidentiary Fact.]

6. TRIAL §395(5) — "ULTIMATE FACT" DEFINED.

An "ultimate fact" is the final resulting effect reached by processes of legal reasoning from the evidentiary facts (citing Words and Phrases, First and Second Series, Ultimate Fact).

7. PLEADING §434—AFFIRMATIVE ALLEGATION IN ANSWER AS DENIAL OF AFFIRMATIVE ALLEGATION IN COMPLAINT.

In a broker's action for commission on negotiating an exchange of properties, the affirmative allegation in the complaint that the purchaser procured owned his exchanged premises in fee simple, followed by denial in the answer, is sufficient after judgment and without timely objection, for the reason that such denial is the equivalent of an affirmative allegation of non-ownership by such purchaser.

8. TRIAL §395(5)—"FACT IN ISSUE" ON WHICH COMPLAINT IS BASED AND WHICH DEFENDANT CONTROVERTS.

In a realty broker's action for commission in negotiating an exchange of properties, question of whether or not the purchaser procured was the owner in fee simple of his lands to be

exchanged held a "fact in issue," defined as that on which plaintiff proceeds by his action, and which defendant controverts in his pleadings, so that findings thereon were findings of ultimate fact and not mere conclusions of law.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Facts in Issue.]

9. BROKERS §2 — "REAL ESTATE BROKER" DEFINED.

A "real estate broker" is one employed in negotiating the sale, purchase, or exchange of lands on a commission contingent on success.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Real Estate Broker.]

10. BROKERS §63(1)—RIGHT TO COMMISSION ON REFUSAL OF PRINCIPAL TO SELL.

A realty broker, employed to sell given lands or to find a purchaser ready, able, and willing to buy, is entitled to commission when he introduces to his principal a person ready, able, and willing to purchase on the terms fixed by the principal, even though the latter refuses to sell.

11. BROKERS §52 — CONSTRUCTION OF CONTRACT TO PAY COMMISSION ON "CONSUMMATION OF DEAL."

In view of a stipulation that plaintiff broker's commission should be so much "of the price," engagement by the owner to pay commission if the broker found a buyer ready and willing to "consummate a deal" for the stipulated price held to be to pay commission on actual completion and carrying out of a contract of exchange of properties with a buyer procured by the broker.

[Ed. Note.—For other definitions, see Words and Phrases, Consummation.]

Appeal from Circuit Court, Multnomah County; W. N. Gatens, Judge.

Action by the Oregon Home Builders against the Montgomery Investment Company. From judgment for defendant, plaintiff appeals. Affirmed.

This is an action by a real estate broker to recover a commission. The Oregon Home Builders, plaintiff, and the Montgomery Investment Company, defendant, are corporations. The plaintiff is engaged in the business of a real estate broker. The defendant owned a four-story brick building and the land upon which it stood in Portland. On June 1, 1916, the defendant signed a writing which reads as follows:

"To The Oregon Home Builders: You are hereby employed and authorized to offer for sale or exchange and given the exclusive sale of the property described in the margin hereof, at the price and terms noted therein or at such other price and terms as I may hereafter agree to. You are hereby authorized by me to accept a deposit to be applied on the purchase price of said property, and, in my name, to execute and deliver a binding written contract for the sale and conveyance of the said above described

§ For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

*Rehearing denied December 23, 1919.

property. In the event that you find a buyer ready and willing to consummate a deal for said price and terms or on such other terms and price as may be agreed to by me, or place me in touch with a buyer to whom I at any subsequent time sell or convey said property, I hereby agree to pay you in cash, as a commission for your services, the following sums, to wit: \$750.00 cash of the price for which said property is sold or at which it is exchanged, which said commission I authorize you to retain out of the first money paid on the purchase price of said property as a deposit, or otherwise. I hereby warrant the information given in the margin to be true and that I am in peaceable possession of the said described property, that my title to the same is perfect, and is without incumbrance as stated, and that I will furnish a satisfactory abstract of title brought down to the date of sale, showing such title. In case of an exchange of my said property, I have no objection to your representing and accepting compensation from the other party to the exchange as well as myself. I agree to furnish an abstract of title to the date of sale. I further agree that this contract and the authority hereby conferred shall continue in effect until I give you ten days' notice of withdrawal.

"Montgomery Investment Co.,

"Bayard T. Allyn, Pres.

"A. J. De Lano, Treas.

"F. J. De Lano, Secy.

"West half of lots 7 and 8, block 135, Portland, Multnomah county, Oregon, known as No. 386 Third street, Portland, Ore. Price \$70,000. Terms, exchange. Present incumbrance: Mortgage \$25,000 at 7 per cent. Are interest charges and all bonded assessments paid to date? Yes. City liens, bonded: None. Character of improvements: 4-story brick store and apartment."

Afterwards the plaintiff introduced to the defendant Claude D. Starr as a prospective purchaser. After "numerous negotiations" between Starr and the defendant, "in all of which said negotiations the plaintiff corporation assisted, associated, and participated," the defendant and Starr signed a writing as follows:

"This agreement, made and entered into this 1st day of June, 1916, by and between the Montgomery Investment Company, a corporation, by its president and secretary, with the corporate seal, party of the first part, and Claude D. Starr, party of the second part, witnesseth:

"That for and in consideration of the agreements hereinafter contained, the party of the first part agrees to sell to the party of the second part and the party of the second part agrees to purchase from the first party the following described property in Multnomah county, state of Oregon, to wit: [Here is described the land upon which the brick building is located.] Subject to a mortgage for the sum of \$25,000.00, which said mortgage is due November, 1916. Also to convey by bill of sale all the furniture, except personal effects, now in the above named premises; free and clear of all incumbrances.

"And in payment of the purchase price of the above described property, and in consideration of the conveyance thereof, the party of the second part agrees to sell and convey to the party

of the first part the following described properties, situated in Multnomah and Clackamas counties, state of Oregon, to wit: [After describing two lots in Portland, one of which was subject to a mortgage for \$4,500, while the other is said to be clear of incumbrance, the writing described two tracts aggregating 232.72 acres located in Clackamas county.] Same to be clear of all incumbrances.

"And the said party of the second part agrees to pay at the consummation of this transaction the sum of \$5,000 in cash, to the party of the first part.

"All rentals, interest and adjustments to be made as of July 1, 1916. Deeds conveying said properties from one to the other of the parties hereto are to be good and sufficient warranty deeds conveying a fee-simple title to the above described properties, free from all incumbrances except as herein mentioned, and said deeds shall be delivered from one to the other of the said parties hereto within a reasonable time. Abstracts of title or certificates of title to be furnished each party to the other to their respective properties, and a reasonable time shall be allowed for the correction of any defects that may appear."

The plaintiff was "the procuring cause of the execution of the agreement" made between the defendant and Starr.

On June 10, 1916, Starr submitted to the defendant abstracts of title covering the two Portland lots and the two Clackamas county tracts. The abstracts "did not disclose that the said Starr was the owner in fee simple of the property situated in Clackamas county * * * and did not disclose that said Starr had a marketable title thereto." In truth, Starr "was not at any time prior to the commencement of this action the owner in fee simple of the real property known as the Clackamas county lands, and did not have a marketable title thereto, but his title therein was defective." On July 20, 1916, the defendant delivered to Starr a complete statement of its objections, "pointing out the defects to the title of said Clackamas county lands as shown by said abstract of title," and "refused to consummate said deal unless the defects so pointed out should be remedied within a reasonable time and on or before the 3d day of September, 1916." Starr failed to correct the defects pointed out to him, and he "did not prior to the 3d day of September, 1916, or at all, tender to the defendant an abstract of title showing that said defects or any of them had been remedied, or showing that the said Starr had or could convey a marketable title to said Clackamas county lands." On September 3, 1916, the defendant notified Starr "that on account of his failure and refusal to comply with said contract the defendant considered itself no longer bound thereby." Starr had caused the written agreement which he and the defendant had signed to be recorded; and in February, 1917, he delivered to the defendant a quitclaim deed to the brick building. Up to and including the time when the quitclaim deed

was delivered, "Starr was not able to convey a fee-simple or marketable title to said Clackamas county lands to the defendant, and neglected within a reasonable time after the defects to the title were pointed out to him by the defendant to cure said defects or any of them." Starr was ready and willing at all times, however, to pay the defendant the \$5,000 stipulated in the contract.

The plaintiff brought this action to recover \$750, alleging that it had earned and was entitled to that sum as a commission under the terms of its contract with the defendant. The facts narrated in the foregoing statement are taken from the findings of fact made by the trial judge, who, with the consent of the parties, heard the cause without the aid of a jury. The judgment was for the defendant, and the plaintiff appealed.

W. B. Shively, of Portland, for appellant.

Robert F. Maguire, of Portland (E. V. Littlefield and Winter, Reams & Maguire, all of Portland, on the briefs), for respondent.

HARRIS, J. (after stating the facts as above). [1-4] The plaintiff contends that the findings labeled "Findings of Fact," so far as they relate to Starr's title to and ownership in the Clackamas county lands, are no more than conclusions of law; and that therefore they are insufficient to support the judgment. Where the parties to an action at law waive their right to a jury, the findings made by the trial judge who hears and decides the cause are in the nature of a special verdict; and hence, since the standard fixed for a special verdict is also taken as the standard for the "findings of fact," the trial judge must find the facts with the same degree of particularity as is required in a special verdict returned by a jury. A special verdict must find all the facts essential for a judgment; but ultimate and constitutive, rather than evidentiary, facts should be stated. Generally, a special verdict must pass upon all the material issues; and yet a special verdict will be adequate if it states sufficient findings on an issue which ultimately determines the case and necessarily supports the judgment rendered so that other issues in the controversy become immaterial. *Turner v. Cyrus*, 179 Pac. 279. If the findings made by the trial judge are not in truth findings of fact, but in effect are only conclusions of law, then the judgment cannot stand because it must be supported by a statement of ultimate facts. 38 Cyc. 1979.

[5, 6] An "evidentiary fact" is one that furnishes evidence of the existence of some other fact. 17 Cyc. 822. An "ultimate fact" is the final resulting effect which is reached by processes of logical reasoning from the evidentiary facts. 21 R. C. L. 438. In 8 Words and Phrases, 7144, it is said:

"Ultimate facts are, when considered with reference to the facts or evidence by which they are established or proved, but the logical results of the proofs, or, in other words, mere conclusions of fact."

It is sometimes difficult to distinguish between conclusions of fact and conclusions of law, because it may be that a statement of fact cannot be made without including a conclusion, or it may be that a conclusion of law is such that, in the attending circumstances, it must be stated in the form of a statement of fact. 38 Cyc. 1979; *Levins v. Rovegno*, 71 Cal. 273, 12 Pac. 161; *Clark v. Chicago, etc., R. Co.*, 28 Minn. 69, 9 N. W. 75.

"The line of demarcation," as stated in *Levins v. Rovegno*, 71 Cal. 273, 275, 12 Pac. 161, 162, "between what are questions of fact and conclusions of law, is not one easy to be drawn in all cases. It is quite easy to say that the ultimate facts are but the logical conclusions deduced from certain primary facts evidentiary in their character, and that conclusions of law are those presumptions or legal deductions which, the facts being given, are drawn without further evidence. This does not, however, quite meet the difficulty. We deduce the ultimate fact from certain probative facts by a process of natural reasoning. We draw the inference or conclusion of law by a process of artificial reasoning, but this last process is often in such exact accord with natural reason that the distinction is scarcely appreciable.

"If ultimate facts were found only from direct evidence to the very fact, the distinction between them and conclusions of law could be easily drawn, but as they are to a great extent presumed from the existence of other facts, they are conclusions reached by argument, by reason, are results deduced from an inferential process, in which the evidentiary facts become the premises and the ultimate fact the conclusion; and this process by which ultimate facts or presumptions of fact are reached differs from presumptions of law only in this, that the latter 'are reduced to fixed rules, and constitute a branch of the particular system of jurisprudence to which they belong'; the former being 'merely natural presumptions, are derived wholly and directly from the circumstances of the particular case, by the common experience of mankind, without aid or control of any rules of law whatever.'"

Although it may not be possible to frame a formula which, in all cases, will serve as an unfailing test by which to determine whether a given deduction states an ultimate fact or a conclusion of law still, "it is, in many cases," as said in *Levins v. Rovegno*, "the means by which the result is to be reached, which must determine whether a given conclusion is one of fact or of law. If from the facts in evidence, the result can be reached by that process of natural reasoning adopted in the investigation of truth, it becomes an ultimate fact, to be found as such. If, on the other hand, resort must be had to the artificial processes of the law, in order to reach a final determination, the result is

a conclusion of law." See, also, *Travelers' Ins. Co. v. Hallauer*, 131 Wis. 371, 111 N. W. 527.

In addition to the difficulty encountered in distinguishing between conclusions of law and ultimate facts, it is also sometimes difficult to distinguish between inferential facts and ultimate facts; and because of this latter difficulty it has been suggested in one jurisdiction that in cases of doubt the only safe plan is to include all the facts in a special verdict, on the theory that if it turns out that a given fact is only evidentiary no harm is done, but if such fact is ultimate its presence is proper and its absence might be fatal. *Louisville, etc., Ry. Co. v. Miller*, 141 Ind. 533, 549, 37 N. E. 343; *Republic Iron Steel Co. v. Jones*, 32 Ind. App. 189, 191, 69 N. E. 191.

It has been said that a fact in issue "is that upon which the plaintiff proceeds by his action, and which the defendant controverts in his pleadings." *Garwood v. Garwood*, 29 Cal. 514; *Glenn v. Savage*, 14 Or. 567, 574, 18 Pac. 442; *King v. Chase*, 15 N. H. 9, 41 Am. Dec. 675.

We now turn to the pleadings to ascertain what were the facts in issue. The complaint avers that the defendant owned the property upon which the brick building is located and that the plaintiff and defendant entered into an agreement under the terms of which the defendant agreed to pay plaintiff \$750; that the plaintiff found a buyer "ready and willing to consummate an exchange thereof for other property upon such terms, conditions, and for such price as should be agreed to by the defendant." It is next alleged in the complaint: That the plaintiff produced Claude D. Starr, and that Starr, and the defendant entered into a contract for the exchange of their respective properties, and that under the terms of the contract the Clackamas county lands were "to be clear of all incumbrances. That in and by said contract it is further provided that the said Starr should pay defendant the further sum of \$5,000 in cash, and said contract further provided that all rentals, interest, and adjustments were to be made as of July 1, 1916. That deeds conveying said properties from one to the other of said parties were to be good and sufficient warranty deeds conveying a fee-simple title to the property conveyed free from all incumbrances except as in said contract mentioned, and that said deeds should be delivered from one to the other of said parties within a reasonable time, and said contract further provided that abstracts or certificates of title were to be furnished by each party to the transaction to the other, covering their respective properties, and that a reasonable time should be allowed each party for the correction of any defects that might appear."

The complaint continues by alleging, in paragraph 4:

"That at all times herein mentioned the said Claude D. Starr has been and is now the owner in fee simple of the properties described in paragraph 3 hereof agreed by him to be conveyed to the defendant, and the said Claude D. Starr has been at all times herein mentioned and is now ready and willing to convey said property and all thereof, subject only to the incumbrances in said contract mentioned, by good and sufficient warranty deed, as provided in said contract, and has been at all of said times and is now ready and willing to pay defendant said sum of \$5,000, in cash, and at all times herein mentioned and is now ready and willing to consummate said transaction for the exchange of said properties in accordance with the terms of said contract."

The answer admits that the terms of the contract between the plaintiff and Starr are as alleged in the complaint. The answer admits that Starr is willing to pay \$5,000, but denies every other allegation in paragraph 4. In other words, the plaintiff says that Starr "has been and is now the owner in fee simple" of the Clackamas county lands, which according to the terms of the contract were to be "clear of all incumbrances"; but the defendant denies that Starr has been or is now the owner in fee simple of these lands.

The answer contains some affirmative matter. In substance, the defendant says in its answer that Starr submitted abstracts, but that they disclosed that he "did not have a merchantable title to any of the real property in Clackamas county"; that on July 19, 1918, the defendant gave to Starr a complete statement of its objections to the title to the Clackamas county lands; that Starr made no attempt "to correct any of objections made to the title as shown by the abstract which was submitted to this defendant, and that this defendant has never at any time or at all been given or tendered an abstract to the title showing a merchantable title to the lands in Clackamas county, Or." The answer concluded by averring that, on account of the failure of Starr to submit an abstract within a reasonable time "showing a fee-simple title to" the Clackamas county lands, the defendant notified Starr on September 6, 1918, that the contract was canceled "on account of his inability to deliver to this defendant a merchantable title to the property in Clackamas county."

[7, 8] All this affirmative matter in the answer was denied by the reply. In other words, the defendant says, but the plaintiff denies, that the abstracts submitted by Starr disclosed that he did not have a merchantable title; and that Starr failed to furnish an abstract showing that he owned the Clackamas county lands in fee simple. It is true that the defendant did not directly allege in its answer that Starr was not the fee-simple

owner of the Clackamas county lands; but it is also true that the complaint alleged that Starr was the fee-simple owner of the premises, and this allegation of the complaint was denied by the answer, thus forming an issue upon the question as to whether Starr owned the Clackamas county lands in fee simple. It will be observed, too, there are numerous averments in the answer about the abstracts not disclosing a marketable title or fee-simple ownership. It may be assumed, without deciding, that in order to prevail the defendant must aver that Starr was not the fee-simple owner of the premises; and yet, notwithstanding such assumption, the answer must be held sufficient after judgment and in the absence of a timely objection, for the reason that the affirmative allegation in the complaint that Starr owned the premises in fee simple, followed by the denial in the answer, is taken as the equivalent of an affirmative allegation in the answer of nonownership. 31 Cyc. 716; Treadgold v. Williams, 81 Or. 658, 663, 160 Pac. 803; Hodson-Feenaughty Co. v. Coast Culvert & Flume Co., 178 Pac. 382, 387. The question of whether or not Starr was the owner in fee simple of the Clackamas county lands was a "fact in issue" within the definition already given of "a fact in issue," for the Montgomery Investment Company defends, in part at least, upon the circumstance that Starr did not own these lands in fee simple. If the fact that Starr was not the fee-simple owner of the premises is, together with the other facts recited in the findings, sufficient to defeat the claim of plaintiff, then the statement of that fact, together with the other recited facts, is enough to support the judgment.

Ownership may be pleaded as an ultimate fact, and a fortiori ownership may be stated as an ultimate fact in a special verdict or in the findings of fact made by a trial judge. Whether a finding of ownership is a finding of fact or a conclusion of law may, of course, depend upon the issues to be tried. We think that the findings about the ownership of the Clackamas county lands are findings of an ultimate fact. The trial court intended that the finding about ownership should serve as a finding of fact. This intention is made clear by the circumstance that this finding appears among the findings of fact and the additional circumstance that there is an appropriate finding of nonownership among the conclusions of law. The record presented to us does not contain any evidence, if any there was, taken at the trial; but the controversy is presented upon the pleadings and the findings made by the trial judge. The record does not disclose any request made by the plaintiff for more detailed findings about the question of ownership. Moreover, it is stated in the printed brief filed by the defendant that—

"The findings of fact * * * were agreed to by plaintiff and its counsel to the effect that Starr did not have a marketable, fee-simple title to the Clackamas county lands."

The following precedents support the holding that a finding of ownership may be the finding of an ultimate fact: *Curtis v. Boquillas Land, etc., Co.*, 9 Ariz. 62, 76 Pac. 612; *Id.*, 8 Ariz. 258, 71 Pac. 924 (affirmed in 200 U. S. 96, 26 Sup. Ct. 192, 50 L. Ed. 388); *Savings & L. Soc. v. Burnett*, 106 Cal. 514, 39 Pac. 922; *Gardner v. San Gabriel Valley Bank*, 7 Cal. App. 106, 93 Pac. 900; *Levins v. Rovegno*, 71 Cal. 273, 12 Pac. 161; *Ybarra v. Sylvany*, 3 Cal. Unrep. Cas. 749, 31 Pac. 1114; *Travelers' Ins. Co. v. Hallauer*, 131 Wis. 371, 111 N. W. 527.

[9, 10] Stated in general terms, a "real estate broker" is one employed in negotiating the sale, purchase, or exchange of lands on a commission contingent on success. 9 C. J. 510; 4 R. C. L. 242; *Rodman v. Manning*, 53 Or. 336, 99 Pac. 657, 1185, 20 L. R. A. (N. S.) 1158. The broker is not entitled to a commission unless he accomplishes what he was employed to do. 9 C. J. 588. Although every agreement is, of course, governed by its own language, yet if the contract states in general terms that the broker is employed to sell given lands or is employed to find a purchaser who is ready, able, and willing to buy, he performs his duty and is entitled to a commission when he introduces to his employer a person who is ready, able, and willing to purchase upon the terms fixed by the employer even though the latter refuses to sell. *York v. Nash*, 42 Or. 321, 330, 71 Pac. 59. In this class of cases the broker has done all that he has agreed to do, while the employer simply declines to avail himself of what the broker has done in pursuance of his employment. The fact that the broker introduces a customer who is ready, able, and willing to purchase on the terms offered by the employer entitles the broker to payment of the stipulated commission.

There is another class of cases where the broker brings about the execution of a contract between his employer and a third person for the sale or exchange of lands. The courts are practically unanimous in holding that a broker employed to sell or exchange lands earns his commission, unless the contract of employment contains a stipulation to the contrary, when a customer and the employer enter into a valid and binding contract for the sale or the exchange of lands. In a few jurisdictions the introduction of a customer by the broker is an implied representation by the broker that the customer is able to carry out the contract to buy or exchange; and hence in those few jurisdictions, if a contract is made between an employer and customer and is not completed on account of the inability of the customer to buy or exchange,

the broker cannot recover any compensation. *Butler v. Baker*, 17 R. I. 582, 23 Atl. 1019, 33 Am. St. Rep. 897; *Riggs v. Turnbull*, 105 Md. 135, 66 Atl. 13, 8 L. R. A. (N. S.) 824, 11 Ann. Cas. 783. But the literally overwhelming weight of authority is that, unless the employer and broker have stipulated to the contrary, the broker has fully earned his commission when the customer and employer enter into a valid and binding contract for the sale or exchange of lands, and the broker's right to recover a commission is not, in the absence of bad faith upon his part, defeated or even affected by the fact that it subsequently develops that the customer is unable to complete his contract to buy on account of financial inability or is unable to complete the contract to exchange on account of inability to transfer a merchantable title. When a broker employed to sell or exchange lands presents a customer there are, as stated in *Roche v. Smith*, 176 Mass. 595, 58 N. E. 152, 51 L. R. A. 510, 79 Am. St. Rep. 345, three courses open to the employer:

"(1) He may examine the title of the customer, and accept him or not accept him on learning the result of the examination; (2) he may enter into a contract with him, in which it is provided that his title shall be examined, and if it turns out that his title is not good the contract is at an end; or (3) he may enter into a binding contract with him for the conveyance of the land."

If the employer takes the third course, he in effect says to the broker:

"I accept the customer as a person ready, able, and willing to purchase or exchange lands, as the case may be; you have done what you agreed to do; I have accepted the services rendered by you; and you have earned your commission."

The employer has a reasonable opportunity to investigate the ability of the customer to perform, and when, without fraud or misrepresentation on the part of the broker, the employer accepts the customer by effecting a valid and binding contract with him, it is equivalent to a determination that the customer is a person ready, able, and willing to purchase or exchange, and the employer is estopped thereafter to deny the ability or willingness of the customer to complete the contract. *Stewart v. Will*, 65 Or. 138, 140, 131 Pac. 1027; *Roche v. Smith*, 176 Mass. 595, 58 N. E. 152, 51 L. R. A. 510, 79 Am. St. Rep. 345; *Francis v. Baker*, 45 Minn. 83, 47 N. W. 452; *Fox v. Ryan*, 240 Ill. 391, 88 N. E. 974; *Moore v. Irwin*, 89 Ark. 289, 116 S. W. 662, 20 L. R. A. (N. S.) 1163, 131 Am. St. Rep. 97; *Hutton v. Stewart*, 90 Kan. 602, 135 Pac. 681; *Seabury v. Fidelity Ins., etc., Co.*, 205 Pa. 234, 54 Atl. 898; *Lombard v. Sills*, 170 Mo. App. 555, 157 S. W. 93; *Payne v. Ponder*, 139 Ga. 283, 77 S. E. 32; *Keinath & Co. v. Reed*, 18 N. M. 353, 137 Pac. 841; 9

C. J. 631, 652; 4 R. C. L. 305, 309, 310, 311. There are cases holding that, where the contract is one for the exchange of lands and its noncompletion is due to the inability of the customer to transfer a merchantable title, the broker is not entitled to a commission, because, it is argued, the employer cannot enforce a specific performance of the contract and thus secure what it was agreed he should have. *Connor v. Riggins*, 21 Cal. App. 756, 132 Pac. 849. See *Griffith v. Bradford* (Tex. Civ. App.) 138 S. W. 1072. The writer takes the view that it is illogical to hold in the one case that the broker has completely performed his duty and is entitled to his commission when the employer and customer execute a valid and binding contract, on the theory that by making the contract the employer accepts the customer as a person ready, able, and willing to purchase or exchange, and to hold in the other case that the right of the broker to a commission is defeated if it afterwards appears that the customer is unable to carry out his written agreement and convey a merchantable title. If the contract is valid and binding, the employer has his remedy in damages. The fact that the customer does not have a complete title may prevent specific performance, and yet the employer is not without a remedy; and it must be remembered that the right to damages resulted from the services rendered by the broker. However, we wish now to direct attention to the contract of employment entered into between the plaintiff and defendant; for, if it appears from an examination of the language of that instrument that the parties intended to make the plaintiff's right to a commission depend upon a completion of the transaction which he was employed to negotiate, then it will be unnecessary to decide whether the contract between the customer and employer for the exchange of their lands must in truth and in fact be capable of specific performance before it can be said that the broker is entitled to a commission where his contract of employment merely states in general terms that he is to find a purchaser or is to sell or exchange the employer's land.

[11] The parties differ radically in their construction of the language used by them in their contract. Referring to the writing signed by the defendant and in which it agrees to pay a commission to the plaintiff, it will be observed that the instrument contains the following language:

"In the event that you find a buyer ready and willing to consummate a deal for said price and terms or on such other terms and price as may be agreed to by me."

The defendant contends that the words "consummate a deal" refer to a completed transfer, and that they do not refer to a contract for a sale or exchange; while the plaintiff insists that to make a binding contract

for an exchange is to "consummate a deal" within the meaning of these words. There are many cases holding that a contract for a sale is "the consummation of a sale" within the meaning of a broker's contract which provides for the payment of a commission upon "the consummation of a sale." *Ormsby v. Graham*, 123 Iowa, 202, 214, 98 N. W. 724; *Micks v. Stevenson*, 22 Ind. App. 475, 51 N. E. 492; *Wolverton v. Tuttle*, 51 Or. 501, 508, 94 Pac. 961; *Shainwald v. Cady*, 92 Cal. 83, 28 Pac. 101; *Clark v. Battaglia*, 47 Pa. Super. Ct. 290; *Purcell v. Firth*, 167 Pac. 379; *Turner v. Watkins*, 36 Cal. App. 503, 172 Pac. 620; *Rice v. Mayo*, 107 Mass. 550; *Sheperd-Teague Co. v. Hermann*, 12 Cal. App. 394, 107 Pac. 622. On the other hand, there are precedents fully supporting the position of the defendant and holding that "to consummate a deal" means to complete the transfer. *Goodwin v. Sleman*, 106 Minn. 368, 118 N. W. 1008; *Connor v. Riggins*, 21 Cal. App. 756, 132 Pac. 849. See, also, *Nutting & Co. v. Kennedy*, 16 Ga. App. 569, 85 S. E. 767; *Morse v. Conley*, 83 N. J. Law, 416, 85 Atl. 196; *Flower v. Davidson*, 44 Minn. 46, 46 N. W. 308; *Gaut v. Dunlap* (Tex. Civ. App.) 188 S. W. 1020; *Ball v. Davenport*, 170 Iowa, 33, 40, 152 N. W. 72. The conclusions reached in other adjudications are not as helpful, as might be wished, for after all, the words "consummate a deal" may have one meaning under one set of circumstances and a different meaning under other circumstances. *Flower v. Davidson*, 44 Minn. 46, 48, 46 N. W. 308.

According to the rule found in section 718, L. O. L., "the terms of a writing are presumed to have been used in their primary and general acceptance." The word "deal" has been defined as "an arrangement to attain a desired result by a combination of interested parties." *Reynolds v. Pray*, 148 Iowa, 213, 215, 127 N. W. 50; *Ball v. Davenport*, 170 Iowa, 33, 40, 152 N. W. 72; *Gaut v. Dunlap* (Tex. Civ. App.) 188 S. W. 1020, 1021. According to Webster's International Dictionary the word "deal," when used to express an "arrangement to attain a desired result," means "a secret arrangement, as in business or political bargains." The same dictionary defines the word "deal" as "an act of buying and selling; a bargain." The primary meaning of the term "consummate" is: "To bring to completion; to raise to the highest point or degree; to complete; finish."

A further examination of the language of the contract of employment will disclose that—

The defendant agreed to pay "in cash as a commission for your services the following

sums, to wit: \$750 cash of the price for which said property is sold or at which it is exchanged, which said commission I authorize you to retain out of the first money paid on the purchase price of said property as a deposit or otherwise."

If there had been a sale for cash payable in installments or otherwise, then the commission to be paid would be "\$750 cash of the price." In other words, the commission would be paid out of the price. In *Ormsby v. Graham*, 123 Iowa, 202, 215, 98 N. W. 724, the employer agreed to execute and deliver a deed, through the broker, "when the said land is sold," and to allow him the stipulated "commission, to be retained in full out of the cash payment," or, if the payment did not pass through the broker's hands, then the employer was to pay the commission directly, and it was there held:

"That a completed sale as a basis for recovery of commissions was contemplated by the parties is shown in the stipulation, which authorized the agent to retain his compensation from the first cash installment of the price for which the property might be sold."

As has already been said, the general rule is that a broker employed under a contract to sell or exchange lands is, in the absence of a stipulation to the contrary, entitled to his commission immediately upon the execution of a valid and binding contract between the employer and customer; but in the contract presented to us we find that the parties have in at least one instance provided "to the contrary," for, if a contract of sale had been made with the price payable in installments or otherwise instead of a contract for an exchange, the commission would be "\$750 of the price" with authority given to the broker to retain the commission out of the first payment made on the price. When the contract of employment is construed as a whole, and especially when it is read in the light of the stipulation which in effect postpones the payment of the commission to such time as enough of the price is paid to satisfy the commission in the event of a contract of sale, we think that "to consummate a deal" should be interpreted, in the contract presented here, to mean the completion and carrying out of the contract of exchange by an actual transfer of the properties. Neither party charges the other with bad faith, and consequently it is not necessary to discuss any questions which might be raised if the defendant had been guilty of bad faith.

The judgment is therefore affirmed.

BENSON, JOHNS, and BENNETT, JJ., concur.

(97 Or. 71)

PIERRARD et ux. v. HOCH et al.

(Supreme Court of Oregon. Oct. 14, 1919.)

1. ARMY AND NAVY \Leftrightarrow 34—SOLDIERS' RELIEF ACT ABATING MORTGAGE FORECLOSURE NOT AFFECTED BY FEDERAL STATUTES.

Laws 1917, c. 275, abating mortgage foreclosure action where owner has enlisted in the military service of United States during and for 60 days subsequent to expiration of war, was not superseded or suspended by Soldiers' and Sailors' Civil Relief Act (U. S. Comp. St. 1918, §§ 3078 $\frac{1}{4}$ a-3078 $\frac{1}{4}$ ss); a federal act not possessing superiority to state legislation upon the subject of remedies and procedure in such courts.

2. CONSTITUTIONAL LAW \Leftrightarrow 170—MORATORIUM AS TO SOLDIERS NOT IMPAIRMENT OF CONTRACTS.

Laws 1917, c. 275, abating mortgage foreclosure action for period of war and 60-day period subsequent to termination thereof, where owner has enlisted in military service of United States, does not impair obligation of contracts; such stay being reasonable in view of nation's need for enlisted men.

3. ARMY AND NAVY \Leftrightarrow 34—UNDER SOLDIERS' RELIEF STATUTE, MORTGAGE FORECLOSURE ACTION NOT ENFORCEABLE.

Under Laws 1917, c. 275, court had no jurisdiction to enter decree in mortgage foreclosure action where owner was in the military service of the United States, having enlisted for a term of three years or for duration of war, under U. S. Comp. St. 1918, §§ 1891a and 2026a.

In Banc.

Appeal from Circuit Court, Multnomah County; G. W. Stapleton, Judge.

Suit by Eugene Pierrard and wife against Eugene Hoch and others. From decree and supplemental decree, plaintiffs and named defendant appeal. Reversed and remanded, with instructions.

This is a suit for the foreclosure of a mortgage. For the purposes of this appeal, the parties have stipulated the facts, which, briefly stated, are as follows:

In 1909 the plaintiff sold the property which is the subject of the suit, to the defendant Hoch for the sum of \$40,500, of which \$10,500 was paid in cash, and for the remaining \$30,000 there were executed the note and mortgage sued upon. On April 11, 1918, Hoch sold the property to the defendant Guyer, who has since been the owner of the legal title thereto. On July 6, 1917, Guyer enlisted in the Army of the United States in the volunteer forces thereof, and is still in such service. During the pendency of the suit in the lower court, he was with the army in France. Under the provisions of the act of Congress of 1918, entitled "Soldiers' and Sailors' Civil Relief," J. M. Haddock was ap-

pointed by the court as attorney for Guyer, for the purpose of protecting his interests in the litigation, by whom an answer was filed, pleading in abatement, by reason of Guyer's military service. It is conceded that at the time when the suit was commenced the debt was due and unpaid. Upon a trial there was a decree entered awarding plaintiffs a judgment against Hoch in the sum of \$33,579.50, foreclosing the mortgage in the usual form, and concluding with the following language:

"That the receiver be, and he is hereby discharged and is ordered to account to defendant Guyer for all the moneys collected by him; the decree to remain open for such further orders to be entered at the foot thereof, as the court may hereafter direct for the purpose of granting such other and further relief as may be necessary to carry into force and effect the provisions of this decree, and for the purpose of protecting and enforcing the rights of all parties to this decree, or the rights of purchaser of said property under this decree, and to that end and purpose the court hereby retains jurisdiction of this cause. Dated February 15, 1919."

Thereafter, on April 14, 1919, a supplemental decree was entered as follows:

"It is therefore ordered that the proceeds of said sale be, and the same is hereby, applied to the full and complete payment, satisfaction, and discharge of the judgment and decree heretofore entered herein.

"And be it further ordered that no other or further execution be issued out of this court upon said judgment or any part thereof, and that the same be canceled of record as paid in full by the application of the proceeds of said sale; and the clerk of this court is hereby ordered to mark as satisfied the said judgment in the journal and judgment docket in each of the places where entered or docketed."

From these decrees, the plaintiffs and defendant Hoch appeal.

Roscoe C. Nelson, of Portland (John W. Kaste, of Portland, on the brief), for appellants.

J. M. Haddock, of Portland (Louis H. Tarpley, of Portland, on the brief), for respondent.

BENSON, J. (after stating the facts as above). Defendant Hoch bases his dissatisfaction with the conduct of the trial court upon its action in proceeding with the suit in disregard of the provisions of chapter 275, General Laws of Oregon for 1917. This act reads as follows:

"No suit or action shall be commenced or maintained, during the period hereinafter provided for, to foreclose any mortgage upon real property, or to collect the debt secured thereby, if the land covered by the mortgage be owned, wholly or in part, by an enlisted man in the Army or Navy of the United States, who shall have enlisted therein in the volunteer forces or who shall have been enlisted in the National

Guard of the United States and of the state of Oregon and his organization called into the service of the United States; and the lands of any such soldier or sailor shall be exempt from judicial sale for the satisfaction of any judgment during the period hereinafter provided for; provided, that this moratorium shall extend only during the period of actual service in the army or navy forces of the United States, and in no case shall begin prior to the day on which the Congress of the United States shall declare war, nor continue after sixty days subsequent to the conclusion of such war; provided, that all statutes of limitation in effect in the state of Oregon shall be suspended during the period above described, as to the mortgages, debts and judgments in this act described."

Defendant insists that this statute deprives the court of jurisdiction to entertain this suit so long as the defendant Guyer continues in the service of the United States Army, and that, upon the disclosure of the facts, the court should have dismissed or continued the cause. It may here be noted that the complaint alleges that the defendant Guyer is in the military service of the United States, having enlisted on July 6, 1917, and it is stipulated that such enlistment was in the volunteer forces of the United States.

An examination of U. S. Compiled Statutes 1918, §§ 1891a and 2026a, discloses that the term of such enlistment is three years, or a less time if the war shall sooner be terminated.

Plaintiffs present two reasons for the disregard of the act of the state Legislature of 1917: (1) That it was superseded or suspended by the Act of Congress of March 8, 1918, c. 20, 40 Stat. 440 (U. S. Comp. St. §§ 3078 $\frac{1}{2}$ a-3078 $\frac{1}{2}$ ss), known as the Soldiers' and Sailors' Civil Relief, which undertakes to cover the same ground; and (2) that the act is unconstitutional, in that it impairs the obligation of a contract.

[1] Regarding the first of these contentions, it may be remarked that counsel have not favored us with any citations of authority upon the question, and it is difficult to conceive of a federal act possessing superiority to state legislation upon the subject of remedies and procedure in state courts.

The important question for our consideration is this: Does chapter 275, Laws of 1917, impair the obligations of contracts? During our Civil War of 1861-1865, a number of the state Legislatures enacted similar stay laws, and we have examined the cases arising thereunder with deep interest. The Pennsylvania Act (Act April 18, 1861, § 4, P. L. 409) was as follows:

"No civil process shall issue, or be enforced against any person mustered into the service of this state or of the United States, during the term for which he shall be engaged in such service, nor until thirty days after he shall have been discharged therefrom: Provided, that the operation of all statutes of limitations shall be

suspended upon all claims against such person during such term."

Under the act, in the case of Breitenbach v. Bush, 44 Pa. 313, 84 Am. Dec. 442, the Supreme Court of Pennsylvania, speaking by Mr. Justice Woodward, gives us an exhaustive and well-considered discussion of the subject, in which are collated and reviewed all of the leading and important authorities which might aid in a satisfactory solution of the problem. Then, as now, the federal statutes fixed the term of enlistment of volunteers at three years, or for a less time if the war was sooner ended. There, as here, it was urged that the act violated the constitutional inhibition upon the states, to impair by law the obligation of contracts. The conclusion in that case is to the effect that such stay of proceedings is permissible and valid if for a time that is definite and not unreasonable, but void if for an indefinite time, or for a time that is unreasonable. It is further considered that the term of enlistment being fixed at three years, or a possibly shorter time, it was not unreasonable, considered in the light of existing circumstances. After reviewing the condition of war which then prevailed, the learned jurist continues:

"Now, if a stay of execution for three years would not be tolerated in ordinary times, did not those circumstances constitute an emergency that justified the pushing of legislation to the extreme limit of the Constitution? No citizen could be blamed for volunteering. He was invoked to do so by appeals as strong as his love of country. In the nature of things there is nothing unreasonable in exempting a soldier's property from execution whilst he is absent from home battling for the supremacy of the Constitution and the integrity of the Union. And when he has not run before he was sent, but has yielded himself up to the call of his country, his self-sacrificing patriotism pleads, trumpet-tongued, for all the indulgence from his creditors which the Legislature has power to grant. If the term of indulgence seem long in this instance, it was not longer than the time for which the President and Congress demanded the soldiers' services. It was not for him, nor is it for us, to rejudge the discretion of the President and Congress in this regard. Basing ourselves on what they did, constitutionally, the question for us is whether the stay granted by our own Legislature to our citizen soldiers was unreasonable. In view of the extraordinary circumstances of the case, we cannot pronounce it unreasonable. We see in it no wanton or careless disregard of the obligation of contracts, but only a sincere effort to enable the general government to prosecute with success a war which, in its exclusive right of judgment, it resolved to wage."

[2] All that is said about existing conditions at the time when the statute was enacted, and what is said about the reasonableness of the suspension of the remedy in that case, is equally true and impressive in the consideration of the case at bar, and demands no

elaboration at our hands. The doctrine of this opinion is supported by the following citations: *Bruns v. Crawford*, 34 Mo. 330; *Johnson v. Higgins*, 3 Metc. (Ky.) 566; *Barkley v. Glover*, 4 Metc. (Ky.) 44; *Wolfkiel v. Mason*, 16 Abb. Prac. (N. Y.) 221; *McCormick v. Rusch*, 15 Iowa, 127, 83 Am. Dec. 401; *Edmonson v. Ferguson*, 11 Mo. 344; *Lindsey v. Burbridge*, 11 Mo. 545; *Coxe's Executor v. Martin*, 44 Pa. 322.

[3] We conclude, therefore, that the trial court was without jurisdiction to enter any decree at the time when it undertook to do so. This view renders it unnecessary to consider any other assignment of error.

The decree is reversed, and the cause will be remanded for further proceedings not inconsistent herewith.

(93 Or. 877)

**WESTERN LOAN & BUILDING CO. v.
SPHIER et al.**

(Supreme Court of Oregon. Oct. 21, 1919.)

**APPEAL AND ERROR §—629—FILING OF TRAN-
SCRIPT WITHIN STATUTORY TIME OR EXTEN-
SION THEREOF JURISDICTIONAL.**

The filing of a transcript in the Supreme Court within the time allowed by law, or within any extension of that time, is jurisdictional, and the Supreme Court has no power to excuse a default.

In Banc.

Appeal from Circuit Court, Deschutes County; T. E. J. Duffy, Judge.

Action by the Western Loan & Building Company against D. H. Sphier, Queenie M.

Sphier, and others. From the decree rendered, the named defendants appeal. Appeal dismissed.

W. P. Myers, of Bend, for appellants.

E. O. Stadter and Frank S. Grant, both of Portland, for respondent.

McBRIDE, C. J. This is a motion to dismiss an appeal. A decree was rendered on February 20, 1919. A notice of appeal was served and filed March 29, 1919, and a final undertaking on appeal was filed April 17, 1919, whereby the appeal became perfected on April 23, 1919.

On April 17th an order was made, extending the time to file transcript here, for 30 days. On May 17th an order was made further extending the time to file a bill of exceptions to and including June 20, 1919, and directing that the clerk have until and including July 1, 1919, to prepare and file a transcript in the Supreme Court. On June 19, 1919, an order was made directing that the time for filing a bill of exceptions be extended until June 30th, and that the clerk have 10 days' additional time after June 30, 1919, in which to prepare and file in this court the transcript on appeal. The transcript was not filed until July 17, 1919, and is clearly too late to be effective.

The filing of a transcript in the Supreme Court within the time allowed by law, or within any extension of that time, is jurisdictional, and this court has no power to excuse a default in that respect. *Davidson v. Columbia Timber Co.*, 49 Or. 577, 91 Pac. 441. *State v. Douglas*, 56 Or. 20, 107 Pac. 957, and cases there cited.

It follows that the appeal must be dismissed, and the decree of the circuit court affirmed.

☞ For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

(43 Cal. App. 87)

MURPHY v. BRIDGE et al. (Civ. 2810.)

(District Court of Appeal, First District, Division 1, California. Aug. 30, 1919. Rehearing Denied by Supreme Court Oct. 28, 1919.)

1. JUDGMENT \Leftrightarrow 661—EFFECT OF GRANT OF NEW TRIAL ON CONCLUSIVENESS.

A judgment, in an action brought by a third person against plaintiff and defendant's predecessor, which found in accordance with the claim of defendant's predecessor that he was the sole and exclusive owner of the property, where set aside on motion for new trial by the third person, is not a conclusive adjudication in favor of plaintiff's predecessor and against his codefendant therein, plaintiff now, even though plaintiff did not move for new trial or contest the predecessor's claim of exclusive ownership; it appearing that the order granting the new trial was general.

2. NEW TRIAL \Leftrightarrow 163(2) — GRANT OPENS UP CASE AS TO ALL PARTIES.

An order granting a new trial which is general in its terms ordinarily opens up the entire case as to all parties, regardless of the fact that some of them may not have moved for a new trial.

Appeal from Superior Court, Alameda County; Stanley A. Smith, Judge.

Action by Ella M. Murphy against Arthur F. Bridge and May E. Bridge as administrators, etc., and May E. Bridge individually. From a decree for plaintiff, defendants appeal. Affirmed.

Haven & Athearn, of San Francisco, for appellants.

Edward C. Harrison and Maurice E. Harrison, both of San Francisco, for respondent.

KERRIGAN, J. This is an appeal from an interlocutory decree adjudging plaintiff to be the owner of the real property described in the complaint subject only to a lien of defendant, May E. Bridge, for the unpaid balance of a certain debt. The suit is one in equity, brought by plaintiff against Arthur F. Bridge and May E. Bridge, as administrators with the will annexed of F. W. Bridge, deceased, and May E. Bridge, individually, to have it adjudged that the legal title to the property in dispute was held by F. W. Bridge in his lifetime in trust and as security for the debt of Herman Murphy, husband of plaintiff, to F. W. Bridge.

The complaint alleges that the debt has been practically all paid, and the prayer is that plaintiff be adjudged to be the owner in fee of the property, subject only to the lien of any unpaid balance upon the debt, and that an accounting be had to ascertain such balance, if any. Judgment went for plaintiff in conformity with her prayer. Defendants moved for a new trial, which motion was denied. From the interlocutory decree defendants have appealed.

The record title to the property in dispute is now in defendant May E. Bridge, as the successor in interest of F. W. Bridge, deceased, having been distributed to her under a decree of partial distribution in the estate of F. W. Bridge, deceased. The only ground upon which a reversal of the judgment is sought is the action of the trial court in rejecting as evidence the judgment roll in an action entitled "Miller v. Murphy," in which action it is claimed the rights of the parties to the property in dispute have been definitely settled, and that the judgment rendered therein is *res adjudicata* in the instant case.

The suit of Miller v. Murphy was one brought by the plaintiff therein against Ella M. Murphy and Herman Murphy, her husband, and F. W. Bridge and others, as defendants, to have it determined that the title to the property here involved was held by F. W. Bridge subordinate to and subject to the claim of such plaintiff. In that action plaintiff herein and F. W. Bridge answered, denying generally all the allegations of the complaint. Defendant Bridge, in his answer, further alleged that he was the sole owner of the property, and prayed that it be adjudged that neither Miller nor defendants, Herman Murphy or Ella M. Murphy, had any interest therein. The court, after a trial of that case, found that defendant F. W. Bridge was the owner of the property, and that he did not hold the same subject to any claim of the plaintiff whatsoever, and that none of the other defendants had any right, title, or interest in the property. Accordingly it was adjudged and decreed that defendant F. W. Bridge was the owner thereof. Thereafter the plaintiff Miller moved for a new trial, which motion was granted. Plaintiff herein, Ella M. Murphy, made no such motion, nor did she appeal from the judgment. Beyond question the judgment was the one she desired, for the record herein discloses the fact that she and her husband co-operated with Bridge in procuring it. It is the appellant's contention that as between defendant F. W. Bridge and his codefendant, Ella M. Murphy, the judgment in the suit of Miller v. Murphy became final, and that the judgment definitely determined the status of the property involved as between them, for the reason that the subject-matter in that case was the same as the subject-matter of the instant case, and that therefore the judgment rendered therein is *res adjudicata* in the case at bar.

This contention presents two questions: First, was the judgment as originally rendered in Miller v. Murphy an adjudication upon the claim of the plaintiff in this case? and, second, if it was, did the granting of a new trial in that case have the effect of entirely vacating the judgment as such an adjudication?

[1, 2] The principles involved in the first question, namely, whether or not the plead-

ings in *Miller v. Murphy* raised an issue which was or could have been litigated between the parties hereto, or whether or not they were adverse parties within the meaning of that term, are questions we do not deem it necessary to discuss or determine, for we are of the opinion that the order granting a new trial in *Miller v. Murphy* vacated and terminated the judgment rendered therein.

The order granting the new trial was general in its terms. The effect of such an order, generally speaking, is to open up the entire case as to all the parties regardless of the fact that some of them may not have moved for a new trial. 1 *Hayne on New Trial and Appeal*, § 187; *Kent v. Williams*, 146 Cal. 3, 79 Pac. 527; *Joost v. Dore*, 27 Cal. App. 729, 151 Pac. 29.

It is appellants' contention, however, that the rule applies only where the judgment is such that it could not be set aside as to one without being set aside as to all, and that the rule has no application where the judgment is severable. Conceding this to be true, no such situation is here presented. The motion for a new trial and the order granting the same were both general in terms. The judgment was predicated upon the issues tendered between the plaintiff and all the defendants, and was rendered against all of them; and the subsequent order, general in its terms, granting a new trial, vacated the entire judgment, and had the effect of placing the parties in the position they held before any trial had taken place. Undoubtedly, the parties herein could have litigated, under appropriate pleadings in the *Miller Case*, the rights here involved, but no such relief was sought by them; they contenting themselves in that case with defeating the claim of the plaintiff therein.

For the reasons given, the judgment is affirmed.

We concur: WASTE, P. J.; RICHARDS, J.

(43 Cal. App. 60)

PEOPLE v. WILLIAMS. (Cr. 852.)

(District Court of Appeal, First District, Division 1, California. Aug. 27, 1919.)

1. CRIMINAL LAW §1023(8)—MOTION IN ARREST OF JUDGMENT NOT APPEALABLE.

Order denying motion in arrest of judgment is not appealable.

2. WITNESSES §387—MAY BE QUESTIONED ON CROSS-EXAMINATION AS TO TESTIMONY AT PRELIMINARY EXAMINATION.

In prosecution for larceny where defendant was charged with having stolen pocketbook of prosecuting witness while sharing his room over night, prosecuting witness, having testified on direct examination that he had asked defendant when defendant entered the room dur-

ing night to turn on the light and having denied on cross-examination that defendant had turned on light without having been asked to do so, was properly asked on cross-examination if he had stated during preliminary examination that he had asked defendant to turn on the light.

3. WITNESSES §270(3)—CROSS-EXAMINATION LIMITED TO MATERIAL EVIDENCE.

In prosecution for larceny committed while defendant was sharing prosecuting witness' room overnight, where prosecuting witness had testified that he had told defendant that he would be unable to keep him overnight, as he was going to have company, cross-examination, as to whom such company was, was immaterial.

4. WITNESSES §388(2)—CROSS-EXAMINATION FOR IMPEACHMENT, WITHOUT FIRST LAYING PREDICATE, ERROR.

In prosecution for larceny committed while defendant was sharing room of prosecuting witness overnight, where prosecuting witness had testified as to what had taken place during night, and had testified on cross-examination that he had made no effort to hold defendant a prisoner, he was properly asked, under Code Civ. Proc. § 2048, if he had not told proprietor of the hotel that he had held defendant until arrival of police, without first laying predicate under section 2052.

5. WITNESSES §388(2)—IMPEACHING TESTIMONY, WITHOUT PREDICATE PROPERLY STRICKEN.

Testimony of witness that prosecuting witness had made a statement to him inconsistent with testimony of prosecuting witness during trial was properly stricken, where the proper predicate had not been laid for such impeachment by examining prosecuting witness relative thereto under Code Civ. Proc. § 2052.

6. WITNESSES §387—LATITUDE GIVEN IN CROSS-EXAMINATION OF COMPLAINING WITNESS.

The utmost latitude compatible with rules of evidence should have been permitted in the cross-examination of complaining witness as to inconsistent statements.

7. LARCENY §65—EVIDENCE SUFFICIENT TO SUSTAIN CONVICTION OF PETIT LARCENY.

In prosecution for larceny committed by stealing prosecuting witness' pocketbook while sharing prosecuting witness' room overnight, evidence held to sustain conviction of petit larceny.

8. CRIMINAL LAW §1186(4)—ERROR IN RULINGS ON EVIDENCE HARMLESS WHERE EVIDENCE OTHERWISE FULLY SUFFICIENT.

In prosecution for larceny committed by stealing prosecuting witness' pocketbook during nighttime while sharing his room, where prosecuting witness had testified that he had not held defendant a prisoner until arrival of police, court's refusal to permit witness to testify during cross-examination whether he had made a statement inconsistent with such testimony was not reversible error, under Const. art. 6, § 4½, where evidence was amply sufficient

to warrant conviction; a miscarriage of justice not having resulted.

Appeal from Superior Court, Fresno County; H. Z. Austin, Judge.

A. W. Williams was convicted of petit larceny, and from judgment of conviction, and from order denying motion for a new trial, and from order denying motion in arrest of judgment, he appeals. Judgment and order denying new trial affirmed.

Fred J. Rogers and F. M. Fulstone, both of Fresno, for appellant.

U. S. Webb, Atty. Gen., John H. Riordan, Deputy Atty. Gen., and R. L. Chamberlain, of Sacramento, for the People.

BARDIN, Judge pro tem. The defendant was informed against for the crime of grand larceny. Upon his trial he was convicted of petit larceny, and, having suffered a previous conviction of felony, which he confessed on arraignment, was sentenced to imprisonment in the state prison at San Quentin. He now appeals from the judgment of conviction and an order denying his motion for a new trial, and also from an order denying his motion in arrest of judgment.

[1] It will be unnecessary to comment further upon the attempted appeal from the order denying defendant's motion in arrest of judgment than to say that there is no authority for such appeal. *People v. Matuszewski*, 128 Cal. 533, 71 Pac. 701; *People v. Mullen*, 7 Cal. App. 547, 94 Pac. 867.

No claim is made by the defendant that the verdict of the jury is not supported by the evidence; the grounds urged for the reversal of the judgment and order denying a new trial being that the trial court erred in its rulings upon the admissibility of evidence upon three separate occasions, thereby committing error of such substantial weight as to entitle the defendant to a reversal of the judgment rendered against him, and to have this cause remanded for a new trial.

The information alleges that the crime was committed on or about January 2, 1919. The errors complained of arose during the cross-examination of the complaining witness, Walker, who testified substantially as follows: That he became acquainted with the defendant about the middle of December, 1918, while both were in the employ of Wells Fargo & Co. at Fresno, Cal. That about the 1st day of January, 1919, Walker stated to the defendant that he was making arrangements to go to Texas and intended going to the bank to withdraw some money. That shortly prior to the alleged theft defendant heard a third party state to Walker that he would pay him some money the following day, and that on January 2d, the day of the commission of the offense, the defendant inquired whether this money had been paid, to which inquiry, however, the prosecuting wit-

ness answered in the negative. Walker further testified that on the afternoon and evening of January 2d the prosecuting witness and the defendant drank intoxicating liquors together, but were not intoxicated, and that night went to Walker's room in the Clark Hotel to pass the night, although at that time the defendant had lodgings at another hotel.

The testimony of Walker further shows that shortly after reaching the latter's room they retired for the night, both occupying the same bed; that when Walker disrobed he felt in his trousers pocket and ascertained that his pocketbook was there, folded his trousers, and left them on a suitcase near the head of his bed. At 5 o'clock that afternoon his pocketbook contained a \$50 Liberty Bond, a \$20 bill and a \$5 bill in currency of the United States, after which time its contents had not been disturbed.

Before retiring Walker locked the door of the bedroom, placed the key on the table, directing the defendant's attention to the fact, should he desire to go to the lavatory. Walker was awakened at 5 minutes to 2 o'clock a. m. of that night by the defendant unlocking the door from outside of the room. Williams stepped inside the room and stated that he had been to the toilet, which was but two or three doors away and in the same hall way. He was fully dressed at the time. Walker then noticed that his trousers had been disarranged and had been moved from the suitcase, and he thereupon discovered that his pocketbook and its contents were gone.

Walker further testified that he and the defendant remained in the room during the balance of the night, the defendant undressing and again retiring, while he (Walker) did not again retire. Shortly before 7 o'clock of the morning of January 3d, one Keith, a fellow roomer at the Clark Hotel, came to Walker's room, and was informed of the larceny of Walker's property. Keith stated to Williams that he had seen him down on H Street a little after 12 o'clock, which Williams then admitted was true.

[2] It was testified by Walker, on direct examination, that when the defendant returned to the room about 2 o'clock a. m., under the circumstances already related, he was asked by Walker to switch on the light. On cross-examination the question was asked if it was not the fact that, when the defendant entered the room at the time referred to, he switched on the light without being asked by the witness so to do, to which question the witness answered in the negative. This question then followed:

"Did you state at the preliminary that you asked him to turn on the light?"

The district attorney objected to the question as immaterial. The question was a proper one and the objection should have been overruled. *People v. Hart*, 153 Cal. 261,

94 Pac. 1042; *People v. Webber*, 28 Cal. App. 413, 147 Pac. 102. And it must be assumed that such ruling would have immediately followed had not counsel for the defendant been apparently diverted from his purpose of making the above inquiry, for, instead of taking the ruling of the court upon the objection, he asked another and different question of the witness before the court had ruled upon the objection, thus in effect withdrawing the previous question.

During the direct examination of the prosecuting witness this testimony was given:

"Q. Was there anything said about where he would stay all night that night? (referring to the night in question). A. Oh, I told him that—he had stayed there the night before—I told him, I says, 'I can't keep you over to-night,' I says, 'I'm going to have company.'"

[3] Referring to this testimony counsel for the defendant on cross-examination propounded the question which follows, which question was objected to as immaterial and the objection properly sustained:

"Now just tell us who that party was and give us an opportunity to subpoena them right now."

The truth or falsity of that statement would shed no light upon the issues before the court. In fact, if the statement was a pure fabrication, then it would seem to militate more against the defendant than be of benefit to him, for, it would, to some extent, demonstrate the desire in the prosecuting witness' mind to rid himself of the company of the defendant.

We pass now to the consideration of the last objection complained of. This objection is predicated upon the court's refusal to permit the prosecuting witness to answer another of the questions directed to the prosecuting witness on cross-examination. That witness had testified that he had made no effort to make the defendant a prisoner in his room prior to the arrival of the peace officers. These proceedings then took place:

"Q. Is it not a fact that you told Mr. Beebe, the proprietor of the Mayer Hotel, where Mr. Williams stopped, a few days after the 2d, that you found this man in your room, and that you held him at the end of a gun in the corner of the room until the police came?"

"Mr. Beaumont: Well, we object to that as irrelevant, incompetent, and immaterial, and not proper cross-examination, and an attempt to impeach the witness on a collateral and immaterial matter, and that the question is not properly founded for impeachment.

"The Court: The objection is sustained. I think it is immaterial.

"Mr. Rogers: If we call Mr. Beebe, will we be prevented from asking whether or not Mr. Walker made this statement to him—that he found him in the room and held him at the end of a gun until the police came?"

"The Court: The chances are you will, if it is objected to."

Mr. Beebe was subsequently called as a witness for the defendant, and testified that the statement above referred to was in fact made by the prosecuting witness; but his testimony was, upon motion of the district attorney, stricken from the record, although the jury was not admonished to disregard it.

[4] The record discloses that during the direct examination of the prosecuting witness he went into a detailed account of what happened in his room from the time the defendant returned there until morning, and during which time the defendant and the prosecuting witness were together alone. It was proper to make full inquiry upon cross-examination as to any facts which had been referred to in the direct examination. Section 2048, Code Civ. Proc. And, having testified on cross-examination that he made no effort to hold the defendant a prisoner under the circumstances referred to, it was proper to ascertain whether or not the witness had made previous inconsistent statements, not only upon that subject, but also relative to the events that occurred in the room and partially detailed upon his direct examination. And it was proper to endeavor to discover that fact from the witness himself, and without the necessity of first laying the predicate referred to in section 2052 of the Code of Civil Procedure. *People v. Jones*, 160 Cal. 358, 117 Pac. 176; *People v. Ho Kim You*, 24 Cal. App. 451, 141 Pac. 950; *People v. Webber*, 28 Cal. App. 413, 147 Pac. 102; *Wigmore on Evidence*, § 1023.

[5, 6] The court did not commit error in striking out the testimony of Mr. Beebe, the witness called for impeachment. It was received over the objection of the district attorney, and was not properly founded for impeachment, as required by section 2052 of the Code of Civil Procedure. But the trial court was in error in sustaining the objection of the district attorney to the question directed to the complaining witness relative to the alleged contradictory statement made to Mr. Beebe. The utmost latitude compatible with our rules of evidence should have been permitted in the cross-examination of that witness. The record shows other instances where the cross-examination was held, within boundaries more restricted than is usual under circumstances where the guilt of the defendant depends to a considerable extent, not only upon indirect evidence, but also upon the credibility of a single witness.

[7, 8] A survey of the whole record of the case, however, which discloses ample testimony to warrant the conviction of the defendant, compels the conclusion that the error complained of has not resulted in a miscarriage of justice. The case seems to be one for the application of section 4½ of article 6 of the Constitution of the state. It appears from the record that the defendant had been unduly inquisitive about the receipt of money by the complaining witness shortly before

the commission of the offense. On the night of January 2d he had pressed himself into companionship with Walker for the night, although he had lodgings at another hotel. Without arousing Walker from his slumber, the defendant stealthily arose at about midnight, fully dressed himself, and went down upon the streets of Fresno, and was observed by two witnesses in front of the hotel where he had permanent lodgings. He returned to the room of the prosecuting witness, unlocked the door from the outside, entered, locked the door again, and stated to Walker that he had been to the toilet. Subsequently, and in the presence of the officers, he admitted having made this false statement to Walker. Confronted with a witness who had seen him down on the street, he offered in explanation of such act that he had gone from Walker's room down upon the street to get a drink. He denied having any money in his possession, other than \$15 in currency and a few dollars in silver. It was only after a very careful search that a \$20 bill in currency was found concealed on the inside of his hatband. The Liberty Bond was not found.

The defendant did not take the stand, but sought to prove by other witnesses that Walker had been imbibing intoxicating liquors quite freely on the afternoon and evening in question, and that he had been consorting with a woman of questionable morals, and that he might have lost his money through her handiwork, rather than by any act of the defendant. The testimony intended to sustain such a theory, while redolent of days before the advent of the redlight abatement act, and of war-time prohibition, is weak and unconvincing, and in our estimate is entitled to no more weight than that given it by the jury and trial court.

The defendant's conduct, his admissions, his highly incriminatory deceptions, coupled with the testimony of the witnesses for the prosecution, justify the conclusion reached by the jury, and make this a proper place to apply the section of the Constitution referred to.

The judgment and order denying a new trial are affirmed.

We concur: WASTE, P. J.; RICHARDS, J.

(43 Cal. App. 113)

JOHNSON v. NELSON et al. (Civ. 3004.)

(District Court of Appeal, First District, Division 1, California. Sept. 2, 1919.)

1. MOTIONS ~~64~~—DISSIMILAR MOTION NOT RES JUDICATA OF SUBSEQUENT MOTION.

A premature motion to set aside sheriff's return is not res judicata of a motion to set aside, made after return had been made.

2. MOTIONS ~~64~~—DOCTRINE OF RES JUDICATA NOT APPLICABLE.

The doctrine of res judicata does not apply to motions, but their renewal is in the discretion of the court.

3. APPEAL AND ERROR ~~1032(1)~~ — OBJECTIONS THAT OTHER DEFENDANTS HAD NO NOTICE OF MOTION NOT AVAILABLE TO APPELLANTS.

Defendants in mortgage foreclosure may not complain of granting of motion to set aside sheriff's return of sale, over their objection that other defendants had not had notice of the motion; it not being made to appear what interest the other defendants had in the case, or how objectors were injured by the others not being served.

4. MORTGAGES ~~502~~—SETTING ASIDE RETURN TO ORDER OF SALE.

The trial court, having control of its process, on knowledge that the sheriff, as its officer, had made an equivocal and unsatisfactory return on the order of sale, and that it was unsatisfied, could, ex parte, set aside the return and direct a new order of sale to be issued and executed.

Appeal from Superior Court, Los Angeles County; John M. York, Judge.

Action by Peter Johnson against Hedvig Nelson and others. From an order after judgment, certain defendants appeal. Affirmed.

John F. Poole and Wm. Lewis, both of Los Angeles, for appellants.

Chas. J. Kelly and D. A. Stuart, both of Los Angeles, for respondent.

RICHARDS, J. This is an appeal from an order made after final judgment setting aside a sheriff's return of sale for the foreclosure of a mortgage and directing a new order of sale to be issued. The facts are undisputed and are as follows:

The mortgage was duly foreclosed, and a decree of sale of the mortgaged premises made and entered, and an order of sale duly issued thereon and placed in the hands of the sheriff for execution. On the day on which the sale was advertised to take place the plaintiff and also one of his attorneys were present at the time and place of sale; the plaintiff personally made a bid of an amount somewhat less than the total sum then due. His attorney also on his behalf made a bid of the total sum due. There were no other bidders. A misunderstanding arose between the sheriff and the plaintiff as to the sum actually bid; the sheriff insisting that he had struck off the property for the amount of the plaintiff's personal bid. Thereupon, and before the sheriff had made any return of sale, the plaintiff moved the court for an order vacating and setting aside the sale. When this motion came on for hearing, the sheriff not yet having made his return of

sale, the court denied the motion. Thereafter the sheriff made his return of sale, which, while reciting the fact that the property was sold, returned the order of sale as wholly unsatisfied. Thereupon the plaintiff moved the court to set aside this return of sale and direct a new order of sale to be issued. Upon the hearing of this motion the court granted the same, and from its order to that effect this appeal has been taken.

[1, 2] The first point urged by the appellants is that the trial court had no jurisdiction to make the order appealed from, for the reason that the first order of said court denying the plaintiff's motion to vacate the sheriff's return of sale rendered the matter *res adjudicata*, and hence the court had no power to grant the plaintiff's second motion to set aside the return of sale. The point is utterly without merit for two reasons: First, that the two motions are dissimilar in the important respect that at the time the plaintiff's first motion was made no return of sale had yet been made by the sheriff, and the motion was therefore premature and doubtless was denied for that reason, while said return of sale was on file when the second motion was made, presenting an entirely different situation to the trial court; and the second reason why the point is without merit is that under the settled practice in this state the doctrine of *res adjudicata* does not apply to motions, the matter of their renewal being in the discretion of the trial court. *Ford v. Doyle*, 44 Cal. 635; *Bowers v. Cherokee Bob*, 46 Cal. 279; *Johnston v. Brown*, 115 Cal. 694, 47 Pac. 686; *Gay v. Gay*, 146 Cal. 237, 79 Pac. 885.

[3] The next contention of the appellants is that the court was in error in granting the motion in question because all of the proper parties to the action had not been served with notice of the motion. This appeal has been taken by a number of persons other than the original mortgagor and main defendant in the action. The record before us does not contain any of the pleadings or proceedings in the case prior to the making and entry of the decree of foreclosure, and we have therefore no means of knowing, except from the terms of said decree, who the defendants in the action were, or what issues were presented by them, or in what way any of them may have been interested in the proceedings in the case subsequent to the entry of the decree of foreclosure and issuance of the order of sale. The record before us, however, discloses that a number of these appealing defendants appeared upon the hearing of said motion to set aside the sheriff's return of sale, and at that time made no objection that they themselves had not been duly served with notice of said motion, and only objected because some other unnamed and unidentified defendants had not been served with such notice. The only evidence offered

in support of said objection was the original notice of trial of the cause, which showed that there were quite a number of defendants who had at that time been served with such notice; but as to what interest they may have had in the case, particularly after the final decree of foreclosure, we are left entirely in the dark. In a word, it is nowhere made to appear how these defendants have been injuriously affected by the fact that some defendants other than themselves, and whose interest is not disclosed, were not served with notice of the motion to set aside the sheriff's return of sale.

[4] In addition to the foregoing considerations the fact that trial courts have control of their process, and that the trial court in this particular case, upon having brought to its attention the fact that the sheriff, as its officer, had made an equivocal and unsatisfactory return upon the order of sale which had been issued to him, and that the same was unsatisfied, would have had full power *ex parte* to set aside such return and direct a new order of sale to be issued and executed, brings this case perilously near the point of being a frivolous appeal.

No error appearing upon the face of the record before us, the order is affirmed.

We concur: WASTE, P. J.; BARDIN, Judge pro tem.

(43 Cal. App. 53)

DRAKE v. TUCKER et ux. (Civ. 2891.)

(District Court of Appeal, First District, Division 2, California. Aug. 27, 1919. Rehearing Denied by Supreme Court Oct. 23, 1919.)

1. WATERS AND WATER COURSES §156(4) — RESERVATION IN DEED CONSTRUED TO INCLUDE ONLY WATER ACTUALLY USED BY GRANTOR.

Deed reserving to grantors the amount of water of stream formerly "held, used, or claimed" by former owner *held* to reserve only portion of the water actually taken and used by former owner.

2. PARTITION §8 — EXECUTION OF TWO DEEDS BY TENANTS IN COMMON TO EACH OTHER PART OF SAME TRANSACTION.

Where children, to whom father had deeded property as tenants in common, partitioned land between themselves by two deeds, executed as part of same transaction, one of the deeds, in being construed, will be taken in connection with the other.

3. WATERS AND WATER COURSES §44—USE FOR IRRIGATION NOT TO INTERFERE WITH RIGHTS OF LOWER OWNER.

Upper owner has no right, by use of water for irrigation purposes, to deprive lower owner of sufficient water for his domestic purposes.

4. WATERS AND WATER COURSES §42—REASONABLE USE OF WATER BY UPPER OWNER.

What is a reasonable use of water by upper proprietor depends upon all the facts and circumstances in the case.

5. WATERS AND WATER COURSES §78 — RIGHTS OF LOWER RIPARIAN OWNER TO DIVERT WATER FROM UPPER OWNER.

Riparian proprietor is entitled only to the water after it reaches his land in its natural flow, and if in the natural flow of the stream there is insufficient water conducted to lower owner's land for his uses, he has not, as a riparian owner merely, the right to go on the land of an upper owner and divert the water from there.

6. WATERS AND WATER COURSES §152(11)—ADJUDICATION OF WATER RIGHTS BETWEEN TWO OWNERS NOT AFFECTING RIGHTS OF LOWER OWNER.

Adjudication of water rights between upper and lower riparian owners does not affect rights of other lower owners not parties to the action.

7. WATERS AND WATER COURSES §152(11)—ADJUDICATION OF WATER RIGHTS UNDER DEED FROM UPPER TO LOWER OWNER.

Where upper owner's deed to lower owner gave lower owner right to divert water at point on upper owner's land after upper owner had used the amount of water "held, used, or claimed" by a former owner of both lands, court, after awarding upper owner's successor in interest water used by former owner, and after allowing lower owner water for domestic uses, properly divided the water for irrigation purposes in proportion to acreage held by each.

8. APPEAL AND ERROR §1073(1)—ERROR IN HOLDING CERTAIN LAND OF UPPER OWNER NOT RIPARIAN HARMLESS.

In action involving water rights of upper and lower owners, holding that certain land of upper owner was nonriparian, if error, was not prejudicial to upper owner, where a greater quantity of similar land of lower owner was likewise held to be nonriparian, and where the water was divided in proportion to acreage of riparian land.

9. EVIDENCE §448—PAROL TESTIMONY INADMISSIBLE TO VARY WRITTEN INSTRUMENT.

Written instruments, which are, not ambiguous, may not be varied by parol testimony.

Appeal from Superior Court, Napa County;
A. B. McKenzie, Judge.

Action by Harry Clyde Drake against Charles L. Tucker and wife. From the judgment rendered, plaintiff appeals. Affirmed.

Clarence N. Riggins, of Napa, for appellant.

John T. York and Percy S. King, both of Napa, for respondents.

LANGDON, P. J. This is an appeal by the plaintiff from a judgment of the superior court in and for Napa county, dividing the

waters of Ritchie creek between the plaintiff and the defendants. The principal question presented to this court is as to the construction of certain deeds in the record. The facts surrounding the execution of said deeds are briefly as follows: From 1867 to 1905 George W. Tucker, the father of the defendant Charles L. Tucker, owned 146 acres of land situated along Ritchie creek, a map of which land is in evidence in this action. During a part of this time he sold about 3,000 gallons per day of the water of said creek to the county, and in addition used what he required thereof for domestic purposes in and about his house and barn. In 1905 he deeded his property to his children, who held it as tenants in common. One of the children died shortly thereafter, and the remaining children partitioned the land among themselves by two deeds, which it is conceded were executed as a part of the same transaction, and which deeds are the key to the solution of the controversy here. In the first deed from Charles L. Tucker, one of the respondents here, and George H. Tucker, to their sisters, Lila J. Eachus and Martha A. Culver, a portion of the land was conveyed, which has since by mesne conveyances become the property of the plaintiff. This land is higher on the stream than the defendants' land. The deed conveying it contains a clause granting to plaintiff's predecessors the right to the amount of water diverted by George W. Tucker at a point in Ritchie creek specified therein. At the same time another deed was executed by Eachus, Culver, and George H. Tucker to Charles L. Tucker, respondent, conveying an undivided three-quarter interest in the portion of the land now owned by defendant and containing a clause granting to said Charles L. Tucker the right to divert water from a point specified and situated upon the land now held by the plaintiff, after the amount formerly diverted by George W. Tucker had been reserved. Defendant has maintained this point of diversion up to the time of the action. Plaintiff has resided on his land for about four years and has diverted water from a point below defendant's said point of diversion until May, 1917, when plaintiff placed a 5-inch pipe in the stream above defendant's point of diversion and diverted substantially all the water of the stream, so that the defendant was deprived of water necessary for domestic and irrigation purposes. Defendant removed the pipe line of plaintiff so placed, and plaintiff sought an injunction.

The clauses in the deeds upon which plaintiff and appellant bases his claim were construed by the trial court in a manner which is in accordance with our own conclusions. Defendant contends that as a riparian owner he is entitled to his proportion of the water except as that right is modified by the

deeds. The first deed, in which Charles L. and George H. Tucker are the grantors, and Lila J. Eachus and Martha A. Culver, plaintiff's predecessors in title, are the grantees, conveys:

"All of the water right acquired, or the right to divert the waters of Ritchie creek acquired by George Tucker, the grantor of all the parties to this instrument, at any time in connection with the above-described tract, or in connection with any other tract of which the foregoing tract was a part, and which said water is now diverted at a point in Ritchie creek southwest of the most southerly point of the above-described land."

The second deed, in which Lila J. Eachus, Martha C. Culver and George H. Tucker are grantors, and Charles L. Tucker, the defendant, is the grantee, contains the following language:

"Granting to the said Charles L. Tucker the right to divert water from Ritchie creek at a point about 450 feet southwest of the main county road, and below the point where F. Salmina & Co. now divert water from said creek; it being understood and agreed that Charles L. Tucker shall only have the right and privilege of using and diverting the overflow from Ritchie creek after Lila J. Eachus and Martha A. Culver, or either of them, have used all of the water formerly held, used, or claimed by George Tucker, the former owner of the 146-acre tract this day divided among the parties hereto, they may desire for any and all purposes, upon the land this day deeded to them, and after said F. Salmina & Co. has used its share of said water; and it is understood and agreed that no right, title, or interest in any water right of said George Tucker, or any water right acquired since said property was granted to the parties hereto is hereby granted."

This deed reserves to the grantors only the amount of water formerly "held, used, or claimed" by George Tucker. The court admitted evidence of the amount of water used by George Tucker, and found that the amount was about 3,000 gallons per day sold to the county, and sufficient water for his domestic uses about his home and barn, and the court therefore allowed the plaintiff such amounts before allowing the defendant any water at all, and after such amounts were taken by the plaintiff, if any water remained, the court allowed the defendant sufficient water for his domestic uses and divided the balance, if any, between the plaintiff and defendant for irrigation in the proportion that the acreage of each bore to the entire acreage of the riparian land. The decisions are to the effect that in running water there can be no absolute ownership; that riparian rights do not mean ownership in any special portion of the water of a stream until such water is actually taken and used. *Kidd v. Laird*, 15 Cal. 161, 179, 76 Am. Dec. 472; *Eddy v. Simpson*, 3 Cal. 249, 252, 58 Am. Dec. 408; *Palmer v. R. R. Com.*, 167 Cal. 163, 168, 188 Pac.

997; *Farnham on Waters and Water Rights*, vol. 2, pp. 1565, 1566.

[1, 2] In view of these decisions, the language of the deed is clear. George W. Tucker "held, used, and claimed" only the portion of the water actually taken and used by him, which amount was found by the court upon substantial evidence. The deed from Charles L. Tucker by which appellant claims the grantor deeded away his riparian rights must be construed in connection with the deed to him, as both are admittedly a part of the same transaction. We think the language of that deed bears out the construction placed upon it by the court. The deed contains a specification of the exact water conveyed by it in the words:

"And which said water is now diverted at a point in Ritchie creek southwest of the most southerly point of the above described land."

The evidence regarding the amount of water diverted at that point at the time the deeds were executed is in harmony with the judgment. As the deeds merely reserved to the plaintiff's predecessors such amounts of water as the court found were used by George Tucker—the rights in the remainder of the water of the creek, as between the plaintiff and the defendant, are governed by the law applicable to riparian owners.

[3] In answer to appellant's contention that he is entitled to use the water for irrigation on his land before the defendant is entitled to any water at all for domestic or other uses, we quote the language found in the decision in the case of *Alta Land & Water Co. v. Hancock*, 85 Cal. 219 at page 230, 24 Pac. 645 at page 647, 20 Am. St. Rep. 217, at page 224:

"So far, the right of a riparian proprietor to the use of water for purposes of irrigation at all has been assumed, rather than determined, and has been properly regarded as among the last, though perhaps not the least important, of his riparian rights; one that must be always held in subordination to the rights of all other riparian proprietors to the use of water for the supply of the natural wants of man and beast, extended to the occupants of each and every tract held as an entirety, bordering upon the stream, whatever its extent. These natural wants supplied and protected the right to a reasonable use of the surplus water by the riparian proprietor, in common with others in like situation, for purposes of irrigation, has been acknowledged and recognized, but it cannot be extended even by implication."

See, also, *Smith v. Corbit*, 116 Cal. 587, 48 Pac. 725; *Learned v. Tangeman et al.*, 65 Cal. 834, 4 Pac. 191.

[4] What is a reasonable use depends upon all the facts and circumstances of the case. *Ferrea v. Knipe*, 28 Cal. 341, 87 Am. Dec. 128; *Union Mills, etc., Co. v. Ferris*, 2 Sawy. 176, Fed. Cas. No. 14,371; *Dilling v. Murray*, 6 Ind. 324, 63 Am. Dec. 385; *Elliot v. Fitch-*

burg R. R. Co., 10 Oush. (Mass.) 191, at pages 193, 194, 57 Am. Dec. 85; *Timm v. Bear*, 29 Wis. 254, 265. The court here heard evidence upon the needs of the parties, the nature of the land, the volume of the stream, and its variation in this respect at different seasons, and we think properly decided that it would be an unreasonable use of the water under all the facts and circumstances for the plaintiff to use it for irrigation before the domestic uses of the defendant had been satisfied. The court, therefore, after reserving to the plaintiff the amount reserved to him by the deeds, allowed him water for his domestic uses, and then allowed to the defendant water for his domestic uses before allowing the plaintiff any water for irrigation. After the domestic uses of the defendant were satisfied, then the water was divided between the plaintiff and defendant for irrigation, having regard to the number of acres of riparian land owned by each. The case seems to fall within the rule announced in the case of *Evans v. Merriweather*, 3 Scam. (Ill.) 492, 38 Am. Dec. 106, where it is said that a riparian owner may use the whole of the stream, if it is necessary to satisfy his natural wants. He may consume all the water for his domestic purposes, including water for his stock, but if he desires to use it for irrigation or manufactures, and there be a lower proprietor to whom its use is essential to supply his natural wants, or for his stock, he must use the water so as to leave enough for such lower proprietor. Where the stream is small, and does not furnish more than sufficient to answer the natural wants of the different proprietors living on it, none of the proprietors can use the water for either irrigation or manufacture.

[6] It is not contended that the land of the defendant is nonriparian land. As a riparian proprietor, he is entitled, it is true, only to the water after it reaches his land in its natural flow, and if in the natural flow of the stream there is insufficient water conducted to defendant's land for his uses, he has not, as a riparian owner merely, the right to go on the land of an upper proprietor and divert the water from there. *Anaheim Union Water Co. v. Fuller*, 150 Cal. at page 332, 88 Pac. 978, 11 L. R. A. (N. S.) 1062. A riparian proprietor's title to the water begins only when it reaches his land. *Hargrave v. Cook*, 108 Cal. 72, 41 Pac. 18, 30 L. R. A. 390. But, in the present case, defendant does not rely upon his riparian right for the privilege of going upon plaintiff's land and diverting the water. The deed to him from plaintiff's predecessor in interest has facilitated the enjoyment of his riparian rights, and by virtue of the contract between the parties, as contained in said deed, defendant is given the right to divert water from Ritchie creek at a certain point on plaintiff's land, after plaintiff has used for any purpose he may desire

the amount of water "held, used, or claimed by George Tucker," the former owner, which amount has been found by the court and saved to the plaintiff.

[6, 7] With respect to the fractional division of the water for purposes of irrigation, there is no evidence before the court as to whether or not there are yet other lower riparian owners; but, if there are, of course, the rights of such owners are not affected by this judgment. As between the parties hereto, the division seems to us proper and reasonable, and if there are other parties who have yet independent rights, in a proper proceeding the rights of the riparian proprietors now before the court may be declared to be subject to such rights of such third parties, but such adjudication would not change the relative rights of the parties hereto as between each other.

[8] Appellant objects to the holding of the trial court that certain land which was owned by the plaintiff, but was divided from his main tract and from Ritchie creek by a strip of land used for the operation of an electric railroad was nonriparian land. The fee to the strip of land occupied by the railroad had been granted to said company by plaintiff's predecessor in title. It becomes unnecessary for us to pass upon this question of law, because, as pointed out by the respondent, this ruling was not injurious to the plaintiff, for the reason that the court held that the land of both the plaintiff and defendant lying north of said railroad was nonriparian, and, as shown by the map, more of the defendant's land was thus held to be nonriparian than of the plaintiff. As the water was divided in proportion to the acreage of riparian land held by each, after reserving certain amounts to the plaintiff, the plaintiff would have received less water had the court held this strip of land to be riparian.

[9] Appellant objects that he was not allowed to introduce evidence of the negotiations and understandings of the parties to the deeds at the time they were executed. The rule is, of course, beyond dispute that when written instruments are not ambiguous, they may not be varied by parol testimony. The plaintiff himself admits that he does not consider these instruments ambiguous, but relies upon certain language used by the court in the course of the trial which he contends shows that the court considered these instruments ambiguous. The answer to this contention is that, in arriving at its judgment, the court did not treat the instruments as ambiguous, but construed them without the aid of parol evidence, and this court finds that construction to be correct. It cannot be held, therefore, that these instruments are ambiguous, requiring the aid of parol testimony for their interpretation.

The judgment is affirmed.

We concur: HAVEN, J.; BRITAIN, J.

(43 Cal. App. 91)

GREENE v. MOORE. (Civ. 2983.)

(District Court of Appeal, First District, Division 1, California. Sept. 2, 1919.)

1. BANKRUPTCY — 277—ACTION FOR BENEFIT OF ESTATE IN DISCRETION OF TRUSTEE.

The trustee in bankruptcy, and not a creditor or any number of creditors, is the sole judge of when or whether to bring actions in the interest and for the benefit of the estate, and, in the absence of an alleged abuse of discretion with which he is invested, he is not subject to the dictation or control of the creditors of the estate.

2. BANKRUPTCY — 20(1) — JURISDICTION OF FEDERAL COURT EXCLUSIVE.

The jurisdiction of the federal court over the assets of a bankrupt and over the actions of the trustee in bankruptcy is exclusive, and the state courts have no jurisdiction over either during the pendency of the proceedings; the remedy of a creditor in such a case being by application to the federal court.

Appeal from Superior Court, Los Angeles County; Grant Jackson, Judge.

Action by A. W. Greene, as a creditor of R. B. Tolmie, etc., against William H. Moore, Jr., as trustee in bankruptcy of R. B. Tolmie, a bankrupt. From judgment for defendant, plaintiff appeals. Affirmed.

John A. Wallis, of Los Angeles, for appellant.

Bowen & Baillie, Norman A. Baillie, and Frederick W. Lake, all of Los Angeles, for respondent.

RICHARDS, J. This is an appeal from a judgment in favor of the defendant after an order sustaining his demurrer to the plaintiff's complaint without leave to amend.

The action is one brought by the plaintiff as one of the creditors of one R. B. Tolmie, a bankrupt, the plaintiff purporting to bring said action on behalf of himself and many other creditors of said bankrupt, though who or how many of these creditors there are, or by what authority the plaintiff assumes to represent them, is not made to appear. The complaint alleges that the proceedings in bankruptcy of said Tolmie are pending in the United States District Court of the Southern District of California, wherein the said Tolmie has been duly adjudicated a bankrupt, and wherein the defendant herein has been and still is the duly appointed, qualified, and acting trustee of the estate of said bankrupt. The complaint further alleges that the plaintiff herein has demanded of such trustee that he commence a certain action against certain parties who are alleged to have seized and sold certain property of said bankrupt, and for the value of which said parties are alleged to be liable to said estate; that the defendant as such

trustee has refused to commence said action, by which refusal the plaintiff and the other parties whom he assumes to represent have been damaged in the sum of \$862.27, for which sum he prays judgment against said trustee.

The defendant demurred to this complaint upon two main grounds: First, that said complaint did not state facts sufficient to constitute a cause of action; second, that the court had no jurisdiction of the subject of the action. The court sustained this demurrer generally without leave to amend.

[1] We are of the opinion that the judgment of the trial court rendered after making said order was proper for both of the reasons urged in said demurrer. The complaint failed utterly to show any abuse of the discretion with which the trustees of bankrupts are invested with respect to the bringing of actions in the interest and for the benefit of the estate. He and not a creditor or any number of creditors is the sole judge of the matter of when or whether to bring such actions; and, in the absence of an alleged abuse of the discretion with which he is invested, he is not subject to the dictation or control of the creditors of the estate. In *re Baird* (D. C.) 112 Fed. 960; In *re Columbia Iron Works* (D. C.) 142 Fed. 234; *Remington on Bankruptcy*, § 900. There being no averment in the complaint herein showing any abuse of this discretion, it failed to state a cause of action.

[2] But the order of the court in sustaining said demurrer without leave to amend is sustainable for another and stronger reason. The proceedings in bankruptcy were pending in the federal court at the time this action was commenced, and the defendant herein was then and still is the duly appointed officer of that court. The jurisdiction of the federal court over the assets of said bankrupt and over the actions of said trustee is exclusive, and the state courts have no jurisdiction over either during the pendency thereof of said proceedings. In *re Watts*, 190 U. S. 1, 23 Sup. Ct. 718, 47 L. Ed. 933; In *re Anderson* (D. C.) 23 Fed. 482; *White v. Schloerb*, 178 U. S. 542, 20 Sup. Ct. 1007, 44 L. Ed. 1183. None of the cases cited by the appellant hold to the contrary. The remedy of a creditor in such a case as this is complete; he may apply to the federal court for relief from any neglect or refusal of the trustee to perform his duty, and the court upon a proper showing will compel him to proceed or remove him for his disobedience or neglect of duty. The exclusive jurisdiction to thus control its officer rests with said court. It follows that the order of the trial court sustaining the defendant's demurrer without leave to amend was proper.

The judgment is affirmed.

We concur: WASTE, P. J.; KERRIGAN, J.

(43 Cal. App. 94)

SIMPSON et ux. v. SMITH. (Civ. 2156.)

(District Court of Appeal, First District, Division 1, California. Sept. 2, 1919.)

1. HUSBAND AND WIFE \S 156—EXTINGUISHMENT OF PRIOR NOTE OF HUSBAND AS CONSIDERATION FOR WIFE'S NOTE.

Where husband executed a note and handed it to defendant wife for her signature and she several days after maturity of note affixed her signature thereto and returned the note to her husband, who thereafter delivered it to plaintiffs with the understanding that it replace a prior note made by the husband before his marriage to defendant, there was a sufficient consideration to support defendant's promise to pay.

2. APPEAL AND ERROR \S 931(1), 1010(1)—FINDINGS BASED ON SUBSTANTIAL EVIDENCE NOT DISTURBED.

Every intendment should be indulged in favor of the findings of a trial court, and the findings not overthrown on appeal unless it clearly appears that the conclusions reached are without the support of substantial evidence.

Appeal from Superior Court, Alameda County; James G. Estep, Judge.

Action by M. L. Simpson and wife against Elsie Smith. Judgment for defendant, and plaintiffs appeal. Judgment reversed, and new trial ordered.

Fitzgerald, Abbott & Beardsley, of Oakland, for appellants.

Weinmann, Wood & Cunha, of Alameda, for respondent.

BARDIN, Judge pro tem. Plaintiffs, who are husband and wife, brought this action to recover a judgment for the balance due of the principal and interest of a promissory note made by the defendant and her husband, E. S. Smith, since deceased, dated April 20, 1912, and payable one day after date "to M. L. Simpson or S. E. Simpson." The defendant, who had judgment below, denies liability upon two grounds: (1) That there was no consideration for the promise of the defendant; and (2) that the signature of defendant to said note was procured under duress and through the undue influence of plaintiffs and the husband of the defendant.

The court found, in effect, among other facts, that the defendant did not, for value received, execute to the plaintiffs the promissory note sued upon; that the defendant had never received any consideration of any nature whatsoever for signing said promissory note; that there was no consideration for defendant signing said note; and "that no detriment of any kind or nature was suffered by the plaintiffs * * * or either of them by reason of said instrument."

The affirmative allegations contained in de-

fendant's answer relative to the charge that plaintiffs procured the defendant's signature to the note in question through duress and undue influence were adopted by the trial court in its findings as true, yet there is no evidence whatever in the record which sustains such findings. They are so clearly unsupported by the evidence that they were probably made through inadvertence.

From a review of the evidence adduced at the trial, and which was believed by the trial court to warrant the finding that there was no consideration for the promise of defendant contained in the promissory note sued upon, we discover the following germane and uncontradicted facts:

[1] The note in suit was the outgrowth of the demands of plaintiff M. L. Simpson for the payment of a prior promissory note, then due and unpaid, made by the husband of defendant and presumably payable, as stated in respondent's brief, to both plaintiffs. The prior note was made previous to defendant's marriage, and the consideration therefor had passed solely to the said husband of defendant and she was not obligated in any manner under it. Under pressure of plaintiff M. L. Simpson for payment of the first note, or that its payment be secured, the note in suit was drawn, dated, and signed by the husband of defendant, and he thereupon handed the note to defendant for her signature. Several days later, and after its maturity, she affixed her signature to the face of the note and returned it to her husband, who thereafter delivered it to the plaintiffs with the understanding that it replace the first note.

It does not appear from the evidence that the defendant participated directly in the arrangement whereby the antecedent debt was discharged by the execution of the new note, other than by signing the note in suit and delivering it to her husband. Some two years thereafter the present action was begun to enforce the payment of the balance due and unpaid on the note last executed.

It is contended by the defendant that, since the note in suit was not delivered until after its maturity, it became, in legal effect, a demand note which the parties might sue upon as soon as delivered; and that therefore no detriment or prejudice was suffered by the plaintiffs, for there could be no enforceable forbearance to sue under the circumstances; and that, since the element of forbearance to sue was not present, there was no consideration for the promise of the defendant.

But this theory eliminates the real consideration for the execution of the note in suit. The consideration for the signature of the defendant to such note is not grounded upon the forbearance of either of plaintiffs to sue upon an antecedent debt, but, instead, upon the extinguishment of the prior note of the husband of defendant. The relinquish-

ment of all rights under that note constituted such a detriment and prejudice to the rights of the plaintiffs as to provide a sufficient consideration to support the promise of the defendant to pay the note sued upon. *Stroud v. Thomas*, 139 Cal. 274, 72 Pac. 1008, 96 Am. St. Rep. 111; *Lyon v. Robertson*, 6 Cal. Unrep. 390, 59 Pac. 990; *Hobson v. Hassett*, 76 Cal. 203, 18 Pac. 320, 9 Am. St. Rep. 193; *Miller & Lux v. Dunlap*, 28 Cal. App. 313, 152 Pac. 309; section 1605, Civ. Code.

In *Stroud v. Thomas*, supra, the court used the following language:

"The contention of the appellant that a pre-existing debt is not a sufficient consideration for the execution of a note, so far as the sureties thereon are concerned, where the obligation for the pre-existing debt is canceled upon the delivery of the new note, does not merit discussion. It is well settled that such a consideration is sufficient as a foundation for the promise of the sureties, as well as that of the principals."

Counsel for the respondent places undue reliance upon the cases of *Westphal v. Nevills*, 92 Cal. 545, 28 Pac. 678, and *Whelan v. Swain*, 132 Cal. 389, 64 Pac. 560. We perceive nothing in those cases contained which is in disagreement with the views herein expressed. In *Westphal v. Nevills*, supra, it was held that the detriment to the plaintiff by reason of time given to make payment of an antecedent debt was sufficient consideration to support the promise of the appellant. The effect of the relinquishment of rights under an antecedent note or debt was not involved. And, in the case of *Whelan v. Swain*, supra, the consideration supporting a promissory note was based not only upon a forbearance to sue, but also because "the old note was surrendered."

[2] While we are aware that every intention should be indulged in favor of the findings of a trial court, and that they should not be overthrown on appeal unless it clearly appears that the conclusions reached are without the support of substantial evidence, yet in this particular case it clearly appears, from the uncontradicted testimony adduced at the trial, that the consideration for the signature of the defendant to the note sued upon was the relinquishment by plaintiffs of rights under the prior note referred to.

The findings of the trial court to the effect that there was no consideration for the execution of the note in suit by the defendant is without sufficient support in the evidence. The resulting judgment cannot, therefore, be upheld.

Judgment reversed, and a new trial ordered.

We concur: WASTE, P. J.; RICHARDS, J.

(43 Cal. App. 126)

AMERICAN TRUST & BANKING CO. v. UNION SECURITY CO.

LOWE v. AMERICAN TRUST & BANKING CO. et al.

(Civ. 3002.)

(District Court of Appeal, First District, Division 1; California. Sept. 3, 1919. Rehearing Denied by Supreme Court Oct. 28, 1919.)

1. CORPORATIONS \S 122 — BONA FIDE PURCHASER ON EXECUTION SALE OF STOCK PROTECTED AGAINST PRIOR PLEDGEE.

A bona fide purchaser at an execution sale of stock standing in the name of a judgment debtor on the books of the corporation is protected in the purchase against a prior pledgee holding a certificate evidencing said stock as security for an antecedent indebtedness, in view of Civ. Code, \S 324, as to transfers not entered on books affecting parties only.

2. CORPORATIONS \S 123(4) — PLEDGEE OF STOCK MAY CAUSE BOOKS TO SHOW TRANSACTION.

Pledgee of corporate stock had right to compel company to cause nature of transaction to be so entered on its books as to show names of pledgor and pledgee, number or designation of shares, and date of transfer.

3. CORPORATIONS \S 122 — BONA FIDE PURCHASER FOR VALUE OF STOCK.

One who purchases corporate stock at a sale under his own judgment, without actual or constructive notice of alleged defects in title thereof, is a bona fide purchaser for value; the rule as to a bona fide purchaser applying to sales of corporate stock.

Appeal from Superior Court, Los Angeles County; John M. York, Judge.

Action by the American Trust & Banking Company against the Union Security Company, in which L. P. Lowe intervened. Judgment for the intervener, and the plaintiff appeals. Affirmed.

Gray, Barker & Bowen and Donald Barker, all of Los Angeles, for appellant.

Swanwick & Donnelly, of Los Angeles, for respondent.

WASTE, P. J. Plaintiff brought this action against the Union Security Company, seeking to compel defendant to enter a transfer of certain shares of its own stock upon its books, showing ownership therein in plaintiff, and to issue to plaintiff a certificate therefor. From the chronological statement of the facts it appears that one Brown, the owner of 70 shares of the capital stock of defendant, Union Security Company, indorsed a certificate of this stock, and delivered it to the plaintiff as a pledge and security for an obligation held by plaintiff against the corporation, of which Brown was president. Plaintiff took no steps to have

the records of the Union Security Company show the transfer, or its interest in the said stock as pledgee, until long after the rights of intervener and cross-complainant Lowe had attached to said stock as hereinafter stated.

After the delivery of the stock certificate and pledge, one Randall commenced an action in the superior court of Los Angeles county against Brown, and caused an attachment to be regularly issued and levied upon the said 70 shares of stock, then standing in the name of Brown on the books of the Union Security Company. Judgment was entered in this action in favor of Randall against Brown, and execution upon the said judgment was issued and levied upon the said 70 shares of stock still standing in Brown's name on the books of the company. The sheriff of Los Angeles county duly sold said stock to Randall in satisfaction of his judgment, and delivered a certificate of sale thereof in regular form. Randall had no notice or knowledge of plaintiff's equities in the stock until long after his purchase at the execution sale in satisfaction of the judgment against Brown and receipt of the certificate of sale from the sheriff. He promptly presented this certificate to the Union Security Company, and demanded transfer of the said 70 shares in his name on the books of the company. As the company had no knowledge of any adverse interest in or claim to the stock, it issued to Randall a certificate for 70 shares of its capital stock, in lieu of said certificate, standing on its books in the name of Brown. Randall thereafter indorsed and delivered said certificate of stock to Lowe, the intervener, who also took the same without notice.

Some time thereafter the certificate of stock which Brown had delivered as a pledge to plaintiff was sold and assigned to plaintiff in satisfaction of the debt for which it was held as security. Plaintiff presented the certificate, with the assignment thereof to the Union Security Company, and demanded the transfer of such shares be made to defendant upon the books of said company. The Union Security Company refused to comply with the demand, and plaintiff commenced this action to compel it to do so. L. P. Lowe intervened in the action, and by cross-complaint against plaintiff and defendant alleged, in substance, the foregoing facts, which at the trial were stipulated as the facts of the case. Judgment was entered in favor of Lowe, adjudging him to be the owner of the stock. Plaintiff moved for a new trial, which was denied, and now appeals from the judgment.

[1] Succinctly stated, the question for the court on this appeal is whether or not a bona fide purchaser at an execution sale of stock standing in the name of a judgment debtor on the books of the corporation is

protected in the purchase against a prior pledgee holding a certificate evidencing said stock as security for an antecedent indebtedness of the judgment creditor. The lower court answered this question, we believe correctly, in the affirmative.

[2] When plaintiff acquired the stock in question in pledge from Brown, it had a right to compel the Union Security Company to cause the nature of the transaction to be so entered upon its books as to show the names of the pledgor and the pledgee, the number or designation of the shares, and the date of the transfer. *Spreckels v. Nevada Bank*, 113 Cal. 272, 277, 45 Pac. 329, 331 (33 L. R. A. 459, 54 Am. St. Rep. 348). As was said in that case:

"All this may be done to the full protection of the pledgee's rights without the surrender of the certificates, their cancellation, and the issuance to him of new ones, and, when done, the pledgee would be fully protected against a subsequent purchaser, who would be charged with the constructive notice which the entries upon the books of the corporation import; and, upon the other hand, there would be preserved to the pledgor all the rights incident to his ownership under the pledge."

Section 324 of the Civil Code provides that shares of stock may be transferred by indorsement and delivery of the certificate, but that such transfer is not valid, except between the parties thereto, until same is so entered upon the books of the corporation as to show the names of the parties, by and to whom transferred, the number or designation of the shares, and the date of the transfer. It has been determined by the decisions of the Supreme Court of this state, interpreting these provisions, that even without entry upon the books of the corporation such a transfer is valid as against all but innocent purchasers and transferees in good faith, for value, and without notice. Actual notice to such an intending purchaser by one having a prior claim upon the stock, even though his claim be not noted in the books of the corporation, is sufficient. *Spreckels v. Nevada Bank*, supra, and cases cited. In the case at bar the subsequent purchaser at the execution sale had no actual notice, nor constructive notice, which the entries on the books of the corporation, referred to in the decision just quoted, would have imported. We are of the opinion, therefore, that plaintiff omitted to take an ordinary business precaution as well as to perform its duty when it failed to cause a proper entry of the transaction between itself and defendant's pledgor, Brown, to be entered upon the books of the Union Security Company for its protection, as the section of the Code referred to contemplated.

Lowe, as the purchaser at the execution sale under his judgment, without notice of the previous assignment of the 70 shares of

stock to the plaintiff, took the stock discharged of the plaintiff's lien (*Farmers' National Gold Bank v. Wilson*, 58 Cal. 600), and was entitled to have the certificate of such shares reissued to him as such purchaser (*West Coast Safety Faucet Co. v. Wulff*, 133 Cal. 315, 316, 65 Pac. 622, 85 Am. St. Rep. 171).

[3] Lowe, purchasing the stock at a sale under his own judgment, without actual or constructive notice of alleged defects in the title thereof, was a bona fide purchaser for value. *Cady v. Purser*, 131 Cal. 552, 559, 63 Pac. 844, 82 Am. St. Rep. 391; *Foorman v. Wallace*, 75 Cal. 552, 17 Pac. 680; *Hunter v. Watson*, 12 Cal. 377, 73 Am. Dec. 543. The rule as to a bona fide purchaser, applies to sales of corporate stock. *Anglo-California Bank v. Grangers' Bank*, 63 Cal. 359; *Winter v. Belmont Mining Co.*, 53 Cal. 428. Within the rule announced intervenor Lowe was a bona fide purchaser in good faith, for value, without notice.

The judgment is affirmed.

We concur: RICHARDS, J.; KERRIGAN, J.

(43 Cal. App. 97)

CURTIS v. ARNOLD. (Civ. 2957.)

(District Court of Appeal, First District, Division 1, California. Sept. 2, 1919. Rehearing Denied Oct. 2, 1919; Denied by Supreme Court Oct. 28, 1919.)

1. LANDLORD AND TENANT §184(2)—RIGHT OF LESSEE TO DEPOSIT WITH LANDLORD ON TERMINATION OF LEASE.

Where money was deposited by a lessee as security for payment of rent, the lessee is entitled, on termination of the lease, to a return of the sum deposited less the amount of rent due and unpaid at the time of termination; but, if the sum was paid by the lessee as a bonus to induce the lessor to make the lease, the lessee is not entitled to recover back any part of the bonus on cancellation of the lease by the lessor for justifiable cause.

2. LANDLORD AND TENANT §184(2)—RECOVERY BY LESSEE OF DEPOSIT MADE WITH LANDLORD.

Assignee of the lessee held not entitled to recover a payment of \$300 made by the lessee on execution of the lease, it appearing that the lease was terminated because of the breach of covenant as to payment of rent; the provision as to repayment excepting termination of the lease for lessee's breach of contract.

3. LANDLORD AND TENANT §188(1)—RIGHT OF TENANT TO MAKE REPAIRS AND CHARGE TO LANDLORD.

Where a lease provided that the landlord should repair defects in the premises which should appear in the first year after completion and that the lessee waived all rights to make repairs at the expense of the lessor, as provided

in Civ. Code, § 1942, held, that the lessee could not justify refusal to pay rent because the lessor refused during the third year after completion of the premises to make repairs, which repairs were then made by the lessee.

Appeal from Superior Court, City and County of San Francisco; Daniel C. Deasy, Judge.

Action by Fannie Slater Curtis against Ella H. Arnold. From a judgment for defendant and an order denying new trial, plaintiff appeals. Affirmed.

R. H. Countryman, of San Francisco, for appellant.

Burrell G. White and John Ralph Wilson, both of San Francisco, for respondent.

WASTE, P. J. The plaintiff appeals from a judgment, and asks for a review of the order denying a motion for a new trial. The controversy involves the sum of \$3,000, on deposit under the terms of a written lease dated March 7, 1910, between defendant, as lessor, and Charles Loeffler, as lessee. The interests and rights of the lessee have been transferred to plaintiff.

The first paragraph of the lease reads as follows:

"For and in consideration of the sum of three thousand dollars (\$3,000) gold coin of the United States of America, the receipt of which is hereby acknowledged, Ella H. Arnold, of the city and county of San Francisco, state of California, agrees to make and enter into, and does hereby make and enter into, to and with Charles Loeffler of the same place the following lease, upon the terms and conditions herein specified, to wit:"

Then follows an ordinary lease made and entered into between the parties, under the terms of which the lessor agrees to erect a certain five-story, class C, building in accordance with plans and specifications therein particularly referred to, for a period of 10 years, from and after the date of completion of the building, at the total rental, or sum, of \$102,500, in monthly payments (the first month's rent being free) of \$875 per month, for the first five years of the lease, and \$925 for the next four years and seven months of the term. Nothing is said in the lease as to the amount of rent to be paid by the lessor for the last five months of the term.

It was expressly covenanted in the lease that the lessor should, at her own cost and expense, keep the roof and exterior of the premises in good order, condition, and repair during the term of the lease, and should likewise, at her own cost and expense, repair or cause to be repaired any defects in the premises which should appear during the first 12 months after the completion and acceptance of said building, if the defects resulted from the settling of the walls, shrinkage of

timbers, defective plumbing, or other defects due to construction.

It was further stipulated in the lease that, otherwise than as above stated, the lessor, after taking possession of the premises, should keep and maintain the interior of the same in good order, condition, and repair during his occupancy; the injury thereto or destruction thereof by the act of God or the elements or other cause beyond the control of the lessee being excepted. The lessee expressly waived all rights to make repairs of said premises at the expense of the lessor, as provided in section 1942 of the Civil Code of the State of California.

A further stipulation in the lease is:

"That in the event of the determination of this lease prior to the expiration of the ten year term hereby demised, for any reason or cause, except a breach of covenant by the lessee, the lessor will pay to the lessee the sum of three thousand (\$3,000) dollars in gold coin of the United States of America, together with interest thereon from the date of the completion of said building, at the rate of four (4%) per cent. per annum, compounded annually, provided however, that if such termination shall occur during the last five months of said term, the amount so payable shall be reduced at the rate of nine hundred and twenty-five (\$925) dollars per month for each of said months as shall have expired prior to said termination. It is understood and agreed that this lease shall not be assigned without the written consent of the lessor. It is understood that if the lessee shall in all respects fully comply with the terms, conditions and covenants of this lease, he shall have the use of the above described premises, herein leased for the last five months of the term herein named and provided, free of rent, and said free rent is conditioned upon the full compliance with the performance of all conditions and covenants of this lease by said lessee both before and during the said last five months hereof."

The building was completed, and possession taken by the lessee, on or about the 31st day of December, 1910. The rent for the month of September, 1914, was not paid. Defendant served on plaintiff a notice, requiring him to pay the rent within three days or deliver possession of the premises. Plaintiff moved out of the premises within the period given, and defendant, in writing, accepted the keys and possession of the leased property.

[1] During plaintiff's occupancy of the house, certain structural defects in the building developed, and plaintiff, after calling the attention of the defendant to these matters, expended certain sums of money in making repairs. Plaintiff brought this action for the recovery of the \$3,000, and interest, paid by her assignor to defendant, under the provision of the lease that has been referred to. Defendant filed an answer and cross-complaint for the amount of the rent for the month of September, 1914. Plaintiff, in answer to the cross-complaint, asserted the right

to offset the claim for the rent for that month by the sum of money she expended in making the repairs to the premises hereinbefore and hereinafter referred to. At the trial defendant dismissed her cross-complaint, leaving as the only issue to be tried by the court the question of the right of plaintiff to recover the \$3,000. The court eventually held that by the failure of plaintiff to pay the rent in cash for September, 1914, she had so violated the covenants of the lease that, under its terms, she was not entitled to recover that amount, and gave judgment for defendant. The decision of the main issue of the case, to wit, the right of the plaintiff to recover the sum of \$3,000, turns upon the determination of the status of that fund now in the hands of defendant. Appellant steadfastly maintains that the amount was deposited with the lessor as security for the performance of the covenants of the lease; that, therefore it was not forfeited to the lessor by reason of the failure on the part of the lessee to pay the rent accrued for September, 1914. She relies upon *Green v. Frahm*, 176 Cal. 259, 168 Pac. 114, and *Rez v. Summers*, 34 Cal. App. 527, 168 Pac. 156. Defendant claims that it was paid to defendant by the original lessee as an additional consideration, or bonus, as an inducement to defendant to make the lease. If either of these claims finds support in the pleadings or evidence, the decision of the case presents but little difficulty. If the money was deposited as security for the payment by the lessee of the rent, it is clear that upon the termination of the lease the plaintiff would be entitled to a return of the sum deposited, less the amount of rent due and unpaid at the time of the termination. *Green v. Frahm*, supra; *Rez v. Summers*, supra; *Caesar v. Robinson*, 174 N. Y. 492, 67 N. E. 58; *Michaels v. Fishel*, 169 N. Y. 381, 62 N. E. 425; *Galbraith v. Wood*, 124 Minn. 210, 213, 144 N. W. 945, 50 L. R. A. (N. S.) 1034, Ann. Cas. 1915B, 609. If the \$3,000 was paid by the lessee as a bonus, as an independent consideration, to induce defendant to make the lease, it is equally clear that a cancellation of the lease by the landlord for any cause which justifies the act would not entitle plaintiff to receive back any part of the sum so paid, in the absence of some stipulation in the lease requiring her to do so. *Galbraith v. Wood*, 124 Minn. 210, 214, 144 N. W. 945, 50 L. R. A. (N. S.) 1034, Ann. Cas. 1915B, 609; *Dutton v. Christie*, 63 Wash. 372, 115 Pac. 856.

[2] In the first of the cases relied upon by appellant, *Green v. Frahm*, the language of the lease is that—

"Cohn hereby deposits with Frahm the sum of three thousand dollars, receipt of which is hereby acknowledged, said sum of three thousand dollars to be retained by Frahm as a guaranty that Cohn will pay the rent as herein provided, and in the manner herein specified, and will keep and perform each and every covenant

herein contained to be performed by Cohn, and in the event of the failure of Cohn to pay the rent or to keep or perform any of the covenants herein contained to be performed by Cohn, then and in that event, the said sum of three thousand dollars shall become forfeited unto Frahm. On the other hand, should Cohn pay the rent herein reserved, then and in that event the said sum of three thousand dollars shall be returned to Cohn at the end of the term hereinbefore created, or at any sooner determination thereof. Frahm agrees to pay Cohn four per cent. interest on the sum of three thousand dollars, to be paid annually."

Another clause provided that, in case of any termination of the lease through any fraud or neglect of Cohn, then the \$3,000 reserved should be repaid to him with interest. Cohn defaulted in payment of rent. Frahm instituted proceedings in unlawful detainer against him, and, upon obtaining judgment, was put into possession of the property. Cohn, by his assignee, began an action against Frahm to recover the \$3,000, which, in pursuance of the terms of the lease, had been deposited by Cohn with Frahm at the time of the execution thereof. The judgment was for plaintiff, and Frahm appealed. The Supreme Court held that the above-quoted provision of the lease naturally divided itself into two parts: One, a provision that the \$3,000 deposited with Frahm was to be a guaranty for performance by Cohn of the covenants of the lease, including the payments of rent; the other that, in the event of the failure of Cohn to perform any of said covenants, the said money should become forfeited to Frahm, that the provision for a forfeiture upon the failure of Cohn to pay the rent was either a penalty, or a provision that the \$3,000 was to be liquidated damages for the breach of the covenants, and in either aspect the provision was void. *Green v. Frahm*, supra. The other part of the clause, providing for the deposit of the \$3,000 as a security for the payment of rent, was held by the Supreme Court to be for a legal purpose, and in all respects valid and enforceable, and that Frahm had a legal right, in case of the failure of Cohn to pay rent, to retain the \$3,000 and apply it on the rent until the same was exhausted; that he did not choose to do this, however, but immediately began proceedings for the restitution of the premises, and the recovery of the rent due, and had succeeded in obtaining judgment for both, also for cancellation of the lease; that, under these circumstances, he must be admitted to have repudiated the security, and to have waived the right to retain the \$3,000 as security for the payment of rent subsequently accruing; that the sum as deposited was to be considered as money held by Frahm as bailee, for the use of Cohn, and due demand having been made for its return, the plaintiff was entitled to recover. In *Rez v. Summers*, also relied upon by appellant, the court found:

"That the sum of \$800 was received by the lessor as being in full payment for the rent for the last two months of the term. But the payment was not absolute and unconditional, since it was also agreed that in certain contingencies this money would be returned to the lessee, and in that part of the contract the \$800 was referred to as 'security.'"

In neither of the foregoing cases were the facts similar to those of the case at bar. In the instant case, for and in consideration of the sum of \$3,000, the receipt of which was acknowledged by the lessor, she agreed to make and enter into the lease to plaintiff's assignor.

This, to our mind, brings the case squarely within the ruling of *Ramish v. Workman*, 33 Cal. App. 19, 164 Pac. 26, and *Dutton v. Christie*, supra. In the first of these cases the provision of the lease was that the lessees would pay to the lessor, as a further consideration for the lease, in addition to the rent therein reserved, the sum of \$7,200, receipt of which was acknowledged by the lessor. There was a further proviso that if the lessees should pay the rent reserved, when same became due under the lease, and should well and truly perform and observe all the covenants and agreements contained in the lease on their part to be performed during the first nine years, seven months, and twelve days, and the lease should not be terminated by the re-entry of the lessor as in the lease provided, within that period, the lessor should credit said sum of \$7,200 so paid by the lessees upon the last four months and eighteen days' rent due under the lease. After taking possession under the lease, the lessees made default and were evicted. The lessor also commenced an action to recover rent for the period during which the premises were held and occupied by the lessees. The defendants, by answer and cross-complaint, set up the deposit of \$7,200, made as hereinbefore indicated, and prayed for its return. Judgment went for the plaintiff, and the defendants appealed, insisting, as does the appellant here, that, notwithstanding the plain language in which the provision of the lease is couched, "the meaning of which, to our minds," said the appellate court, "admits of no controversy," the payment of \$7,200 should be construed as security for the payment of the rent reserved during the time ending with their eviction, and any damages sustained by plaintiff; that, when the landlord elected to evict defendants from the premises for nonpayment of rent, he waived all claims to the fund except in so far as it was necessary to apply it in payment of rent then due and accrued. In its decision the court said:

"As stated in *Dutton v. Christie*, 63 Wash. 373, 115 Pac. 857, where a similar question was involved: 'We cannot agree with this contention without in effect writing a new contract for the parties.' Clearly, the \$7,200 was paid

for a ten-year lease of the premises, upon the conditions and terms specified therein. Defendants parted with the money, not as a penalty or as security, but as a payment the consideration for which was the execution of the lease on the part of plaintiff. The title thereto passed absolutely to the lessor, unaffected by the fact that he agreed, upon the performance of certain conditions by defendants, to give them credit therefor. The conditions were never performed by defendants, and hence they could have no claim to the fund. The authorities which appellants cite in support of their contention all appear to have been cases where the deposit was made with the lessor upon the execution of the lease as security for the payment of the rent, and in such cases, upon the lessor evicting the tenants, it is uniformly held that he cannot assert claim to the amount so deposited, over and above rent due, with damages sustained. The cases cited by appellants involve deposits made as 'a guaranty,' 'as indemnity,' as 'a penalty,' 'for security,' etc., and hence are readily distinguished from the case at bar. This view finds full support in the case of *Dutton v. Christie*, 63 Wash. 373, 115 Pac. 857.

"The provisions of the lease in question hereinbefore quoted should be interpreted in accordance with the plain import of the language used, and thus construed it is clear that the parties intended the \$7,200 to be in the nature of a bonus or additional consideration paid the lessor as an inducement to make the lease upon the terms and conditions therein contained; and, as stated, the fact that upon the performance of all the covenants and agreements contained in the lease to be performed by the lessees during the first nine years, seven months, and twelve days of the term thereof, he promised in effect to release them from the payment of rent at the rate of \$1,500 per month for the last four months and eighteen days of the term so demised, furnishes no reason for appellants' contention."

A rehearing of this case was denied by the Supreme Court.

The facts in *Dutton v. Christie*, supra, are very similar to those under consideration here. The respondent in that case let to the appellants certain premises in the city of Seattle, for the period of five years, under a written lease by which it is provided that the rental of the premises should be \$750 every month in advance. It was stated in the first paragraph of the lease that it was made "in consideration of the covenants of the second parties (appellants) hereinafter set forth, and of the sum of fifteen hundred dollars (\$1,500) now paid to the first party by the second parties, the receipt of which is hereby acknowledged." In a subsequent paragraph of the lease it was stated that the "above payment of fifteen hundred dollars (\$1,500) now made shall, in the event of the full and faithful performance of this contract by the second parties, be credited in payment of rent for the last two months of said term; but otherwise said payment this day made shall belong to first party as a part of the consideration to them for the execution of this lease."

184 P.—33

The lessees defaulting, the lessor brought an action to recover the unpaid rent. Judgment was rendered against the lessees who appealed claiming that the judgment should have been in their favor for the difference between the advance payment of \$1,500 and the amount of the unpaid rent, earnestly insisting that the \$1,500 so paid in advance was merely intended as a deposit in the nature of a penalty for any failure on their part to carry out the terms of the lease.

"We cannot agree with this contention," said the Supreme Court of Washington, "without in effect writing a new contract for the parties. In the beginning of the lease the parties have declared that the lease is given in consideration of the covenants of the second parties and of the payment of \$1,500. The lease was certainly a legally sufficient consideration for the payment. If there had been no further mention of this money, there could be no question of the respondent's ownership of it. Does the added stipulation that this payment shall, in the event of full performance of the contract by the second parties, 'be credited in payment of the rent for the last two months of said term; but otherwise said payment this day shall belong to the first parties as a part of the consideration to them for the execution of this lease,' change the nature of this payment from consideration to penalty? We think not. It is declared to be a part of the consideration in the beginning, and this clause reiterates the same thing. In both instances the ownership of the respondent therein is affirmed. This is not changed by his agreement to apply this sum in payment of the rent for the last two months of the terms in the event of the appellants fully performing their contract. It was only by that performance that they could assert any claim upon this money. They must earn it."

"Provision is sometimes made in a lease for the payment in advance of the rents of the last or later periods of the lease, and such a provision has been held not to be a security merely for the lessee's performance of his agreements in the lease, but purely a payment of rent in advance, and therefore may be retained by the lessor though he terminates the lease for the default of the lessee as provided for in the lease." 16 R. C. L. 931.

A case bearing directly on this phase of the question which we are now considering is *Galbraith v. Wood*, supra, where the Supreme Court of Minnesota was called upon to determine the status of a payment made upon the execution of a lease under circumstances not far dissimilar from the facts in the case at bar. At the time of the execution of the lease there considered, the lessee agreed to pay the lessor the sum of \$20,000 "as an advance payment on the rent," which advance he agreed to keep good during the first five years of the lease, with the privilege of reducing the rent at the rate of \$8,666.66 per year for the third, fourth, and fifth years of the term. On motion of defendants the lower court dismissed the action brought by the assignee in bankruptcy of the lessee, after default of the latter, to

recover the money so deposited, and in which it was contended that the fund was but a guaranty for the payment of rent to be made by the lessees during the terms of the lease. On appeal the higher court held that the claim of plaintiff that the money was deposited as security was not sustained by the pleadings or evidence, and also found a lack of anything in the pleadings or evidence to support its claim that the money was paid as a bonus or independent consideration to induce the making of the lease. It was decided that it was no more than an advance payment of rent, and affirmed the ruling of the lower court.

It requires but a short mathematical calculation to demonstrate that it would be improper to hold that the \$3,000 fund under consideration here may be regarded as an advance payment for the rent of the leased premises for the last five months of the term, which was for the full period of ten years, at the agreed monthly rental of \$875 per month for the first five years (no rent being charged for the first month), and \$925 for four years and seven months. The credited rent is the exact amount specified in the lease, to wit, \$102,500. At the rate of \$925 per month, the rent for the last five months of the term, for which no rent is otherwise provided, would aggregate \$4,625. The sum of \$3,000 at four per cent. per annum, compounded annually for ten years, the term of the lease, would approximate just about that amount. Furthermore, the stipulation in the lease that the lessor will repay to the lessee the sum of \$3,000, with interest, on the date of the completion of the building, is effective only in the event of the termination of the lease prior to the expiration of the ten-year term thereby demised, for any reason or cause, *except a breach of covenant by the lessee* (the italics are ours), and the stipulation further provides that if such termination shall occur during the last five months of said term the amount so repayable shall be reduced at the rate of \$925 per month, for each of said months as shall have expired prior to said termination.

From the facts of the present case, and our review of the foregoing authorities, we reach the conclusion that plaintiff in this action is not entitled to recover any portion of the fund of \$3,000 paid at the time of the execution of the lease. If the money be regarded as given in consideration of the covenants of the lease when paid, the title thereto passed to the lessor (*Ramish v. Workman*, supra; *Dutton v. Christie*, supra); if it is to be regarded merely as an advance payment of rent, the lessor is entitled to retain it (*Galbraith v. Wood*, supra—see, also, citations under this case found in 50 L. R. A. [N. S.] 1034, Ann. Cas. 1915B, 609, 613).

An examination of the authorities cited by appellant bearing on this point of the case, and its allied questions, discloses that they were dealing with instances in which the money sought to be recovered was deposited as security for the payment of rent, and the performance of the conditions and covenants of the lease, and, in our view, they are not in point as applied to the lease we are called upon to construe in this case.

[3] Appellant also asks for a reversal of the judgment in the case at bar upon the contention that defendant, upon the terms of the lease, had agreed to make repairs which we have before referred to, and had failed and refused to do so; and that, as they were made by plaintiff, she had a right to recoup her losses of money in making such repairs from the rent of the premises as it became due. The stipulation of the lease, however, is that the lessor, at her own cost and expense, shall repair, or cause to be repaired, any defects in said premises due to construction which shall appear during the first 12 months after the completion and acceptance of said building. The building was completed and accepted on or about the 31st day of December, 1910, and no notice of any defects was given until January, 1913. By the terms of the lease, therefore, the lessor was not obligated to make such repairs. As to other work claimed by plaintiff to have been done by her in repairing the building, it appears not to have been performed until nearly one year and five months after the completion of the building. Plaintiff contends that she was called upon to make certain necessary repairs during her occupancy of the building, which it was the duty of the defendant to make.

"If it be assumed that under ordinary circumstances the defendants should be credited with such an expenditure as a payment on account of the rent, provided such expenditure was not greater than one month's rent of the premises, in view of the provisions of section 1942 of the Civil Code, the complete answer to any such claim in this case is to be found in the provisions of the lease, whereby the lessee 'hereby waives all rights to make repairs of said premises at the expense of the lessor as provided in section 1942 of the Civil Code of the State of California.'" *Arnold v. Krigbaum*, 169 Cal. 147, 146 Pac. 424, Ann. Cas. 1916D, 370.

It follows, therefore, that the action of the trial court in striking out much of plaintiff's evidence, and in refusing to admit other evidence relative to these repairs, was proper. The court was correct in its action in denying the motion for a new trial.

The judgment is affirmed.

We concur: RICHARDS, J.; KERRIGAN, J.

(43 Cal. App. 110)

ROGERS BROS. CO. et al. v. BECK et al.
(Civ. 2997.)

(District Court of Appeal, First District, Division 1, California. Sept. 2, 1919.)

1. EVIDENCE ¶366(1) — IDENTIFICATION OF OFFICIAL RECORDS SUFFICIENT.

In action to foreclose street assessment lien, testimony of employe of city clerk, who identified records containing assessment, warrant, and diagram of street superintendent, and who testified that such records were official records kept in city clerk's office, was sufficient foundation for introduction of such records in evidence without identification thereof by city clerk himself.

2. PLEADING ¶122—DENIAL OF CORPORATE EXISTENCE ON INFORMATION AND BELIEF INSUFFICIENT.

Denial of allegation of corporate existence of a domestic corporation on information and belief held an insufficient denial amounting to an admission of the alleged fact.

3. PLEADING ¶258(4)—REFUSAL OF AMENDMENT OF ANSWER AT CLOSE OF PLAINTIFFS' TESTIMONY PROPER.

Refusal to permit amendment to answer after plaintiffs had fully presented their case was proper, where no sufficient reason for delay was given.

4. APPEAL AND ERROR ¶681 — RECORD NOT SHOWING PROPOSED AMENDMENT, REFUSAL NOT REVIEWABLE.

Court's refusal to permit amendment of answer after introduction of plaintiffs' testimony will not be considered on appeal, where the record does not embrace copy of proposed amended answer; the court on appeal having no means of determining whether amendment should have been permitted.

5. MUNICIPAL CORPORATIONS ¶562(1) — FRAUD NO DEFENSE TO ACTION TO FORECLOSE STREET ASSESSMENT.

In action to foreclose street assessment lien, unfairness or fraud relating solely to the progress of the work is no defense; such matters being subject to correction by appeal to city council, whose decision is conclusive on parties entitled to take such appeal.

6. APPEAL AND ERROR ¶690(1)—RECORD NOT CONTAINING PROPOSED AMENDMENT TO ANSWER.

Question whether court erred in rejection of certain evidence which appellants claimed would have been admissible under amended answer which trial court rejected will not be considered on appeal, where proposed amended answer was not in the record; the court being unable to determine whether rejected testimony was within issues presented by such amended answer.

Appeal from Superior Court, Imperial County; W. H. Thomas, Judge.

Action by the Rogers Bros. Company and others against John H. Beck and others.

Judgment for plaintiffs, and defendants appeal. Affirmed.

Jas. E. O'Keefe and C. H. Van Winkle, both of San Diego, for appellants.

Crouch & Crouch, of San Diego, for respondents.

RICHARDS, J. This appeal is from a judgment based upon a verdict in the plaintiffs' favor in an action to establish and foreclose the lien of a street assessment.

[1] The appellants make several points upon appeal. The first of these consists in their contention that the trial court erred in overruling their objection to the introduction in evidence of the assessment, diagram, and warrant of the street superintendent upon the ground that no proper foundation had been laid for their introduction. The plaintiffs have produced a witness who testified that he was one of the employes of the city clerk of the city of Imperial, in which said street improvement work had been done, and who in that capacity produced and fully identified the records containing the assessment, warrant, and diagram of the street superintendent of the city, and who further testified that these were to his knowledge part of the official records of said street superintendent's office, and that the said records were kept in the city clerk's office. This testimony was entirely sufficient to furnish the requisite foundation for the introduction in evidence of these records. It is not necessary for the legal custodian of a public record in every case to be present in court to identify it. This may be done by any witness who can speak from his own knowledge in identifying the documents as the official records of the office from which they are produced, as such, and hence the ruling of the court was proper in admitting the assessment, diagram, and warrant in question in evidence.

[2] The next contention of appellants requiring attention is that the offered proof of the fact that the plaintiffs, Rogers Bros. Company and O. & C. Construction Company, were corporations was insufficient, but this objection is without merit, for the reason that the corporate existence and character of these two plaintiffs were alleged to be that of corporations organized and existing under and by virtue of the laws of the state of California. The defendants' denial of these averments was based on the want of information and belief upon the subject. This was an insufficient denial, and amounted to an admission of the alleged fact; hence no evidence was required to prove these averments of the plaintiffs' complaint. *Bartlett Estate Co. v. Fraser*, 11 Cal. App. 373, 105 Pac. 180; *Mulcahy v. Buckley*, 100 Cal. 487, 35 Pac. 144; *Mullally v. Townsend*, 119 Cal. 47, 50 Pac. 1066.

[3, 4] The next contention of the appellants

is that the trial court committed an abuse of discretion in refusing the defendants leave to file an amended answer during the progress of the trial of the case. This action was commenced on January 3, 1915; the answer of the defendants was filed on March 5, 1915; the cause came on for trial on January 17, 1916. The amended answer was not proffered for filing until the trial of the cause had proceeded up to the point where the plaintiffs had fully put in their case. No sufficient reason was given for the defendants' delay in seeking to amend their answer, and this of itself would have been a sufficient ground for the court's refusal to permit the same to be filed. But aside from this the record herein does not embrace a copy of the proposed amended answer, and this court has no means of knowing its contents, and hence cannot determine whether or not the trial court should in any event have permitted it to be filed, nor whether its refusal to do so was error.

[5] The next contention of the appellants is that the trial court was in error in sustaining the objection of the plaintiffs to questions asked or proofs offered by the defendants in an endeavor to show fraud in the doing of the public work upon which the assessment in question is predicated. In so far as these questions asked or proof offered were based upon the averments of the original answer of the defendants herein we are satisfied that no foundation is therein laid for the introduction of such evidence, since the only unfairness or fraud therein alleged relates solely to the progress of the work, and has reference to matters which are properly the subject of correction by appeal to the city council, whose decision, in the absence of fraud on the part of said council or its members in the hearing of said appeal or the rendition of such decision, is final and conclusive upon the parties entitled to take said appeal. *Girvin v. Simon*, 116 Cal. 604, 48 Pac. 720; *McLaughlin v. Knobloch*, 161 Cal. 676, 120 Pac. 27; *Lambert v. Bates*, 137 Cal. 676, 70 Pac. 777.

[6] In so far as the appellants' contention as to the existence of fraud on the part of the city council or its members in the hearing or determination of said appeal is concerned, it may be stated that possibly such an issue was presented by the amended answer which the defendants vainly sought to file; but since the said amended answer has not been embraced in the record before us we are unable to say whether such an issue was so tendered, and hence cannot determine whether the court was in error in its refusal to admit such offered proofs.

No question being presented, the judgment is affirmed.

We concur: WASTE, P. J.; KERRIGAN, J.

(43 Cal. App. 799)

ROGERS BROS. CO. et al. v. BECK et al.
(Civ. 2998.)

(District Court of Appeal, First District, Division 1, California. Sept. 2, 1919.)

Appeal from Superior Court, Imperial County; W. H. Thomas, Judge.

Action by the Rogers Bros. Company and others against John H. Beck and others. Judgment for plaintiffs, and defendants appeal. Affirmed.

Jas. E. O'Keefe and C. H. Van Winkle, both of San Diego, for appellants.

Crouch & Crouch, of San Diego, for respondents.

PER CURIAM. On the authority of *Rogers Bros. Co. et al. v. Beck et al.*, No. 2997, 184 Pac. 515, this day decided, the judgment is affirmed.

(43 Cal. App. 799)

ROGERS BROS. CO. et al. v. BECK et al.
(Civ. 2999.)

(District Court of Appeal, First District, Division 1, California. Sept. 2, 1919.)

Appeal from Superior Court, Imperial County; W. H. Thomas, Judge.

Action by the Rogers Bros. Company and others against John H. Beck and others. Judgment for plaintiffs, and defendants appeal. Affirmed.

Jas. E. O'Keefe and C. H. Van Winkle, both of San Diego, for appellants.

Crouch & Crouch, of San Diego, for respondents.

PER CURIAM. On the authority of *Rogers Bros. Co. et al. v. Beck et al.*, No. 2997, 184 Pac. 515, this day decided, the judgment is affirmed.

(43 Cal. App. 800)

ROGERS BROS. CO. et al. v. HOLSAPPLE.
(Civ. 3000.)

(District Court of Appeal, First District, Division 1, California. Sept. 2, 1919.)

Appeal from Superior Court, Imperial County; W. H. Thomas, Judge.

Action by the Rogers Bros. Company and others against F. W. Holsapple. Judgment for plaintiffs, and defendant appeals. Affirmed.

Jas. E. O'Keefe and C. H. Van Winkle, both of San Diego, for appellant.

Crouch & Crouch, of San Diego, for respondents.

PER CURIAM. On the authority of *Rogers Bros. Co. et al. v. Beck et al.*, No. 2997, 184 Pac. 515, this day decided, the judgment is affirmed.

(48 Cal. App. 801)

ROGER BROS. CO. et al. v. HOLSAPPLE
et al. (Civ. 3001.)

(District Court of Appeal, First District, Division 1, California. Sept. 2, 1919.)

Appeal from Superior Court, Imperial County; W. H. Thomas, Judge.

Action by the Rogers Bros. Company and others against F. W. Holsapple and others. Judgment for plaintiffs, and defendants appeal. Affirmed.

Jas. E. O'Keefe and C. H. Van Winkle, both of San Diego, for appellants.

Crouch & Crouch, of San Diego, for respondents.

PER CURIAM. On the authority of Rogers Bros. Co. et al. v. Beck et al., No. 2997, 184 Pac. 515, this day decided, the judgment is affirmed.

(48 Cal. App. 21)

MOTT v. WRIGHT et al. KING v. SAME.
MacSWAIN et al. v. SAME. (Civ. 2007.)

(District Court of Appeal, Third District, California. Aug. 26, 1919. On Petition for Rehearing, Sept. 25, 1919; Rehearing Denied by Supreme Court, Oct. 23, 1919.)

1. MECHANICS' LIENS §281(2)—SUFFICIENCY OF EVIDENCE TO SHOW DATE OF COMPLETION OF BUILDING.

In an action to foreclose mechanics' liens, evidence of owner that work or labor ceased on building on a certain day, and that last work necessary to be done on the building to complete the contract was performed on that date, and that the building was then completed, and nothing more was to be done thereon, was sufficient evidence on which to base a finding that the building was completed on that date.

2. MECHANICS' LIENS §132(9) — CONSTRUCTIVE COMPLETION OF BUILDING BY CESSATION OF LABOR.

Cessation from labor by reason of actual completion of a building contract is not the cessation of labor, which, under Code Civ. Proc. § 1187, relating to filing of claim, itself constitutes a constructive completion of the building or contract.

3. APPEAL AND ERROR §1011(1)—FINDINGS OF FACT ON CONFLICTING EVIDENCE CONCLUSIVE.

The District Court of Appeal is concluded by the findings of the trial court on conflicting evidence.

4. MECHANICS' LIENS §132(7)—COMPLETION OF BUILDING—"TRIVIAL IMPERFECTION."

Where the papering of a building had been completed, and the owner later informed the paper hanger that there was a defect in the papering in a hallway, and requested him to repaper the defective part, and the work of repapering required only about two hours, such

defect amounted to only a "trivial imperfection" in the work, within the meaning of Code Civ. Proc. § 1187, relating to the time from which right of lien claimants to file their liens begins to run.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Trivial Imperfection.]

5. MECHANICS' LIENS §132(7) — TIME FOR FILING LIEN FIXED BY SUBSTANTIAL COMPLETION.

All that Code Civ. Proc. § 1187, requires to fix the time from which the right of lien claimants to file their liens begins to run, is that there be, so far as actual completion is concerned, a substantial completion.

6. MECHANICS' LIENS §132(4, 9)—TIME FOR FILING LIEN AS GOVERNED BY ACTUAL AND CONSTRUCTIVE COMPLETION.

The rule under Code Civ. Proc. § 1187, as to the 120-day period after cessation of labor within which a lien claimant may file a lien does not apply where there is an actual completion, and the 90-day provision applies, not only to cases of actual completion, but also to those of constructive completion, including completion, by cessation from labor, for in such case there is no completion until there has been a cessation of labor for the period of 30 days, after which the lien claimant has 90 days within which to file his lien by virtue of estoppel because of owner's failure to file notice of cessation from labor.

7. MECHANICS' LIENS §279—OCCUPATION OF BUILDING INSUFFICIENT TO SHOW ITS COMPLETION.

Where the owner of a building never ceased occupying the building at any time pending the reconstruction or alteration thereof, except during the brief time when building was in course of removal from one parcel of land to another, there was not such an occupation or use, within the meaning of Code Civ. Proc. § 1187, as raised a conclusive presumption of completion.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Occupation.]

8. CONTRACTS §186(2)—NO PRIVILEGE OF CONTRACT BETWEEN OWNER AND EMPLOYEES OF BUILDING CONTRACTOR.

Where a person contracts to construct a building for a certain price, and employs labor and purchases material for such work, there is no privity of contract between the owner and the employees and the materialmen.

9. CONTRACTS §186(2) — OWNER OF BUILDING NOT PERSONALLY LIABLE TO EMPLOYEES OF CONTRACTOR AND MATERIALMEN.

Where a contract is let for the construction of a building for a certain amount, and the contractor employs labor and purchases material, the owner of the building is not personally liable to the employees of the contractor and the materialmen, unless it is shown that there exists a contract, express or implied, as a contractual privity, between the owner and such persons, notwithstanding Code Civ. Proc. § 1192.

10. WORK AND LABOR ⇨22—IN ACTION TO FORECLOSE MECHANIC'S LIEN, COMPLAINT INSUFFICIENT AS ON QUANTUM MERUIT.

In an action to foreclose mechanics' liens, complaint alleging that materials and labor were "of the reasonable value of" certain amounts held not to state cause of action against the owner in the form of a quantum meruit; it being alleged that the labor and materials were furnished in pursuance of the contract between the contractor and the owner, and were furnished at the instance of the contractor.

On Petition for Rehearing.

11. APPEAL AND ERROR ⇨835(2)—NEW POINT RAISED ON REHEARING NOT REVIEWABLE.

A new point raised in a petition for rehearing need not be considered.

12. MECHANICS' LIENS ⇨280(6) — CONTRACT TO REMOVE BUILDING TO OTHER LOT AND RECONSTRUCT SEVERABLE.

Where a contract was entered into whereby a contractor was to remove a building from one parcel of land to another, and certain work was to be done on the parcel from which the building was removed, owner to pay the absolute cost of such work, and no more, and the building was to be altered and reconstructed on the lot where removed to, the contract was severable, and those furnishing labor and material on the land where the building was reconstructed were not entitled to show the date of the last work done on the land from which the building had been removed, in order to show when the contract was completed, as to the work to be done on the land where the building was moved to; purpose being to show that a lien was filed in time.

Appeal from Superior Court, Sacramento County; Charles O. Busick, Judge.

Consolidated actions by Philip F. Mott, and by Chester E. King, and by A. R. MacSwain and E. W. MacSwain, copartners doing business under the style of Sacramento Builders' Supply Company, against Frank E. Wright and Frank P. Williams. From a judgment for plaintiffs for part of the relief demanded, they appeal. Affirmed.

W. A. Gett and Johnson & Lemmon, all of Sacramento, for appellants.

Devlin & Devlin, of Sacramento, for respondents.

HART, J. The actions were brought to enforce mechanics' liens and were consolidated for trial. Judgment was rendered in favor of plaintiffs against Frank P. Williams, the contractor, and in favor of Frank E. Wright, the owner, for his costs, and that the plaintiffs were not entitled to liens upon the premises described in the complaints. The appeal is by plaintiffs from the judgment.

The owner, defendant Wright, entered into a contract with the contractor, defendant Williams, for the removal of a cottage from

Eleventh and O streets, in the city of Sacramento, to Twenty-Fourth and L streets, in said city, and for the raising of said cottage and constructing flats underneath the same. The liens in question are sought to be enforced against the lot on Twenty-Fourth and L streets. Work started on the flats about the middle of February, 1915, and continued without cessation until the 24th day of May, 1915. From about March the owner occupied the upper portion of the building, and later on tenants occupied the flats.

It was found by the court that defendant Wright entered into a contract with defendant Williams, "which said contract was never recorded in the office of the county recorder of Sacramento county," under which said contractor agreed to construct said building; that no notice of completion of said building or contract and no notice of cessation of labor were recorded; "that the said building and said contract were completed on the 12th day of May, 1915; that subsequent to said 12th day of May, 1915, the plaintiff Chester E. King repapered a portion of the hallway of the building located on said premises; that the papering of said hallway had been completed by said plaintiff Chester E. King prior to the 12th day of May, 1915, but said papering was defectively done by said plaintiff Chester E. King, whereby it became necessary for him to repaper a portion of said hallway; that the cost of repapering said hallway subsequent to the said 12th day of May, 1915, was the sum of \$2.40; that the condition of said hallway subsequent to the 12th day of May, 1915, was a trivial imperfection in said work, and was not such as would prevent filing of liens; that the cost of said repapering said hallway was trivial in comparison with the cost of the work and improvements that were done under said contract."

The liens which are sought to be enforced were filed, respectively, August 12, 15, and 18, 1915. The complaints alleged the completion of the work on June 1st.

It is strenuously argued by appellants that the finding that the building was actually completed on May 12, 1915, is unsupported by the evidence. The contractor testified that the last work he did was about May 28th or June 1st; Mott, the plumber, said that he went to the building on June 2d to fix a water pipe; and King, the painter and paper hanger, testified that he worked personally on the building about the 14th or 15th of May, and that in the week ending May 29th one man worked there. King produced his "labor book," showing the following entries:

"May 15. Bert Ranner. \$2.50. May 29. Pape. \$2.00."

The last item was explained to have been for repairing in the hall where the plaster

had burned through the paper. It was also explained that the men working for Mr. King turned in their time cards every Saturday, showing the time they had worked during the week; that the time cards were destroyed, and the total paid each man entered in the labor book at the week end. Consequently the item of May 15th covered work that may have been performed on any day between the 10th and 15th, both inclusive, and the work shown by the item of May 29th may have been done on any day between the 17th and 29th, both inclusive.

The testimony on behalf of respondent on this point was as follows: M. F. Trebilcox testified that the two lower flats were rented to tenants who took possession on April 1st. Mr. Dunn, one of the tenants, testified that he took possession on April 7th of the east lower flat; that at the time it was finished and ready for occupancy and there were no mechanics working in the building after that except, he believed, some painters were working on the garage, and he did not think they had finished upstairs; he thought the west flat was also finished; that some carpenters were working "for maybe a week or more." Defendant Wright testified that he moved into the building the 1st of March; that labor ceased on May 12th, and at that time there was no further work to be done on the property, either the upper part or the lower flats. Mr. Wright's wife corroborated his testimony.

The discussion to follow will be the better understood by first reproducing herein the provisions of section 1187 of the Code of Civil Procedure pertinent to the points advanced here by the appellants. Said section provides that every person save the original contractor—

"claiming the benefit of this chapter [on the enforcement of liens of mechanics, laborers and materialmen], within thirty days after he has ceased to labor or has ceased to furnish materials, or both, or at his option, within thirty days after the completion of the original contract, if any, under which he was employed, must file for record * * * a claim of lien. * * *

The said section further provides:

"Any trivial imperfection in the said work, or in the completion of any contract by any lien claimant, or in the construction of any buildings," etc., "shall not be deemed such a lack of completion as to prevent the filing of any lien; and, in all cases, any of the following shall be deemed equivalent to a completion for all the purposes of this chapter: The occupation or use of a building, improvement, or structure, by the owner, or his representative; or the acceptance by said owner or said agent, of said building, improvement, or structure, or cessation from labor for thirty days upon any contract or upon any building, improvement or structure or the alteration, addition to, or repair thereof; the filing of the notice herein-after provided for. The owner may within ten

days after completion of any contract, or within forty days after cessation from labor thereon, file for record in the office of the county recorder of the county where the property is situated, a notice setting forth the date when the same was completed, or on which cessation from labor occurred, together with his name and the nature of his title, and a description of the property sufficient for identification, which notice shall be verified by himself or some other person on his behalf. * * * In case such notice be not so filed, then the said owner and all persons deraining title from or claiming any interest through him shall be estopped in any proceedings for the foreclosure of any lien provided for in this chapter from maintaining any defense therein based on the ground that said lien was not filed within the time provided in this chapter: Provided, that all claims of lien must be filed within ninety days after the completion of any building, improvement or structure, or the alteration, addition or repair thereto."

[1, 2] The appellants insist that the evidence without conflict shows that there was not an actual completion of the building under the contract on the 12th day of May, 1915, but that there was only a constructive completion by cessation of labor on said day. But in this they are mistaken. Wright, the owner, testified, it is true, that work or labor ceased on the building on the 12th day of May, 1915. He also testified, as seen, and Mrs. Wright corroborated him, that the last work necessary to be done on the building to complete the contract was performed on the 12th day of May, and that the building was then completed, and nothing more was to be done thereon. Of course, that testimony was the equivalent of testimony that the contract was completed, and from it the trial court was justified in so finding, if it believed the testimony, as obviously it did. Manifestly there must have been a cessation of labor when the building was completed according to the terms of the contract, but the cessation from labor by reason of the actual completion of the contract is not the cessation of labor which, under section 1187, itself constitutes a constructive completion of the building or contract.

[3] There is, it is true, some testimony slightly tending to show that the actual completion occurred at a later date, which would render the liens effective; but this merely raised a conflict in the evidence upon that issue, which the trial court resolved, as it was within its constitutional province to do, in favor of the defendants. This court is, as is well understood, concluded by the findings so made, and must accept as the fact that the building was actually completed according to the terms and requirements of the contract on the 12th day of May, 1915. It follows, therefore, that the appellants filed their claims too late to render them effective or of any force.

[4, 5] As to the work of repapering a por-

tion of the hallway on May 29, 1915, by King, who had the contract for papering the house, the uncontradicted testimony upon that point shows that said work of repapering occurred after King had finished his contract. Wright, the owner of the house, called on King after the building had been in all respects completed, and, informing him that there was a defect in the papering in the hallway, requested him (King) to repaper the defective part, and, as seen, on the 29th day of May King did so. This work of repapering required, according to the testimony, approximately two hours' time. If the testimony of King as to this matter is to be accepted, the defect in the papering was not due to any remissness or lack of proper skill or care on his part in doing the work originally, but to some circumstance or fact subsequently occurring and over which he had no control; and, if this be true, the work of repapering was as far removed from any consideration of the original contract as though the papering had naturally become defective from long use. But, however that may be, it is clear that if the original papering was defectively done, and the repapering was for that reason required to be done, it amounted to a trivial imperfection only in the work, within the meaning of that language in section 1187. All that the statute requires, to fix the time from which the right of lien claimants to file their liens begins to run, is that there be, so far as actual completion is concerned, a substantial completion, and, in this case, the testimony shows that there was such a completion, if, indeed, not more than that. *Willamette, etc., Co. v. College Co.*, 94 Cal. 229, 237, 29 Pac. 629; *Harlan v. Stufflebeem*, 87 Cal. 508, 25 Pac. 686; *Santa Monica L. & M. Co. v. Hege*, 119 Cal. 376, 379, 51 Pac. 555; *Schindler v. Green*, 149 Cal. 752, 754, 87 Pac. 626; *Bianchi v. Hughes*, 124 Cal. 24, 27, 56 Pac. 610; *Joost v. Sullivan*, 111 Cal. 286, 292, 43 Pac. 896.

The foregoing, of course, disposes of the proposition earnestly urged by the appellants that the completion was not actual, but by cessation from labor, and that, therefore, they were entitled to file their liens at any time within 120 days from the date of the cessation from labor, and that in that view their liens were seasonably filed under the law. But there is some intimation by appellants in their briefs that the 120 days' limitation applies in all cases of completion, whether actual or statutory, and they cite as supporting that view the cases of *Buell v. Brown*, 131 Cal. 158, 63 Pac. 167, and *Farnham v. Cal., etc., Trust Co.*, 8 Cal. App. 266, 96 Pac. 788.

[6] In each of these cases the lien claimants relied upon a constructive completion of the contract by cessation from labor, and it was held that where a contract has not been actually completed, but there was a constructive completion by cessation from labor

for the period of 30 days, and no notice of such cessation had been filed by the owner with the office of the county recorder, lien claimants have 90 days from and after the expiration of the 30 days of cessation from labor within which to file their liens. In other words, in such case lien claimants relying on completion by cessation from labor are, like those relying on actual completion, limited, as to the time within which they may file their liens, where the owner has failed or neglected within the prescribed period to file with the county recorder a notice of the cessation from labor, to 90 days from the time that there has been a completion by cessation from labor (30 days from and after the time of such cessation) within which to file their liens, or 120 days from the date of the cessation from labor. But, in this case, there was an actual completion, and the rule as to the 120 days' period can have no application where there is an actual completion. The statute plainly provides that all claims of lien must be filed within 90 days after the completion of any building, improvement, etc., and, as a matter of fact, that provision, as above suggested, applies, not only to cases of actual completion but also to those of constructive completion, including completion by cessation from labor, for in the latter case, as is obvious, there is no completion until there has been a cessation from labor for the period of 30 days, from and after which time the lien claimant has, by virtue of the estoppel arising against the owner upon his failure to file with the county recorder notice of the cessation from labor 90 days within which to file his lien.

[7] Counsel for the respondents state in their brief that the appellants claim, for the first time on this appeal, that there was a constructive completion of the contract through occupation and use of the building by the owner. But counsel for appellants make no such contention here. Indeed, in their closing brief they positively declare that there is no ground afforded by the record for any such claim, and in this they are clearly right. The owner never ceased occupying the building at any time pending the reconstruction or alteration thereof, except during the brief time the building was in the course of removal from Eleventh and O streets to Twenty-Fourth and L streets in Sacramento. The lien claimants here involved did all their work after the occupation or use by the owner took place, or while the owner was occupying and using the building. This, quite clearly, is not such an occupation or use as raises a conclusive presumption of completion under the statute. *Orlandi v. Gray*, 125 Cal. 372, 374, 58 Pac. 15; *Boscut v. Waldmann*, 31 Cal. App. 245, 255, 160 Pac. 180.

[8-10] It is lastly contended that, because the materials and the labor were furnished

with the knowledge and consent of Wright, an implied contract arose between the claimants and Wright, and that, having received the benefit of the labor performed and the materials furnished, Wright ought in equity and good conscience to be held to be personally liable and compelled to pay the appellants their claims. There are two answers to this proposition, viz.:

(1) As the court found, upon sufficient evidence, to be true, the materials and labor were furnished to Williams, the contractor, and, as is necessarily implied from that finding, the materials and the labor were not furnished to Wright. In other words, there was no contract, either express or implied, between the materialmen and the laborers and the owner. There was, therefore, no privity of contract between the defendant Wright and the several lien claimants. Obviously, to sustain an action against Wright, it must be upon the theory that he is personally liable, and to render him personally liable, there must be shown to exist a contract, express or implied, or a contractual privity, between him and those claiming lien.

(2) The complaints, in neither counts thereof, submit any issue as to the reasonable value of the labor and the materials in the form of a common count. It is true that the complaints are in two counts, but in both it is alleged that the labor bestowed upon and the materials furnished for the building were so bestowed and furnished in pursuance of the contract between the contractor and the owner and were bestowed and furnished at the instance of the contractor. There is no allegation in either count of the complaints that the materials were furnished for and the labor done on the building at the direct instance of Frank E. Wright, the owner, or at his instance at all. There is, in short, no attempt to rely upon a common count in the form of a quantum meruit. While the second count in each of the complaints alleges that the materials and the labor were "of the reasonable value of" the respective amounts of the several claims, the right to the enforcement of the payment of said claims is expressly and primarily based upon the contract between Williams and Wright and upon the theory that said materials and labor were furnished and bestowed at the instance of Williams, the contractor.

The case of *S. C. L. Co. v. Schmitt*, 74 Cal. 625, 626, 16 Pac. 516, was decided when section 1183 of the Code of Civil Procedure provided that all contracts for work on buildings or other improvements, where the amount agreed to be paid thereunder exceeded \$1,000, should be in writing and filed by the owner in the office of the county recorder, in default of which the contract became wholly void, and no recovery could be had thereon, and that in that case the work done and the materials furnished thereunder were to be deemed

to have been done and furnished at the personal instance of the owner, and that laborers, mechanics, and materialmen doing work thereon and furnishing materials therefor should have a lien for the value thereof. Answering the argument made in that case that, notwithstanding that no liens were filed for the enforcement of the plaintiff's claim for furnishing materials for a building constructed for the owner by a contractor, a personal judgment for the value of the materials should be entered and enforced against the owner, the Supreme Court said:

"It is claimed, although no lien exists on the building as to the contractor, and those who may claim under him, and none as to the materialman, that nevertheless, according to section 1183, Code of Civil Procedure, the plaintiff ought to have had a personal judgment against Schmitt, with whom he never had any contract to furnish the building materials. * * * We cannot agree with the appellant in a case where neither the contractor nor the materialman has filed any lien, such as is given them by statute, that under the section, *supra*, a personal judgment for the value of the materials furnished may be had against the owner of the building, who did not purchase them, and who was under no contract with the materialmen, either express or implied, to pay for them."

See, also, *Davies-Henderson L. Co. v. Gottschalk*, 81 Cal. 641, 647, 22 Pac. 860; *First National Bank v. Perris*, 107 Cal. 55, 64, 40 Pac. 45; *Marchant v. Hayes*, 120 Cal. 137, 139, 52 Pac. 154.

The cases relied upon by appellants as supporting their position that they are entitled to a personal judgment against the owner of the building are *Castagnino v. Balletta*, 82 Cal. 250, 23 Pac. 127, *Acme Lumber Co. v. Wessling*, 19 Cal. App. 406, 126 Pac. 167, and *Gentle v. Britton*, 158 Cal. 328, 111 Pac. 9. But the decisions in those cases proceed upon a very much different state of facts from that with which we are confronted in this case.

In *Castagnino v. Balletta* the action was by the contractor against the owner, between whom and the former a contract had been entered into for the construction of certain buildings. The complaint declared upon two counts, one being for the foreclosure of a mechanic's lien, and the other in indebitatus assumpsit, or a common count, founded upon the proposition that the original contract had been departed from in material respects in the construction of the buildings. That is not this case.

In *Acme Lumber Co. v. Wessling* the action was for the foreclosure of a lien for work done under an oral, and consequently an unrecorded, contract between the contractor and a tenant in possession of the real property upon which the improvement was made. It was made to appear that the owner had knowledge of the improvement being

made on his premises, but that he failed to file the notice of nonresponsibility prescribed by section 1192 of the Code of Civil Procedure, and it was therefore held that, by virtue of the terms of said section, it was to be presumed that the improvement was constructed or made at the instance of the owner of the premises, and said premises were subject to the lien filed for the materials and labor used in the work of improvement. But it is claimed or intimated that in that case the complaint proceeded upon a quantum meruit against the owner of the premises and that the appellate court held that it was proper to do so. But, even so, that case is not in point here, for the reason that between the plaintiff therein, who was the assignor of the contractor, and the owner, there existed a privity of contract, created by the terms of section 1192.

Gentle v. Britton is another case where section 1192 was applied, the improvement having been made under a contract between the contractor and a party not the real owner of the premises upon which the improvement was made. The conditions pointed out by said section 1192 to render the premises subject to a lien for the labor and materials used in the improvement were found to exist in that case; hence an equitable lien was created on the premises to secure the payment of the value of the labor and materials. It is obvious that section 1192 has no application to the facts of this case.

We have been shown no reason for disturbing the judgment, and it will therefore stand affirmed.

We concur: CHIPMAN, P. J.; BURNETT, J.

On Petition for Rehearing.

HART, J. Appellants have filed a petition for rehearing, in which several points are raised. The first one is that the contract in question was an entire and not a divisible one. The contract was made by Wright, the owner, with Williams, the contractor, and provided for the erection of a six-flat building upon a lot at Eleventh and O streets, in the city of Sacramento, for the consideration of \$9,500. Said contract also contained the following provision:

"It is hereby agreed that in consideration of receiving the above contract, the party of second part will furnish plans, and superintend the moving and erection of flats under present house, the location to be Twenty-Third and L streets, without commission or consideration; it being understood that this work is to be done at absolute cost to the owner. The cost of remodeling not to exceed \$1,800, and moving not to exceed \$125. He will also agree to superintend erection of garages and other work on lot which owner may desire under above conditions."

The specific point made is that the work on the O street property was not completed until June 4 or June 12, 1915, which is "the true date from which the tolling of the limitation of time within which liens may be filed is to be computed," and not May 12, 1915, the date of the completion of the work on the L street property.

[11, 12] In neither appellant's opening brief nor in his reply brief is there one word concerning the Eleventh and O streets property. Indeed there seems from the record not to be any occasion for referring to that property, because there is nothing in the pleadings, nothing in the findings, nothing in the evidence, and nothing in the judgment having any reference to the O street property, except incidentally it is mentioned by one of the witnesses. The liens were all filed against the Twenty-Third and L streets property, and there was no issue in the case regarding the O street property. If questions can be raised for the first time in the petition for rehearing, there would never be an end to litigation. It has in many cases been held that, where a case has been decided, a new point raised in appellant's reply brief, or in the petition for rehearing, will not be considered. *Buena Vista Oil Co. v. Park Bank of Los Angeles*, 180 Pac. 12; *Camp v. Boyd*, 182 Pac. 60; *Hibernia Sav. & Loan Soc. v. Farnham*, 153 Cal. 578, 96 Pac. 9, 126 Am. St. Rep. 129; *Flores v. Stone*, 21 Cal. App. 105, 131 Pac. 348, 351, 352. However, in this case, we will consider the point raised.

In 13 C. J. p. 563, it is said:

"If the consideration is single, the contract is entire, but if the consideration is either expressly or by necessary implication apportioned, the contract will be regarded as severable. * * * Where the portion of the contract to be performed by one party consists of several and distinct items, and the price to be paid is apportioned to each item according to the value thereof and not as one unit in a whole or in a part of a round sum, the contract will ordinarily be regarded as severable."

In Elliott on Contracts (volume 4, § 3667) it is said:

"A building, construction, or working contract is entire, and not divisible, where it is for an entire structure for a stated compensation. * * * If the price is apportioned among the several items, or to the different parts of one item, the contract will generally be construed as severable."

In the case at bar "the price was apportioned to each item according to the value thereof, and not as one unit," and we hold that the contract was not an entire one, but was severable.

As to the remaining points raised in the petition, that "provisions as to trivial imperfections were designed merely to prevent premature filing of liens," and that "slight

work after substantial completion, done at request or with consent of owner or subcontractor, extends time for filing liens," we are satisfied with what is said in the main opinion.

The petition for a rehearing will be denied.

We concur: CHIPMAN, P. J.; BURNETT, J.

(43 Cal. App. 180)

NEZIK v. COLE et al. (Civ. 3018.)

(District Court of Appeal, First District, Division 1, California. Sept. 3, 1919.)

1. APPEAL AND ERROR §373(1)—NECESSITY OF BOND ON APPEAL BY ALTERNATIVE METHOD.

The new and alternative method of taking appeals, provided by Code Civ. Proc. § 941a, 941b, and 941c, enacted in 1907, dispenses with the necessity of an undertaking on appeal, and the fact that a bill of exceptions is prepared in place of the reporter's transcript authorized by section 953a has no bearing on the question; the latter section having to do with the preparation of the record on appeal.

2. APPEAL AND ERROR §607(1)—MAKING UP OF RECORD.

An appeal having been properly taken in compliance with either the old or the alternative method, the record may be made up in any way permitted by the Code.

3. CORPORATIONS §594—DISSOLUTION AT EXPIRATION OF TERM OF EXISTENCE.

A corporation is dissolved at the expiration of the term of its corporate existence.

4. CORPORATIONS §594—POWER TO SHORTEN TERM OF EXISTENCE.

A company had power to shorten the term of its corporate existence by an amendment to its articles of incorporation even if the result of such abbreviation amounted to an almost immediate dissolution.

5. ABATEMENT AND REVIVAL §39—CONTINUANCE OF ACTION AGAINST REPRESENTATIVE OF DISSOLVED CORPORATION.

If Code Civ. Proc. § 385, providing that an action does not abate at the death or disability of a party if the cause of action survives, is applicable to the case of a corporation on dissolution, it does not authorize the continuance of the action against the corporation itself, but allows the action to be continued only against the representative or successor in interest, brought in on motion.

6. ABATEMENT AND REVIVAL §39—CONTINUANCE OF ACTION AGAINST CORPORATION IN NAME OF REPRESENTATIVES AFTER DISSOLUTION.

Despite Civ. Code, § 400, where a corporation was dissolved, during action against it by expiration of the term of its existence, it was necessary, for the action to continue at all, that the company's successors or representa-

tives under section 400 be properly brought in on motion as defendants, as provided in Code Civ. Proc. § 385.

7. CORPORATIONS §630(1/2)—VOID PROCEEDINGS IN ACTION AGAINST AFTER DISSOLUTION.

After a corporation was dissolved by expiration of the term of its existence, filing of demurrers and answer in its name and on its behalf in an action pending against it were nullities, as the company could no longer be served with process, could not appear, and could not itself admit anything, or authorize any one else to do so for it.

8. CORPORATIONS §630(3) — PROCESS INEFFECTIVE AS TO COMPANY AFTER ITS DISSOLUTION PENDING ACTION AGAINST IT.

After a corporation was dissolved by expiration of the term of its existence, any service, on counsel previously authorized to represent it in a pending action, of plaintiff's notice of motion to file an amended and supplemental complaint, and the notice that such pleading had been filed, and of the time granted the company's directors, substituted as its trustees, within which to plead thereto, were not effectual so far as any interest of defendant company was concerned.

9. ABATEMENT AND REVIVAL §39—SUBSTITUTION OF DIRECTORS AS TRUSTEES ON DISSOLUTION OF CORPORATION BY EXPIRATION OF TERM.

After a corporation, pending action against it, had become dissolved by expiration of the term of its existence, if plaintiff intended to secure any judgment enforceable against the company's directors as its trustees, he should have had them substituted as parties in place of the company, under Code Civ. Proc. § 385.

10. PARTIES §61—SUBSTITUTION OF PARTY BY ORDER OF COURT NOT AMENDMENT.

The substitution of one party for another by order of court is not such an amendment of a pleading as is required to be made on notice or to be engrossed, otherwise than to be entered in the minutes of the court.

11. PARTIES §61 — AMENDMENT OF COMPLAINT SUBSTITUTING DIRECTORS AS DEFENDANTS AFTER DISSOLUTION.

In action against corporation pending which company was dissolved by expiration of term of existence, notice of motion for permission to file an amended and supplemental complaint substituting the company's directors, as trustees, and the order directing that the proposed amended complaint be filed and made of record, further directing that the new defendants named in the amended complaint have 20 days in which to plead, *held* a substantial compliance with Code Civ. Proc. § 385, operating to bring about the substitution as defendants of the directors as trustees for the defunct company.

12. PARTIES §63—NOTICE TO SUBSTITUTED PARTY.

One substituted in a cause must be duly notified of the fact of his having been made a party before he can be affected by notices or proceedings in the action.

13. JUDGMENT \Rightarrow 17(1) — JUDGMENT BY DEFAULT VOID AGAINST SUBSTITUTED DEFENDANTS NOT SERVED.

Default judgment against the individual defendants in an action against a corporation which was dissolved pending action by expiration of the term of its existence, the action being continued by amendment against the company's directors as its trustees, in the absence of service upon or authorized appearance by or on behalf of the individual defendants, was unauthorized and void.

Appeal from Superior Court, Inyo County; Wm. D. Dehy, Judge.

Action by John Nezlik against Walter D. Cole and others. Judgment for plaintiff, and defendants appeal. Reversed, and cause remanded, with directions.

Thomas, Beedy & Lanagan, of San Francisco, for appellants.

Edmon G. Bennett, of Los Angeles, Chas. E. Barrett, of Las Vegas, Nev., and Platt & Sanford, of Carson City, Nev., for respondent.

WASTE, P. J. Appeal from a judgment, entered after default, awarding damages in the sum of \$17,688 for personal injuries.

Within the time when an appeal may be taken appellants filed with the clerk of the court in which the judgment was entered a notice stating the appeal from the same and served a similar notice on the attorneys for the adverse party. They did not, however, within five days after service of the notice of appeal, file the undertaking, or, in lieu thereof, make the deposit of money with the clerk as required by sections 940 and 941 of the Code of Civil Procedure, and no waiver of the same was ever made or filed. Neither did appellants, in lieu of preparing and settling a bill of exceptions, pursuant to the provisions of section 650 of the same Code, file with the clerk the notice required by section 953a thereof, requesting that a transcript of the proceedings be made up and prepared.

On the contrary appellants caused to be duly prepared and settled a bill of exceptions, containing the usual statement of the matters occurring at the trial. Respondent moves to dismiss the appeal upon the ground that no undertaking on appeal having been given or deposit in lieu thereof made, this court has no jurisdiction of the cause, for the reason that no appeal has been perfected in the manner or form prescribed by law.

[1, 2] The motion is without merit. The new and alternative method of taking appeals provided by sections 941a, 941b, and 941c of the Code of Civil Procedure, enacted in 1907, dispenses with the necessity of an undertaking. *Estate of McPhee*, 154 Cal. 385, 97 Pac. 878; *Mitchell v. California S. S. Co.*, 154 Cal. 781, 99 Pac. 202; *Union Collec-*

tion Co. v. Oliver, 162 Cal. 755, 124 Pac. 435; *Title Ins., etc., Co. v. Cal. Dev. Co.*, 168 Cal. 397, 402, 143 Pac. 723. Section 941b provides that the notice of appeal when filed "shall without further action on the part of the appellant transfer the cause for decision and determination to the higher court." "That this appeal was perfected under the new method there can be no question. Appellant filed his notice, and that was all that was required to perfect it." *Mitchell v. California, etc., S. S. Co.*, *supra*. The fact that a bill of exceptions was prepared in place of the reporter's transcript authorized by section 953a has no bearing upon the question. The latter section has to do with the preparation of the record on appeal. An appeal having been properly taken in compliance with either the old or the alternative method, the record may be made up in any way permitted by the Code. *Lang v. Lilley & Thurston*, 161 Cal. 295, 119 Pac. 100; *Union Collection Co. v. Oliver*, *supra*.

The motion to dismiss the appeal is denied.

The original complaint in this action was filed July 8, 1914, against the Pacific Coast Borax Company, then a corporation, incorporated for a period of 50 years from and after July 5, 1912. It was alleged that plaintiff had suffered severe personal injuries by reason of the negligence of defendant in failing on two separate occasions to furnish him a safe place in which to work. After obtaining time by stipulation within which to plead, on September 18, 1914, counsel, who later specially appeared in the action for appellants, filed a general and specific demurrer, purporting to be interposed on behalf of the borax company. At the hearing on demurrer the same counsel orally suggested to the trial court that the corporation defendant had ceased to exist, and moved for a dismissal of the action, which was denied. The demurrer was overruled and an answer was filed on April 26, 1915.

From the answer it appeared that on September 8, 1914, which date was prior to the appearance of the company in the action by proceedings duly taken to that end, the corporation had amended its articles by changing the term for which it was to exist from 50 years to 2 years, 2 months and 7 days from and after the date of its incorporation. In other words, the life of the company had expired on September 12, 1914, 6 days before the demurrer purporting to be on its behalf was filed in this action.

After the service of notice thereof by plaintiff on the attorneys who first made the purported appearance in the action on behalf of the borax company, the court granted permission to plaintiff to file an amended and supplemental complaint, naming as defendants the appellants, who were alleged to be the directors of the Pacific Coast Borax Com-

pany prior to and at the time it ceased to exist as a corporation. The amended and supplemental complaint set forth the original causes of action, the facts relating to the termination of the life of the corporation, and that the directors thereof (appellants) had thereby become its trustees, with full power and authority to settle its affairs. The prayer of the amended and supplemental complaint was for recovery "of and from the said defendants" of the amount claimed as damages by reason of the personal injuries. The court ordered that the defendants named therein be given 20 days from the date of service of a copy of the order so fixing the time in which to plead.

No summons or any notice that the appellants so alleged to be directors of the Pacific Coast Borax Company prior to and at the time it ceased to exist had been made defendants in the action was served on the defendants, or either of them, or upon any attorney of record other than upon the attorneys who first appeared and filed the demurrer and thereafter the answer before referred to. Except in the same manner, no service was made of the court's order fixing the time within which defendants might plead to the amended and supplemental complaint.

The defendants not appearing, judgment by default was entered against them in the amount prayed for. Thereupon the defendants, specially appearing by counsel for the purpose, made a motion, supported by affidavits of merit and as to the facts, for an order setting aside the default judgment and all subsequent proceedings. The motion was based on the facts, substantially set forth herein, and the further fact that no one of the defendants was a director of the borax company at the time it ceased to exist. No counter showing was made by the plaintiff. The court denied the motion, and appellants have appealed from the judgment.

[3-5] A corporation is dissolved at the expiration of the term of its corporate existence. *Kohl v. Lillenthal*, 81 Cal. 378, 386, 20 Pac. 401, 22 Pac. 689, 6 L. R. A. 520. The Pacific Coast Borax Company had power to shorten the term of its corporate existence by an amendment to its articles of incorporation, even if the practical result of such abbreviation amounted to almost an immediate dissolution. *Tognazzini v. Jordan*, 165 Cal. 19, 130 Pac. 879, Ann. Cas. 1914C, 655. "It is settled beyond question that, except as otherwise provided by statute, the effect of the dissolution of a corporation is to terminate its existence as a legal entity, and render it incapable of suing or being sued as a corporate body, or in its corporate name. It is dead, and can no more be proceeded against as an existing corporation than could a natural person after his death. There is no one who can appear or act for it, and all actions pending against it are abated,

and any judgment attempted to be given against it is void." *Crossman v. Vivlenda Water Co.*, 150 Cal. 575, 580, 89 Pac. 335, 337. Where there is no statute providing for the continuance of the corporation itself after dissolution, for the purpose of settling its affairs, provision is generally made for the doing of this by others. We have such a provision in this state. Section 400 of the Civil Code provides:

"Unless other persons are appointed by the court, the directors or managers of the affairs of a corporation at the time of its dissolution are trustees of the creditors and stockholders or members of the corporation dissolved, and have full power to settle the affairs of the corporation."

Before the Supreme Court was called upon to construe the provision of the act of the Legislature relating to the forfeiture of charters by corporations for failure to pay license taxes, to which we will shortly refer, section 400 was held to be applicable in all cases of dissolution, whether voluntary or involuntary. *Havemeyer v. Superior Court*, 84 Cal. 327, 365, 24 Pac. 121, 10 L. R. A. 627, 18 Am. St. Rep. 192; *Crossman v. Vivlenda Water Co.*, supra. Construing that section in the last-mentioned case, the court said:

"There is no statute of this state that authorizes the commencement or continuance of an action against the corporation after its legal death. We have no statute similar to that of several states, providing that in the event of the dissolution of a corporation its existence shall be continued either indefinitely or for a specified time for the settlement of its affairs. Statutes similar to our section 400 of the Civil Code above quoted do not have the effect of continuing the existence of the corporation as cestui que trust, or otherwise, so as to render it capable of defending actions in its corporate name. *Thompson on Corporations*, § 6739; *Clark & Marshall on Private Corporations*, § 333; *Sturgis v. Vanderbilt*, 73 N. Y. 384. If section 385 of the Code of Civil Procedure, providing that an action does not abate by the death or any disability of a party, if the cause of action survives, is applicable to the case of a corporation, it does not authorize the continuance of the action against the corporation itself, but allows the action to be continued only against the 'representative or successor in interest,' brought in on motion." *McCulloch v. Norwood*, 58 N. Y. 562, 568.

See, also, *Judson v. Love*, 85 Cal. 463.

[6] Respondent, nevertheless, contends that the lower court, having acquired jurisdiction over the defendant and the subject-matter of the action by reason of the service of summons, continued to entertain and hold such jurisdiction, regardless of the fact that subsequent to such jurisdiction attaching the corporation voluntarily ceased to exist, and that, while the directors might properly be substituted as parties defendant, such substitution was not essential to a continuance of the action. He cites three cases as sup-

porting this proposition: *Lowe et al. v. Superior Court of Los Angeles County*, 165 Cal. 708, 134 Pac. 190, 192; *Brandon v. Umpqua Lumber & Timber Co.*, 166 Cal. 322, 136 Pac. 62; *Turney v. Morrissey*, 22 Cal. App. 271, 134 Pac. 335. An important distinction must be made in the consideration of these decisions. Each deals with facts arising under the provisions of the special act of the Legislature relating to the payment of the license tax by corporations and cases of forfeiture under its provisions. By reference to the above statute, and acts amendatory thereof, we find that the provision of section 10a, Act Extra Sess. 1906, p. 25, as amended by section 2, Act 1907 (Stats. 1907, pp. 746, 747), so strongly relied on by respondent, is restricted by the title of the act to "making provision for settling the affairs of corporations where said tax has not been paid," and by the language of the provision itself to "cases of forfeiture under the provisions of this act."

As we read the cases relied on by respondent, they merely determine that, since the amendment of 1907 to the act in question, an action pending against a corporation which has forfeited its charter by reason of failure to pay its license tax shall not abate by reason of the forfeiture, but may be continued and prosecuted or defended in the corporate name, the control and management of the action, so far as the corporate interests are concerned, being in the directors or managers in office at the time of the forfeiture, they being the trustees of the corporation, its stockholders or members. *Brandon v. Umpqua Lumber Co.*, supra. We find nothing in any of said decisions, read in connection with the statute under which the cases arose, which may properly be said to remove this case, and cases like it, from the operation of the well-established general principles so succinctly stated in the authorities from which we have quoted. As was so well pointed out by the Chief Justice in the *Crossman Case*, supra, section 400 of the Civil Code, already quoted, does not have the effect of continuing the existence of a corporation after dissolution so as to render it capable of defending actions in its corporate name. It was therefore necessary that if the action could continue at all its successors or representatives, under section 400, be properly brought in on motion, as provided in section 385 of the Code of Civil Procedure.

[7, 8] Assuming the correctness of the recital in the judgment in this case, that the Pacific Coast Borax Company was regularly served with process, the filing of the demurrers and answer in its name, and purporting to be in its behalf, was a nullity. So far as the dead corporation itself was concerned there could be no admission or estoppel. It could no longer be served with process, could not appear, could not itself admit anything

nor authorize any one else to do so for it. It was legally dead. *Crossman v. Vivlenda Water Co.*, supra. The action of counsel, who may have had authority to represent the defendant company prior to the termination of the period of its legal existence, could not, so far as that party was concerned, vitalize any proceedings taken in the abated action after the corporation ceased to exist. Any subsequent service on them by the plaintiff of the notice of motion to file the amended and supplemental complaint, the notice that such pleading had been filed, and of the time granted the substituted defendants within which to plead thereto, was not effectual, so far as any interest of the defunct corporation was concerned. *Deiter v. Kiser*, 158 Cal. 259, 262, 110 Pac. 921; *Bell v. San Francisco Savings Union*, 153 Cal. 64, 69, 94 Pac. 225; *Pedlar v. Stroud*, 116 Cal. 462, 48 Pac. 371.

[9] Unless, therefore, it can be shown that some other course was followed, the result of which was to properly bring the appellants into the action, after which, by due service or voluntary appearance, they were subjected to the jurisdiction of the court, the respondent will have failed to maintain his position here. From the very nature of things the dissolution or death of the defendant, like the death of any other party to a pending action, could only be brought to the attention of the court on proper suggestion made by some one other than the defunct corporation itself. *Combes v. Keyes*, 89 Wis. 297, 62 N. W. 89, 27 L. R. A. 369, 46 Am. St. Rep. 839. If the plaintiff intended to secure any judgment in this case, enforceable against these appellants, he should have had them substituted under section 385 of the Code of Civil Procedure as parties in place of the corporation, after the latter had become functus officio. *Ex parte Tinkum*, 54 Cal. 201, 208.

The notice of motion given by the plaintiff for permission to file the amended and supplemental complaint was based upon the notice itself and upon all the records, pleadings, and files in said action. The verified proposed amended and supplemental complaint was attached to, and by apt reference made a part of, the notice and motion. There was on file in the action the purported answer of the borax company, which was duly verified by one purporting to have been the secretary of the corporation prior to and at the time it ceased to legally exist. It fully appeared in both of these verified pleadings that the defendant corporation was legally dead. It was alleged in the verified proposed amended and supplemental complaint that "immediately prior and at the time of said dissolution" appellants, naming them, "were the duly elected, qualified, and acting board of directors of said corporation, and that they, as such directors are now the legally constituted and authorized trustees,

representatives, and successors in interest of said corporation, and trustees of the creditors, stockholders, and members of said corporation, with full power and authority to settle the affairs of said dissolved corporation, and to appear in and defend this action, and as such are true and proper defendants herein."

[10] This notice of motion was not served on any of the appellants personally. It was addressed to the defendant borax company and to the attorneys who had purported to represent it in the earlier proceedings in the action. It was served on these attorneys and on no one else. It seems to be the well-settled rule that the substitution of one party for another by order of court is not such an amendment of a pleading as is required to be made on notice or to be engrossed otherwise than to be entered in the minutes of the court. *Kittle v. Bellegarde*, 86 Cal. 556, 562, 25 Pac. 55; *Taylor v. Western Pacific R. R. Co.*, 45 Cal. 323, 337.

[11] No record appears in the transcript from which we may gather that a formal order was made and entered in the minutes of the court, either in substance or in *hac verba*, substituting the appellants as parties defendant in the place and stead of the borax company. We are of the opinion, however, that the notice of motion and the order of the court directing that the proposed amended and supplemental complaint be filed and made of record in the case, and further directing that the defendants named in said amended and supplemental complaint have and were given 20 days from date of a service of a copy of this order in which to plead thereto, constituted a substantial compliance with section 385, Code of Civil Procedure, and operated to bring about such substitution. *Taylor v. Western Pacific*, *supra*; *Campbell v. West*, 93 Cal. 653, 29 Pac. 219, 645; *Ford v. Bushard*, 116 Cal. 273, 276, 48 Pac. 119. Furthermore, there is a recital in the judgment regarding the substitution of the defendants which, liberally construed, would show, whether with formality or not, the suggestion of the dissolution of the original defendant and a continuance of the action, or a revival of it, against the appellants. *Gregory v. Haynes*, 13 Cal. 592.

[12] One substituted in a cause must be duly notified of the fact of his being made a party before he can be affected by notices or proceedings in the action. *Judson v. Love*, 35 Cal. 463, 469. "A defendant appears in an action when he answers, demurs, or gives the plaintiff written notice of his appearance, or when an attorney gives notice of appearance for him." Section 1014, Code Civ. Proc. None of these things was done in the instant case. The attorneys for the dissolved corporation defendant were never authorized to and never appeared as attorneys of record in

the cause for appellants so as to waive service of the amended and supplemental complaint or notice of its filing and of their time to answer. Service on them alone, as we have pointed out, was a nullity after the borax company ceased to exist. Prior to their appearance to move to set aside the default and judgment, which was special for that particular purpose, and in no sense a general appearance in the cause (*Powers v. Braly*, 75 Cal. 237, 239, 17 Pac. 197), they never appeared in the action for the appellants at all. Proper service of the notice that appellants had been substituted as parties defendant in the action, and of the amended and supplemental complaint, not having been made on the appellants, their rights were not affected by the subsequent proceedings.

[13] It follows, therefore, that as there was no service upon, or authorized appearance by or in behalf of the defendants, the default entered in the action against the appellants was unauthorized, the judgment entered thereon was void, and must be reversed. *Linott v. Rowland*, 119 Cal. 453, 51 Pac. 687; *Hill v. City Cab, etc., Co.*, 79 Cal. 188, 191, 21 Pac. 728; *Altpeter v. Postal Tel. & Cable Co.*, 26 Cal. App. 705-713, 148 Pac. 241.

The judgment is reversed, and the cause remanded, with directions to the trial court to vacate and set aside the default of the defendants, with permission granted to them to plead to the amended and supplemental complaint, as in the original order therefor provided.

We concur: RICHARDS, J.; KERRIGAN, J.

(25 N. M. 447)

HARRIS v. KEEHN et al. (No. 2089.)

(Supreme Court of New Mexico. Sept. 24, 1919.
Rehearing Denied Oct. 24, 1919.)

(Syllabus by the Court.)

LANDLORD AND TENANT §133(3)—RIGHT TO DAMAGES OF TENANT DISTURBED IN POSSESSION.

A tenant in possession under an unexpired lease who has not abandoned the premises, although not upon them when entry thereon is made, has a right to the possession of said premises against the world and may recover damages from one who disturbs or deprives him of such possession.

Appeal from District Court, Lincoln County; Richardson, Judge.

Suit by Thomas Keehn and William H. Keehn against William R. Harris, Mary Harper, and another. Judgment for plaintiffs against defendants Harris and Mary Harper, and Harris brings error. Affirmed.

This case arose out of the following facts: The defendants in the court below, Monroe Harper and Mary Harper, were the owners of 160 acres of land known as the Bar Circle Z. ranch in Lincoln county. On September 13, 1913, said defendants executed a five-year lease to the plaintiffs, Thomas Keehn and William Keehn, and the plaintiffs went into possession thereunder and remained in possession until December 1, 1913, or April, 1914; the exact date not being material for the purposes of this case. Some time in February or March, 1914, the two defendants the Harpers sold the ranch in question to Harris, the plaintiff in error herein, and gave him a warranty deed dated April 9, 1914, under which he took possession about that time. On August 25, 1914, plaintiffs began suit against the three defendants, the two Harpers and Harris, alleging in their second amended complaint a conspiracy to deprive them of their possession and various acts of the defendants the Harpers, and further alleging that they were evicted by the defendants as the result of this conspiracy. The plaintiffs claimed damages from the said three defendants in the sum of \$28,800.

The defendants the Harpers filed their answers; but, as neither of them joined in the writ of error sued out by the defendant Harris, it is not necessary to consider the case except as to the last-named defendant.

The demurrer of the defendant Harris to the second amended complaint was overruled, and the latter filed an amended answer which was in effect a general denial of the material allegations of the second amended complaint.

The case was tried without a jury, and judgment was rendered for the plaintiffs against the two defendants Mary S. Harper and William Harris for the sum of \$2,000; the other defendant, Monroe Harper, having died prior to the rendition of the judgment.

At the request of the defendant Harris, the trial court found the facts as follows:

"(1) Said defendant requests the court to find as a matter of fact that the said defendant William R. Harris did not evict the plaintiffs from the premises covered by the lease involved.

"Answer: The court so finds in this case.

"(2) The defendant requests the court to find as a matter of fact that he, the said defendant, had no part and took no part in the acts of the defendants Harper, which the court has found amounted to an eviction of said plaintiffs.

"Answer: The court so finds in this case.

"(3) The said defendant requests the court to find as a matter of fact that, at the time this defendant took possession of said premises under the deed received by him of said Harpers, the plaintiffs had already abandoned said premises either by reason of the acts of said defendants Harper, or otherwise, and that this defendant took peaceable possession of said premises.

"Answer: The court so finds that the plain-

tiffs were not on the premises in question at the time the defendant Harris went into possession; that Harris took peaceable possession of the premises; and that the plaintiffs had not actually abandoned the premises, but were not thereon when the defendant Harris went into possession.

"(4) The said defendant requests the court to find as a matter of fact that at the time this defendant took possession of said premises he did not have actual notice of the lease existing between the plaintiffs and the defendants Harper, but had only such constructive notice of same as was imparted by the record of said lease in the office of the county clerk of Lincoln, N. M.

"Answer: The court finds that the defendant Harris had both actual and constructive notice of the lease in question in this case at the time he took possession of the premises in question; that the constructive notice was imparted by the record of said lease in the office of the county clerk at Carrizozo, Lincoln county, N. M."

From the judgment of the trial court the defendant, Harris, sued out a writ of error to this court and assigned six errors which may all be included in the general assignment, that the court erred in rendering judgment against the defendant, Harris, contrary to the findings of fact.

R. D. Bowers, of Roswell, for plaintiff in error.

G. B. Barber, of Carrizozo, for defendants in error.

RAYNOLDS, J. (after stating the facts as above). As shown by the statement of facts, this is a suit to recover damages in tort against three defendants for conspiracy to deprive the plaintiffs of the benefit of a lease from the defendants Harper to the plaintiffs. The trial court found as a fact that the defendant Harris did not conspire with the other two defendants, nor did he take any part in what the court found to be an eviction of the plaintiffs by the Harpers. The court further found that the defendant Harris took possession of the premises, and that the plaintiffs were not on the premises when such possession was taken. Under this state of the findings by the court, the plaintiff in error, Harris, contends that the court below erred in finding against him. No specific findings of fact were asked by the defendants in error in the court below, and none were made by the court, except in a short written opinion in which the court "finds that the ranch property did not produce the income annually as claimed by the plaintiffs," and further he "finds the issues in favor of the plaintiffs and fixes the damages at \$2,000, based upon the alfalfa crop, the apples, and the general crops grown on the place."

It will be noted that the court in the third finding found that the plaintiffs had not actually abandoned the premises, but were not

thereon when the defendant went into possession, and in the fourth finding that the defendant Harris had actual and constructive notice of the lease from the Harpers to the plaintiffs at the time he took possession. It further appears from the transcript of the testimony that Harris admitted that the plaintiffs came upon the property and demanded possession from him on August 28, 1914, as is alleged in the plaintiffs' second amended complaint.

There also appears in plaintiffs' second amended complaint the allegation that the defendant Harris entered upon the plaintiffs' property without plaintiffs' consent. Counsel for defendants in error, plaintiffs below, argued in his brief that Harris became a joint tort-feasor together with the Harpers in evicting plaintiffs, and asks for an affirmance of the judgment below upon that ground. But the court specifically found that Harris did not conspire in the eviction of the plaintiffs by the Harpers, nor did he have anything to do with the acts which the court below held amounted to an eviction of the plaintiffs. The decision below cannot be sustained upon that ground. The action, as stated before, is an action in tort, and the decision below may be sustained upon the ground of the well-known principle of law that a tenant in possession has the right to such possession against the world during the continuance of his lease and may maintain an action for damages for the disturbance or deprivation of such possession. Jones on Landlord and Tenant, § 349; 24 Cyc. 1056; Dec. Dig. subject "Landlord and Tenant," § 132, and cases cited. That the defendants in error could have sued Harris in ejectment to regain possession and for damages does not deprive them of the right to sue in tort for interference with their possession. The plaintiffs below might have also waived the tort and sued the defendant Harris on the lease of his grantors, the Harpers, under the well-known principle that a covenant of quiet enjoyment runs with the land and binds the transferee of the reversion. Glidden v. Second Investment Co., L. R. A. 1915C, p. 220, and cases cited. The plaintiffs chose to sue in tort for the disturbance of their possession. The complaint contains allegations of entry by the defendant Harris without right and refusal to vacate. The trial court found that the plaintiffs had not abandoned the premises at the time Harris entered, and that Harris had actual and constructive notice of the outstanding lease, and awarded damages against Harris on the basis as stated in his written opinion of the value of the outstanding leasehold estate in the plaintiffs of which they were deprived. The proof in the case sustained these allegations in the complaint, and although the court found that the defendant Harris had no part in the conspiracy or wrongful acts of the defendants

Harper, he nevertheless held the defendant Harris liable for his entry and retention of the plaintiffs' outstanding leasehold. The decision of the lower court is sustained by the evidence and the findings, and its decision is the correct legal conclusion from the facts so found.

The decision of the lower court is therefore affirmed, and it is so ordered.

PARKER, O. J., and ROBERTS, J., concur.

(25 N. M. 452)

PRICHARD v. FULMER et al. (No. 2284.)

(Supreme Court of New Mexico. Sept. 15, 1919. Rehearing Denied Oct. 24, 1919.)

(Syllabus by the Court.)

1. LIMITATION OF ACTIONS §=50(3)—RIGHT TO ATTORNEY'S FEES ON FORECLOSURE BEGINS ON SALE.

Where a complaint in a suit for attorney's fees alleges that plaintiff was employed "to perform all services required to be performed by him in and about the foreclosure (of a mortgage) and the business incident thereto," the right to compensation begins when the sale of the mortgaged premises is confirmed by the court, and not when the decree of foreclosure is signed.

2. LIMITATION OF ACTIONS §=50(3)—SUIT FOR ATTORNEY'S FEES MAINTAINABLE WITHIN FOUR YEARS FROM CONFIRMATION OF FORECLOSURE SALE.

A suit for attorney's fees in such a case, begun within four years from the date of the order confirming the sale of the mortgaged premises, is not barred by the statute of limitations.

(Additional Syllabus by Editorial Staff.)

3. APPEAL AND ERROR §=181—MATTERS NOT JURISDICTIONAL, NOT RAISED BELOW, NOT REVIEWABLE.

Matters not called to the attention of the trial court except as to questions of jurisdiction cannot be raised for the first time on appeal.

Appeal from District Court, Lincoln County; Medler, Judge.

Suit by George W. Prichard against J. H. Fulmer, Jr., and others. Demurrer to complaint sustained and judgment of dismissal entered, and plaintiff appeals. Reversed and remanded, with instructions to overrule the demurrer.

G. B. Barber, of Carrizozo, for appellant.
Lorin O. Collins, of Los Angeles, Cal., for appellees.

RAYNOLDS, J. This is a suit for attorney's fees alleged to be due the plaintiff for

legal services in the foreclosure for the defendant of a mortgage against the Eagle Mining & Improvement Company. To the complaint defendant interposed a demurrer pleading the four-year statute of limitations, which demurrer was sustained by the court. The plaintiff having elected to stand upon his complaint and refusing to plead further, a judgment of dismissal was entered. From the judgment of dismissal this appeal is taken.

[1, 2] Plaintiff alleges in his complaint:

"That the plaintiff, on or prior to said date, and now, is a duly licensed and practicing attorney in the courts of said state, and as such was duly retained and employed by said Fulmer to institute suit in the foreclosure of said mortgage in the above-named court, and to perform all of the services required of him as such attorney in and about said foreclosure and the business incident thereto, for which services the said Fulmer agreed with plaintiff that plaintiff should receive and be paid the attorney's fee provided in said notes and mortgages."

The decree of foreclosure was obtained on May 7, 1909, and the attorney's fee fixed therein at the sum of \$7,906.10, being the amount specified in the notes and mortgages. Subsequently, on August 30, 1919, the property was sold to the appellee, and on the 23d day of May, 1910, the sale was confirmed by the court. This suit for attorney's fees was begun October 14, 1913.

It is the contention of the appellee and the ground of his demurrer that the statute of limitations is a bar to the action, the suit not having been begun within the four years from the date when the cause of action accrued to the plaintiff. The appellee urges that the right to the attorney's fees arose on the signing of the decree of foreclosure, namely, May 7, 1909, on which date the amount of the attorney's fees was fixed by the court, and that this action, begun October 14, 1914, comes too late.

We cannot agree with this contention. The general rule in cases of this kind is that the attorney employed to prosecute or defend a suit is entitled to his fees at the termination of the suit.

"It is held that the statute begins to run upon his claim for services and disbursements whenever his services are so brought to end that he can maintain an action for them. This point is held to be reached under a general employment when the suit is terminated by the entry of final judgment, and this is so although there may be other things incidental to

the matter incurred afterwards." Wood on Limitations (2d Ed.) p. 333.

It is not necessary to decide whether the entry of the decree of foreclosure or the confirmation by the court of the report of sale terminated the suit, as the language of the agreement to pay attorney's fees, as set forth in the complaint, specifies the extent of the employment in these words, to wit:

"That the plaintiff was to perform all services required of him in and about the said foreclosure and incident thereto."

Obtaining an order confirming the sale of the mortgaged premises was clearly within the meaning of this language. Plaintiff's right to compensation arose at the time such order of confirmation was signed. This suit was begun on August 14, 1913, less than four years from May 23, 1910, and was within the period of limitations.

It is urged that the amended complaint which was filed May 7, 1917, states a new and different cause of action from the original one filed October 14, 1914, and that the amended complaint cannot relate back to the beginning of the action and thereby toll the statute of limitations. It is also urged that the plaintiff cannot by his own laches in failing to procure an order of confirmation extend the time of the statute.

[3] Assuming that defenses of this kind could be raised by demurrer, the record fails to show that either of these propositions was called to the attention of or passed upon by the court below. The only question there presented was that the statute of limitations had run against the cause of action alleged in the amended complaint, for the reason that the cause of action arose on May 7, 1909. No question as to improper amendment of the complaint stating a new and different cause of action, nor of the plaintiff's laches, was presented. It has often been decided by this court that matters not called to the attention of the trial court, except as to questions of jurisdiction, cannot be raised for the first time on appeal. *James v. County Commissioners*, 24 N. M. 509, 174 Pac. 1001; *Woods v. Fambrough*, 24 N. M. 488, 174 Pac. 996.

For the reasons above stated, the court below erred in sustaining the demurrer to the amended complaint. The cause is therefore reversed and remanded, with instructions to overrule the demurrer to the complaint, and it is so ordered.

PARKER, C. J., and ROBERTS, J., concur.

(5 N. M. 439)

STATE v. WILSON. (No. 2314.)

(Supreme Court of New Mexico. Sept. 27, 1919.)

*(Syllabus by the Court.)*1. CRIMINAL LAW \S 1159(2)—VERDICT SUPPORTED BY SUBSTANTIAL EVIDENCE NOT REVIEWABLE.

Where the verdict of the jury is supported by substantial evidence, it will not be disturbed upon appeal.

2. CRIMINAL LAW \S 678(1) — ELECTION BY STATE BETWEEN OFFENSES UNNECESSARY WHERE SEPARATE TRANSACTIONS NOT SHOWN.

The state in a prosecution is not compelled to elect which one of the two or more offenses it seeks to convict the defendant of, where the evidence does not disclose separate and distinct transactions.

3. CRIMINAL LAW \S 753(2) — DIRECTED ACQUITTAL UNAUTHORIZED WHERE SUBSTANTIAL EVIDENCE SUPPORTS CHARGE.

A court should not direct a verdict of acquittal where there is any substantial evidence to support, or tending to support, the charge.

Appeal from District Court, Chaves County; McClure, Judge.

Ross Wilson was convicted of larceny, his motion for a new trial was denied, and he was sentenced, and from the conviction and sentence he appeals. Affirmed.

L. O. Fullen, of Roswell, for appellant.

N. D. Meyer, Asst. Atty. Gen., for the State.

RAYNOLDS, J. Appellant was convicted for the larceny of a calf. After denial of a motion for a new trial appellant was sentenced by the court to serve a term in the penitentiary from one year to eighteen months. From the conviction and the sentence imposed thereon he appeals to this court and assigns as errors for reversal the following:

(1) That there was no substantial evidence to support the verdict.

(2) That the court erred in refusing to grant appellant's motion for a directed verdict at the conclusion of the state's evidence in chief.

(3) That the court erred in refusing to grant appellant's request, at the conclusion of the state's evidence in chief, requiring the prosecution to elect which one of the two animals the alleged larceny of which the state intended to rely for a conviction, the testimony showing two distinct animals, and the indictment alleging the larceny of one only.

[1] In regard to the first assignment, we

have read the record carefully, and it appears therefrom that on the state's case in chief the complaining witness testified she owned two calves, kept them in a pasture near her house, and they were branded with her brand; that on a certain day they were missing, and she found them 40 miles away in the defendant's pasture newly branded with his brand and earmark; that he agreed to give her two other cows for them; that the second day after finding them in his pasture she returned to get them and they had disappeared. She then had the defendant arrested. This evidence was corroborated in part by her son as to finding and identifying the animals, and by two other witnesses who testified as to her ownership of the calves in question, and the fact that defendant had moved his cattle to his pasture about the time her calves had been missed by her. There was evidence in conflict with that of the complaining witness introduced by the defense, and also further evidence in rebuttal by the state.

We believe the first assignment of error is not well taken. As was said in *Territory v. De Gutman*, 8 N. M. 92, at page 95, 42 Pac. 68, 69:

"The main point contended for is that the evidence of itself and in itself is insufficient in law to warrant the conviction. We have carefully read and considered the evidence, and think it fully and sufficiently sustains the verdict. The jury passed upon the conflicting testimony, and determined where the weight and credit lay. Their verdict cannot be disturbed on appeal. *Territory v. Webb*, 2 N. M. 154; *Territory v. Trujillo*, 7 N. M. 43 [32 Pac. 154]."

[2] The evidence set out above was given by the witnesses for the prosecution in the state's case in chief, and we hold that it was not error for the trial court to refuse to grant appellant's motion to direct a verdict of not guilty at the close of the state's case in chief. There was substantial evidence in this case that the crime as charged under the allegations of the indictment had been committed, and the court properly submitted the case to the jury.

[3] "As a general rule the court should not direct a verdict of acquittal where there is any evidence to support, or reasonably tending to support, the charge." 16 C. J., Criminal Law, p. 936, par. 2299.

Appellant contends that the court should have compelled the state to elect, at the conclusion of the evidence in chief, as to which of the two animals the appellant was charged with having stolen.

"But the principle of election is applicable only where there is evidence of separate and distinct transactions; otherwise, an election will not be required." 16 C. J., Criminal Law, p. 861, par. 2169.

Finding no error in the record, the judgment of the lower court is affirmed, and it is so ordered.

PARKER, O. J., and ROBERTS, J., concur.

(25 N. M. 424)

FLORES v. BACA. (No. 2233.)

(Supreme Court of New Mexico. Sept. 24, 1919.)

(Syllabus by the Court.)

1. CONTRACTS \S 334—BY STATUTE WRITTEN CONTRACTS IMPORTED CONSIDERATION.

Under the provisions of section 2181, Code 1915, every written contract imports a consideration, and in a suit upon such a contract it is not necessary to allege a consideration.

2. CONTRACTS \S 334 — COMPLAINT ON CONTRACT NOT ENTIRELY WRITTEN MUST ALLEGE CONSIDERATION.

A contract which is not entirely in writing is regarded as an oral or verbal contract, and a complaint, in a suit upon such a contract, which fails to allege a consideration, is fatally defective.

Appeal from District Court, Socorro County; M. C. Mechem, Judge.

Suit on alleged written contract by Estevan Flores against Hilario Baca. Demurrer to second amended complaint sustained and judgment for defendant, and plaintiff appeals. Affirmed.

M. C. Spicer, of Socorro, for appellant.

Neill B. Field, of Albuquerque, for appellee.

ROBERTS, J. Appellant instituted suit in the district court of Socorro county against the appellee on a contract which he alleged to have been in writing. The contract was written in Spanish, the English translation of the same being as follows:

"Both parties hereto do certify that the undersigned Ylario Baca, party of the first part, and Estevan Flores, party of the second part, have agreed, the first party to sell the number of 158 animals between steers, dry cows and cows with calves for the value of \$3,850.00, which said deal shall be consummated at the time of the getting of purchaser, and the said Estevan Flores, party of the second part, shall deliver to the said party of the first part the sum of \$3,850.00 as soon as the said deal is consummated, according to the conditions, and without any refusal.

"Signed by both parties this 14th day of November, 1913, before a witness.

"Hilario Baca.
"Estevan Flores."

The complaint attempted to state either two or three causes of action upon the contract. Appellant apparently contends there

were two causes of action stated, while the appellee assumes there was an attempt to state three causes of action. It is difficult to determine from the complaint whether the pleader was attempting to state two or three causes of action. That question, however, is not material. By each count of the complaint appellant alleged that under the contract entered into between the parties the appellant agreed to find a purchaser for the cattle, and that he was to receive for his services the amount of the purchase price in excess of \$3,650; that appellee was to sell the cattle to the purchaser found by appellant.

To the second amended complaint appellee filed a demurrer, based upon the failure of the complaint to state facts sufficient to constitute a cause of action, and it was particularly specified that the complaint was defective in that it failed to allege that there was any consideration for the contract. The demurrer was sustained. Appellant elected to stand on his complaint, and judgment was entered for appellee.

[1] Appellant contends that the action of the court was erroneous in that, as the cause of action was upon a written contract, it was unnecessary to allege the consideration, because such allegation was obviated by section 2181, Code 1915, which reads as follows:

"Every contract in writing hereafter made shall import a consideration in the same manner and as fully as sealed instruments have heretofore done."

If the suit were upon a written contract, clearly appellant's contention would be correct; for, under the provision of the Code above quoted, every written contract imports a consideration, and therefore it is not necessary that a consideration should be specifically averred. This has been the uniform construction of the above statutory provision by the courts of other states where such provision exists, and it was so held in the case of *Bank v. Insurance Co.*, 16 N. M. 66, 113 Pac. 815. See *Georgia Home Insurance Co. v. Boykin*, 137 Ala. 350, 34 South. 1012; *Henke v. Eureka Endowment Ass'n*, 100 Cal. 429, 34 Pac. 1089; *Williams v. Hall*, 79 Cal. 606, 21 Pac. 965; *Roller v. Ott*, 14 Kan. 609; *County of Montgomery v. Auchley*, 92 Mo. 126, 4 S. W. 425; *Fleming v. Mulloy*, 143 Mo. App. 309, 127 S. W. 105; *Noyes v. Young*, 32 Mont. 226, 79 Pac. 1063. Hence if the suit in question was upon a written contract and the only point upon which the demurrer was sustained was the failure to allege a consideration, the action of the court would be erroneous; but it is clear, from the contract attached as an exhibit to the complaint in question and the allegations of the complaint, that the action was not upon a written contract, for the allegations of the complaint added, to the written memorandum, terms

and provisions not contained in the writing itself. It was alleged that, under the contract which the parties entered into, the appellant was to find a purchaser for appellee's cattle; that appellee was to sell the cattle to the purchaser so found, and was to receive the sum of \$3,650 for the cattle, and appellant was to receive, as commission for his services, all sums received for the cattle in excess of such amount. This allegation was clearly adding, to the written contract, terms and provisions not incorporated therein, and by doing so brings the case under the established rule that where a contract is not all in writing it is a parol contract. In 18 C. J. p. 246, the rule is stated thus:

"A contract which is not entirely in writing is regarded as an oral or verbal contract."

And many authorities are cited in support of the text.

In the case of Board of Commissioners of Marion County v. Shipley, 77 Ind. 553, it was held that a contract resting partly in writing and partly in parol is regarded in law as an oral contract, to which the six-year period of limitation applies. This case was followed, with approval, by the territorial Supreme Court in the case of Cunningham v. Fiske, 13 N. M. 331, 83 Pac. 789. In the case of Louisville, New Albany & Chicago Ry. Co. v. Reynolds, 118 Ind. 170, 20 N. E. 711, suit was instituted by Reynolds against the railroad company for professional services rendered the company by him as an attorney at law. The basis of the contract under which the services were rendered was a letter from the railroad company. The court said:

"It does not specify the services which the appellees are to perform, nor does it designate the consideration to be yielded for the services that may be performed. It does provide that the passes given the appellees shall be their compensation for services in the class of cases denominated 'stock cases,' but it does not state what other services shall be rendered, and instead of providing a measure of compensation for other services, it provides that the appellees shall receive 'reasonable attorney's fees.' Two important elements are left open to parol agreement: The services to be performed, and the consideration to be yielded. It clearly implies that what shall be done in other than 'stock cases,' and what consideration shall be yielded, are to be ascertained by resorting to parol evidence. It is difficult to conceive of a case where the writing more clearly discloses its incompleteness and points to extrinsic facts. As the contract is not all in writing, it is a parol contract."

[2] The same is true of the contract here in question. Its incompleteness is apparent on its face, and parol evidence was required to complete the contract and warrant a recovery by appellant. This being true, the contract is to be regarded as an oral or ver-

bal contract, hence would not come within the purview of section 2181, Code 1915; and it would be incumbent upon appellant to allege and prove a consideration, hence the court properly sustained the demurrer to the complaint.

For the reasons stated, the judgment will be affirmed, and it is so ordered.

PARKER, C. J., and RAYNOLDS, J., concur.

(25 N. M. 430)

LUNA v. MONTOYA. (No. 2276.)

(Supreme Court of New Mexico. Sept. 24, 1919.)

(Syllabus by the Court.)

1. ALTERATION OF INSTRUMENTS ¶27(1), 30
—TIME OF ALTERATION A QUESTION FOR JURY.

Where an alteration is apparent on the face of an instrument in suit, there is no presumption as to whether such alteration was made before or after the execution of the instrument, and the question of the alteration and its binding effect on the parties after its introduction are questions to be considered in the light of all the evidence, extrinsic and intrinsic, and decided by the judge sitting as a jury, or by the jury under proper instructions.

2. ALTERATION OF INSTRUMENTS ¶27(3)—
BURDEN OF PROOF OF ALTERATION IS ON PARTY ALLEGING IT.

Where an alteration is apparent on the face of an instrument in suit, the burden of proof to explain such alteration is not upon the party seeking to recover under it, but upon the one who alleges that the alteration has been made in the instrument.

3. LIMITATION OF ACTIONS ¶86(9)—LIMITATIONS, AS TO CERTIFICATE OF DEPOSIT, RUN FROM DEMAND.

An instrument which reads as follows: "I testify that on November 30, 1903, Santos Luna deposited six hundred dollars in my care, I paying him five per cent. interest per annum. This money is guaranteed by me, Max H. Montoya"—is properly treated and considered as a certificate of deposit, and the statute of limitations begins to run against the depositor at the time when demand for payment is made.

Appeal from District Court, Socorro County; M. C. Mechem, Judge.

Action by Francisco Luna, administrator of the estate of Santos Luna, deceased, against Max H. Montoya. Judgment for plaintiff on findings of fact and conclusions of law, and defendant appeals. Affirmed.

This is an action by an administrator upon a writing in Spanish signed by appellant, found on page 4 of a book purporting to be a time book of appellee's intestate, a literal translation of which is as follows:

"I testify that in November 30, 1903, Santos Luna deposited \$600 in my care, I paying 5 per hundred of interest per annum. This money is guaranteed by me.

"Max H. Montoya."

The writing on the opposite page, which is also in the handwriting of appellant, was also introduced, and other pages are referred to in the evidence. The trial judge, being of the opinion that it was necessary and proper that this writing should be inspected by this court, ordered the transmittal of the book to the clerk, and it is before the court for consideration in connection with the transcript, under rule 3, par. 7 (153 Pac. xviii).

Appellant, in his answer, denied that plaintiff's intestate had ever deposited with him \$600 in money, or any other sum, and in substance alleged that the writing in question was given by him and accepted by the intestate as a memorandum of the amount or part of the amount of a claim due the intestate from the estate of a deceased brother of appellant, for which estate, or rather for the administratrix thereof, appellant at the time was acting as agent; that the memorandum was originally, to the best of his recollection and belief, for \$500, and was afterwards raised to \$600 without his knowledge or consent. Appellant also pleaded the six-year statute of limitations.

The court, by its second, third, and fourth findings, held that the alteration was apparent on the face of the instrument; that it therefore was not an alteration of a suspicious character, so as to place the burden of proof upon plaintiff; and that the proof failed to show that the alteration was made after execution and delivery, or at such other time as not to be binding upon appellant; and as conclusions of law the court held that the instrument was in the nature of an individual certificate of deposit; that the rights and liabilities of the parties were governed by substantially the same rules and principles of law applicable to bank certificates of deposit; that appellant was not relieved from his liability upon said instrument by reason of the alteration apparent upon the face of the same; that the instrument was not barred by the statute of limitations; and that appellee was entitled to recover \$600, with 5 per cent. interest from the date of the writing. To each of these findings and conclusions appellant took an exception at the time. Judgment was thereupon rendered against him accordingly.

J. G. Fitch, of Socorro, for appellant.

Nicholas & Nicholas, of Magdalena, for appellee.

RAYNOLDS, J. (after stating the facts as above). Two questions are presented by this appeal: First, the ruling of the trial court that the alteration apparent on the face of

the writing, raising the amount from \$500 to \$600, was not of a suspicious character, so as to place the burden of explaining the same upon appellee; and, second, the ruling of the court that the action was not barred by the statute of limitations. The trial court found as follows:

"That said instrument on its face shows no erasure or attempted erasure, and that said alteration, so apparent on the face of said instrument, is not an alteration of suspicious character, so as to place the burden of proof upon plaintiff to explain the same." To which finding defendant then and there objects and excepts.

"That the proof fails to show that said alteration of said instrument was made after its execution and delivery by the defendant or at such other time as not to be binding upon him." To which finding defendant then and there objects and excepts.

[1, 2] It is urged by the appellant as a ground for reversal of this judgment that the trial court misapplied the rule of evidence as to the burden of proof on the subject of altered instruments; that, although there was conflicting evidence as to the handwriting of the figure "6," the trial judge did not base his finding upon this evidence, but upon inspection of the instrument, from which inspection he concluded that the alteration, being apparent on its face, was not of a suspicious character, so as to place the burden of proof on the plaintiff. It is conceded by the appellant that alteration alone does not make an instrument suspicious, where it is apparently altered to correct some obvious mistake and carry out the intentions of the parties (*Hart v. Sharpton*, 124 Ala. 638, 27 South. 451); but he contends that the element of interest is a most important test in determining whether an apparent alteration is suspicious or not, and that the trial judge overlooked this important factor.

The authorities on the subject are in hopeless confusion. As is said in a note to *Burgess v. Blake*, 128 Ala. 105, 28 South. 963, 86 Am. St. Rep. 78, at page 128 of the last citation:

"Where the alteration is apparent, the authorities are hopelessly divided as to the presumptions arising from such apparent alteration. Any attempt to reconcile them would be useless, and an accurate classification of their varying views is impossible. They seem to fall, however, into four general classes, each of which is representative of a view opposed to that of the others: (1) One line of cases holds that no presumption arises from an alteration apparent on the face of the instrument, but that the entire question of the time when the alteration was made is for the jury to consider in the light of all the evidence, intrinsic and extrinsic. (2) Another holds that an alteration apparent on the face of the paper raises a presumption that it was made after the execution and delivery. 3. A third line of authorities holds that the presumption that the alteration was made after execution arises only where the alteration

or the facts surrounding it are suspicious; and, finally, it is held by another group of courts: (4) That an alteration, apparent on the face of the paper, is, without explanation, presumed to have been made before delivery. This classification of the authorities is, at best, approximate only, as many of the courts have taken compromise positions, holding the presumption to depend upon various matters, such as denial under oath that the paper was executed, the nature of the instrument—i. e., whether a specialty or not, etc.”

“While the different views presented in the three paragraphs as to the presumptions arising from apparent alterations are seemingly in hopeless conflict, yet an examination of the decisions leads to the opinion that, whatever doctrine may be theoretically adhered to in any particular jurisdiction regarding the presumption as to the time of apparent alterations, yet in the greater number of cases the person who claims under or offers in evidence an instrument which is at all suspicious by reason of an apparent alteration will be required to explain and remove the suspicion.” 1 R. C. L. “Alteration of Instruments,” par. 77.

The words “suspicious alterations,” as used in the above quotation, have been given many different meanings by the adjudicated cases. No definite rule can be deduced to determine the circumstances connected with an apparent alteration which will be regarded as suspicious and will require explanation by the party relying on the altered instrument. 2 C. J. “Alteration of Instruments,” par. 199. The weakness of an objection to the rule above will be found in the following quotation:

“This furnishes no definite rule by which to determine when the burden is upon the holder to explain the alteration and when it is not. Who is to determine, and by what test, whether the alteration is suspicious? * * * And it seems to us that the rule just referred to amounts to nothing more than saying that in some cases this intrinsic evidence may tend to prove that the alteration was made after delivery, and therefore throw the preponderance on that side, unless the holder of the instrument produces extrinsic rebutting evidence. Thus construed, we would find no special fault with the rule. But it is incorrect to call this a presumption of law; it is simply an inference of fact drawn from evidence in the case.” *Wilson v. Hayes*, 40 Minn. 531, 42 N. W. 467, 4 L. R. A. 196, 12 Am. St. Rep. 754.

In the present case the lower court found the alteration to be so apparent that it was not an alteration of a suspicious character. We have inspected the instrument and agree with the conclusion reached by the trial judge. But the question before us is one as to the burden of proof, when an instrument which has been apparently altered is sued upon by one who will benefit by such alteration. The rule to determine this question, which seems to us best and supported by reason of authority, is that no presumption arises from an alteration apparent on the

face of the instrument, but that the entire question of the time when the alteration was made is for the jury to consider in the light of all the evidence, intrinsic and extrinsic.

It is evident from the adjudicated cases that the courts which maintain the position that no presumption arises from an apparent alteration of an instrument in fact hold that such instrument is not an altered instrument within the meaning of the phrase. They hold, in effect, that the instrument as changed or altered is the instrument which the parties executed. As before stated, we believe this to be the proper rule. To modify this rule, by casting the burden of proof on the plaintiff or the defendant, according as the trial judge may deem the alteration suspicious or not, changes a rule of law into an inference of fact, which inference of fact the court should not pass upon, but leave to the jury.

The trial court, in holding that the apparent alteration was not one of a suspicious character, so as to place the burden of proof upon the plaintiff, reached the correct conclusion, and properly placed the burden of proof upon the defendant, who alleged that the instrument had been altered. We hold, however, that the correct rule to be applied in case of apparent alteration of instruments is this: That there is no presumption from such apparent alteration, and that the question of alteration and its binding effect on the parties after the introduction of the instrument in evidence, are questions to be considered in the light of all the evidence, extrinsic and intrinsic, and decided by the judge sitting as a jury, or by the jury under proper instructions.

[3] It is further urged by the appellant that the instrument in question was improperly treated as a certificate of deposit. Appellant concedes that the case of *Bank of Commerce v. Harrison*, 11 N. M. 50, 66 Pac. 460, correctly states the law in regard to certificates of deposit, but he contends that the doctrine therein announced should not be extended to the instrument involved in this case. The case of *Bank of Commerce v. Harrison*, supra, holds that the statute of limitations does not begin to run against the holder of a certificate of deposit until he has made demand on the bank for payment of the money evidenced by the certificate of deposit. We hold that the same rule of law applies to the instrument involved in this suit. As was said by Mullins, J., in *Payne v. Gardiner*, 29 N. Y. at pages 171, 172:

“Questions as to the rights and remedies of depositors have generally, if not altogether, arisen in actions by and against banks; but it is every day's practice for persons having surplus funds to deposit them with merchants, lawyers, and other business men, and they are received as often as matters of favor to the person depositing as with a view to the advantage of the person receiving; and I apprehend that such

persons believe that, before they can be sued for the money, a demand must be made of the deposit. Such a rule not only gives effect to the intention of the parties, but it is essentially just. Why should a demand be held necessary in the case of a deposit in a bank, and unnecessary in the case of a deposit with a private person? In both cases the depositor is not an ordinary borrower; that is to say, they do not solicit the deposit for their own benefit exclusively. In both they hold themselves out as willing to receive deposits, and to pay interest, perhaps, thereon. The same considerations which render proper demand before suit in the case of the one are equally operative in the case of the other. * * * I entertain no doubt but that the transaction in question was a deposit, and that the rights and liabilities of the parties are precisely the same as if the money had been in a bank; and hence there was no right of action against the depositaries until actual demand made, and the statute of limitations began to run from the same time. If such is the law, then the demand in question was not barred, and the judgment should be affirmed."

Finding no error in the record, the case is affirmed; and it is so ordered.

PARKER, C. J., and ROBERTS, J., concur.

(55 Utah, 170)

HOGGAN v. PRICE RIVER IRRIGATION CO. et al. (No. 3303.)

(Supreme Court of Utah. Oct. 10, 1919.)

1. APPEAL AND ERROR §1042(5)—FILING OF AMENDED COMPLAINT SETTING UP NEW CAUSE OF ACTION HARMLESS.

The denial of defendant's motion to strike from the file an amended and supplemental complaint, because additional causes of action were set forth, referring to an allegation asking attorney's fees which was not in the original complaint, was not prejudicial error, where no attorney's fees were allowed and no further attention paid by either counsel or court to the question of attorneys' fees.

2. PLEADING §64(2)—CREDITORS' BILL NOT MULTIFARIOUS.

A complaint, in effect a creditors' bill after exhaustion of legal remedies, seeking to force a creditor's lien on debtor's property and to follow assets of the debtor corporation into the hands of all who are not bona fide purchasers, the facts stated relating wholly to the same general cause of action, is not multifarious, and not subject to demurrer for improperly uniting or mingling causes of action, which should be separately stated.

3. CORPORATIONS §579(2)—NEW CORPORATION ORGANIZED BY SELLER'S STOCKHOLDERS LIABLE FOR SELLER'S DEBTS.

The management of one corporation may organize another and transfer its property to

the new corporation, but if it does so, even with the consent of all its stockholders, the new corporation is liable for the debts of the other to the extent of the value of the property received; and, assuming that such conveyance was not void unless fraudulent, nor for the purpose of hindering or defrauding creditors, the creditors still have the right to follow the property thus transferred.¹

4. CORPORATIONS §269(3) — STOCKHOLDERS ON TRANSFER TO NEW CORPORATION HAVING SAME DIRECTORS, NOT LIABLE FOR ULTRA VIRES ACTS.

Evidence held not to show transactions by which debtor corporation was stripped of all its property resulted from fraud or bad faith of the directors, or that there was any dissipation of assets in making such conveyances, or any intent that such transactions should be of advantage to the directors of both the selling and buying corporation, except perhaps incidentally as stockholders and defendants in creditors' action, and those stockholders who were not directors of the debtor corporation at the time of such transfer were not accountable for the corporation's illegal or ultra vires acts.

5. CORPORATIONS §579(2)—RIGHTS OF CREDITORS ON TRANSFER OF PROPERTY TO NEW CORPORATION—SALES.

A trust agreement, under which all the property of the debtor corporation was transferred to a new corporation, construed and held to provide that the proceeds of sale of water shares should be applied first to pay the debts the company incurred in connection with the construction of its irrigation project, excepting only a loan from the state, so that a creditor of the company was entitled to payment out of the proceeds of stock sales.

6. CORPORATIONS §545(2)—RIGHTS OF OFFICERS AND STOCKHOLDERS UNDER CREDITORS' BILL.

Where individual stockholders, defendants in a creditor's suit, paid out their money for the corporation, a stockholder, who was not a director of the debtor corporation, had a right to accept a preference by payment in corporate stock whether the company was insolvent or not, but a director of an insolvent corporation had no right to do so whether he became creditor as guarantor, indorser, or surety.

7. CORPORATIONS §545(2) — PAYMENT OF NOTES TO DIRECTOR WHEN CORPORATION WAS INSOLVENT.

Where a corporation was willing to make unusually liberal discounts to a stockholder purchasing its notes, the purchaser would not for such reason be charged with fraud or dishonesty, but if such purchaser was a director when presenting the purchase notes for payment, and the company was then insolvent, he would not be justified in accepting and appropriating shares in a new corporation in payment of such debts, thus depriving other creditors of a fund to which they were entitled, and as director he must be presumed to know the corporation's financial condition.

¹ Cooper v. Light & Power Co., 35 Utah, 570, 102 Pac. 202, 136 Am. St. Rep. 1075.

8. APPEAL AND ERROR \S 1177(6)—INSUFFICIENCY OF RECORD TO ESTABLISH VALUE AT TRANSFER OF ASSETS TO NEW CORPORATION.

In a creditor's bill to subject property of a debtor irrigation company passing into the hands of another corporation to his claims, failure to determine whether the irrigation company was insolvent at a particular time leaves the Supreme Court unable to direct what findings should be made as to the price of the stock or water shares in the new company at the time of the transfer to it from the irrigation company; the price fixed in a trust agreement for transfer being purely fictitious.

Appeal from District Court, Salt Lake County; H. M. Stephens, Judge.

Action by James W. Hoggan against the Price River Irrigation Company, a corporation, and others. Judgment for plaintiff, and the named defendant and certain other defendants appeal. Reversed as to certain defendants, reversed and directed as to certain others, and affirmed as to others.

M. Thomas and Soule & Spalding, all of Salt Lake City, for appellants.

Willard Hanson and Dey & Hopbaugh, all of Salt Lake City, for respondent.

WEBER, J. The substance of plaintiff's amended and supplemental complaint is that in 1906 he sold and conveyed the Mammoth Reservoir system, with buildings and personal property, to the Utah Irrigation & Power Company for \$20,000, on which a partial payment of \$500 was made; that on July 22, 1907, the Irrigated Lands Company, one of the above defendants, was incorporated under the laws of Utah, and took over the property of the Utah Irrigation & Power Company, and assumed the debts of the latter company, including plaintiff's claim; that in January, 1910, the Irrigated Lands Company made and delivered to plaintiff its promissory notes, secured by shares of stock in the Price River Irrigation Company and the Abraham Irrigation Company; that said notes were not paid when due; that plaintiff obtained judgment, sold the collateral which he had received with the notes for the sum of \$4,890, and that in one case the deficiency judgment amounted to \$13,910.90 and in the other the judgment was for \$882.82; that executions were issued and were returned wholly unsatisfied.

Plaintiff further alleges that on the 4th day of January, 1910, John Y. Smith, Van D. Spaulding, Thomas Austin, George A. Smith, Thomas Webb, Charles Tyng, William D. Livingston, David Morgan, Albert Smith, and Frank Nelsen constituted the entire board of directors and managing officers of said Irrigated Lands Company, and owned and controlled substantially the entire out-

standing capital stock of said corporation; that at the same time the said John Y. Smith, George A. Smith, Thomas Austin, William D. Livingston, Albert Smith, Frank Nelsen, and David Morgan constituted the entire board of directors and managing officers and agents of the Price River Irrigation Company, and were the owners and holders of substantially all of its capital stock; that between the 1st day of August, 1909, and the 12th day of January, 1911, all of the defendants to this suit, contriving and intending to defraud the plaintiff of his claim against the Irrigated Lands Company, and with intent to hinder, delay, and defraud its creditors, and wrongfully to appropriate to themselves, without any adequate or substantial consideration, all the assets of said last-named company, made and caused to be made by said company various pretended contracts and agreements with the Price River Irrigation Company, and the other defendants, whereby the Irrigated Lands Company conveyed and delivered, without any adequate or substantial consideration whatsoever therefor, all the property, real and personal, and all rights and franchises of the said Irrigated Lands Company to the said Price River Irrigation Company, and to the other defendants; that by reason of the transfers, assignments, and conveyances by the Irrigated Lands Company to the said defendants all of the assets of the Irrigated Lands Company were conveyed, transferred, and assigned to the said defendants, and said Irrigated Lands Company, by reason of the same, was rendered bankrupt and unable to pay any of its debts and obligations, including the debt and obligation owing to plaintiff; that the property so transferred, conveyed, and assigned to said defendants was worth at least the sum of \$200,000, and was more than ample to pay the debts and obligations owing plaintiff by the Irrigated Lands Company; that the shares of stock in the Price River Irrigation Company so transferred and assigned to the several defendants had, on or about the 24th day of October, 1908, been placed in trust with William D. Livingston, as trustee, for the purpose of paying the debts and obligations of the Irrigated Lands Company incurred for and in connection with the construction of said project of said Irrigated Lands Company, including the reservoir and main canals of the said Mammoth Reservoir system, other than a loan theretofore made by the state of Utah, and that plaintiff's claims heretofore placed in judgment were incurred in connection with the construction of said project and scheme, and for the reservoir site, maps, and fillings, water rights and other property, and tools and implements in connection therewith; that said trust at the

time of said transfer had not terminated, and the plaintiff by virtue of said trust was entitled in equity to a lien upon said stock and to be paid therefrom; that the said defendants and each and all of them well knew of said trust, and well knew of the rights of the plaintiff therein; that the transfer of said Price River Irrigation Company stock was a conversion of said stock and a violation of said trust, and the said defendants and each and all participating therein were, and are, liable to account to the plaintiff for the property so sold and converted; that by the said conveyances and assignments the Irrigated Lands Company was deprived of all its properties, franchises, and assets of every kind and description, including property necessarily held and used in the operation, use, and enjoyment of the rights and privileges conferred by its franchises, without which its franchises could not be successfully operated and enjoyed, and thereby became wholly insolvent and unable to pay plaintiff's claim or any part thereof, except so far as the same was secured by said collateral; that plaintiff had no notice, knowledge, information, or belief of the fraud until after rendition of the judgment hereinbefore pleaded; that defendants pretend that they do not now own and are not in possession or control of the property heretofore received by them, and that because they have ceased to own and hold said property they are relieved from all obligation to account herein; but plaintiff alleges that defendants in receiving said property, and in participating in the wrongful acts herein set forth, became and are liable to account for the full value of said property as of the date of the transfer; that by reason of the trust set forth in favor of plaintiff he is entitled to require all of said parties to account for said property and its value as of the date of the transfer thereof, and that the individual directors of the said Irrigated Lands Company, made defendants herein, are personally liable to plaintiff and the other creditors for the value of the property so dissipated and distributed by the said directors in violation of their trust and duties as such officers.

[1] A motion was made by defendants to strike the amended and supplemental complaint from the files because additional causes of action were set forth. The motion was overruled. It is contended that an allegation in which attorneys' fees were claimed was an additional cause of action, and should have been stricken. As no attorney's fees were allowed and no further attention was paid by either counsel or court to the question of attorneys' fees, the ruling of the court did not constitute prejudicial error. To allow the amendment, or the filing of a supplemental complaint was clearly within the discre-

tion of the court, and the ruling on the motion was not erroneous. 15 C. J. 1445.

[2] A demurrer was interposed on the ground that several causes of action had been improperly united and mingled together, and that the causes of action were not separately stated. The complaint is in effect a creditor's bill after exhaustion of legal remedies. The crux of it is that the creditor seeks to force a creditor's lien on the property of the debtor, and seeks to follow assets of the corporation debtor in the hands of all who are not bona fide purchasers. The facts stated in the complaint relate to the same general cause of action, and the complaint is therefore not multifarious. 15 C. J. 1424; 8 R. C. L. § 531; 2 Thompson, Corp. § 1317; Haskin Wood V. Co. v. Cleveland S. Co., 94 Va. 439, 26 S. E. 878; Wood v. Sidney S. & F. Co., 92 Hun, 22, 37 N. Y. Supp. 885.

Issues were joined by answers of defendants, and at the close of the trial the case was dismissed as to all defendants except Irrigated Lands Company, Price River Irrigation Company, Thomas Austin, George A. Smith, Albert Smith and John Y. Smith, who, with the exception of the Irrigated Lands Company, are the appellants here. All issues were found in favor of plaintiff. The court's conclusions of law were, in part:

"1. That the attempted transfer to the defendant the Price River Irrigation Company of the property and assets of the Irrigated Lands Company, under date of January 12, 1911, was fraudulent and void, and the taking of said property by the Price River Irrigation Company was a wrongful appropriation and conversion of said property as against the plaintiff herein; and that as against said plaintiff said property is and should be adjudged and decreed to be the property of the Irrigated Lands Company, and subject to plaintiff's judgments.

"2. That the plaintiff is entitled to have applied the property so attempted to be transferred and so converted, and the proceeds thereof, to the satisfaction of his said judgments, hereinbefore set forth, recovered against the said Irrigated Lands Company; and to have and recover from said property, and the proceeds thereof, the sum of said judgments, together with interest to this date, aggregating the sum of \$18,812.80, and also interest hereafter accruing until paid, together with his costs of suit.

"3. That a special master should be appointed to take over and sell so much of the real and personal property so wrongfully appropriated by the Price River Irrigation Company as may be required to pay plaintiff's claim, together with interest, costs of sale, special master's fees, and the costs of this suit.

"4. That in the event the proceeds of said sale are insufficient to pay the costs and expenses herein, and plaintiff's said claim in full, the plaintiff is entitled to a personal judgment for such deficiency as may remain against the Price River Irrigation Company, John Y. Smith, Thomas Austin, and George A. Smith, to the extent that the property so converted has been

sold, mortgaged, or depreciated in value through the acts of the said defendant corporation, and while in its hands, which loss, dissipation, and depreciation of assets exceed the plaintiff's said judgments, and execution against said defendants should issue therefor."

[3] Ninety alleged errors are assigned. The record is voluminous. We have read the testimony as it appears in both the abstract and the transcript. Except to refer to some of the more important of the essential facts, it is neither practicable nor necessary to review the evidence. That all the property of the Irrigated Lands Company was transferred to the Price River Irrigation Company, who refused to pay plaintiff the amount due him, is undisputed. In fact, when the last remnant of the Irrigated Lands Company's assets was transferred to the Price River Irrigation Company, it was expressly stipulated between the two corporations that the Price River Irrigation Company did not assume or agree to pay any of the obligations or indebtedness of the Irrigated Lands Company. It is also conceded that the Price River Irrigation Company never had any property save that received from the Irrigated Lands Company. The management of one corporation may organize another and transfer its property to the new corporation, but if it does so, even with the consent of all its stockholders, the new corporation is liable for the debts of the other to the extent of the value of the property received. *Cooper v. Light & Power Co.*, 35 Utah, 570, 102 Pac. 202, 136 Am. St. Rep. 1075. Assuming that the conveyances to the Price River Irrigation Company were not void, nor fraudulent, nor made for the purpose of hindering or defrauding creditors of the Irrigated Lands Company, the plaintiff still had a right to follow the property which had been transferred to the Price River Irrigation Company. The object sought would have been attained as well without setting aside the conveyances. Giving the plaintiff a lien upon the property of the Price River Irrigation Company would have accomplished the same purpose. That, however, is merely a matter of form. We therefore approve conclusions of law 1, 2, and 3.

[4] To understand conclusion No. 4 it is necessary to consider the evidence upon which it is based.

In August, 1908, the Irrigated Lands Company transferred the Mammoth Reservoir and other property to the Price River Irrigation Company, a corporation that had been organized by the management of the Irrigated Lands Company. The capital stock of the Price River Irrigation Company was \$500,000, divided into 20,000 shares of the par value of \$25 per share. Its capital stock was paid by acceptance of the property conveyed to it by the Irrigated Lands Company. With the exception of one share in the name of

each of the incorporators, the stock of the Price River Irrigation Company was placed in the hands of a trustee for the benefit of the Irrigated Lands Company. It is claimed by appellants that the company was organized for the purpose of distributing water among farmers to whom the Price River shares were to be sold. Nothing appears in the record that effectually contradicts this claim. Instead of being a scheme to defraud, as claimed by plaintiff, it seems that it was, under the circumstances at that time, a sensible and businesslike plan, and perhaps as practical as any that could have been devised. When the conveyance of 1908 was made the Irrigated Lands Company agreed to complete the reservoir, and when the balance of the property was conveyed the alleged consideration for the transfer was the release by the Price River Irrigation Company of the other company's promise to complete the reservoir. These transactions stripped the Irrigated Lands Company of all its property, but the evidence, as we read it, does not warrant the conclusion that there was fraud or bad faith by the directors, or that there was any dissipation of assets by them in making these conveyances, or that in conveying the property to the Price River Irrigation Company there was any intent that such conveyance should be of advantage to these directors, or that they did or could make any profit thereby, except, perhaps, incidentally as stockholders. All of the stock of the Price River Irrigation Company, except 14 shares to the organizers, had been transferred to the Irrigated Lands Company, and was the latter's property, and so far the transaction was merely the exchange of property for stock, and the stock represented the value of the property so conveyed—all of the property of the Price River Irrigation Company. The stock represented so many shares of water rights, and these water rights represented the real value of the Price River project. With the exception of John Y. Smith, the individual appellants were not directors of the Irrigated Lands Company during 1908, and for that reason, if for no other, they should not be held accountable for any illegal or ultra vires acts of the Irrigated Lands Company during that year.

[5] The court's conclusion of law No. 5, and the last, is as follows:

"That each of the defendants John Y. Smith, Thomas Austin, George A. Smith, and Albert Smith is a trustee ex maleficio of the 600 shares of stock of the Price River Irrigation Company received by the several defendants, from Wm. D. Livingston, trustee, and charged with a trust in favor of the plaintiff for payment therefrom of the debt due plaintiff hereinbefore stated. In the event that plaintiff's claim is not recovered in full from the sale of the property of the Irrigated Lands Company wrongfully taken over by the defendant corporation, or by execution against the defendants Price River Irriga-

tion Company, John Y. Smith, Thomas Austin and George A. Smith, then, upon the coming in of the report of the special master showing the deficiency, the defendants should account for the trust stock so received by them, and turn over to the said special master the amount remaining in their hands; and upon said accounting, in so far as said stock has been disposed of by said several defendants, the said defendants should each severally be charged with the stock disposed of by him at the value of \$40 per share, and upon such accounting (to the extent only required to pay the balance of plaintiff's said claim), a personal judgment should be entered against the said several defendants respectively, for the stock disposed of."

On September 1, 1908, the Irrigated Lands Company made its 15 separate promissory notes, each in the sum of \$10,000. The payment of these notes was guaranteed by 15 men who thereafter became the incorporators of the Price River Irrigation Company and who were stockholders of the Irrigated Lands Company. In July, 1908, a contract was entered into between the Irrigated Lands Company and the Irrigation Investments Company, by which the latter was to sell water rights in the Price River Irrigation Company for a price that would net the Irrigated Lands Company \$33 per acre. August 1, 1908, an agreement was executed between the proposed guarantors of 15 promissory notes of \$10,000 each, to be issued and disposed of by the Irrigated Lands Company, providing that the personal liability among themselves should be \$10,000 each, or one-fifteenth of the total liability. October 24, 1908, the same date on which the Mammoth Reservoir and other property was transferred to the Price River Irrigation Company by the Irrigated Lands Company, a so-called trust agreement was executed by the two corporations. This trust agreement provided inter alia that 14,000 shares of stock should be sold in accordance with a certain contract between the Irrigated Lands Company and the Irrigation Investments Company, and that the trustee should see that the proceeds of sales of the water stock or rights would be applied as follows: First, in the payment of the debts and obligations of the Irrigated Lands Company incurred for and in connection with the construction of said project, including reservoir and main canals, other than a loan of \$100,000 from the state of Utah; second, in payment of any bonuses allowed and agreed upon by the first party to be paid to those who aided in securing financial aid to the first party; and, third, to turn over any remaining proceeds to the Irrigated Lands Company.

It is contended by plaintiff that by the express terms of the trust agreement the proceeds of sales of this stock were to be applied, first, for the benefit of the creditors of the Irrigated Lands Company. Appellants

insist that by the express terms of the agreement such proceeds were to be applied only in payment of the debts of the Irrigated Lands Company which might be incurred in the completion of the Price River project. Appellants further insist that if their construction be not plain and reasonable the district court erred in not permitting testimony to be introduced to show the intention of the parties as to who was included in the first class in this trust agreement. In our opinion, the claims of creditors were included in the provision where it is stated that proceeds of sale of water shares shall be applied:

"First, in payment of the debts and obligations of the Irrigated Lands Company incurred for and in connection with the construction of said project, including reservoir and main canals (other than a loan of \$100,000 from the state of Utah)."

It is found that the plaintiff had sold to the Irrigated Lands Company, not only the reservoir, but it is found by the court that the debt to plaintiff was incurred in connection with the construction of the Mammoth project, including the Mammoth Reservoir and main canal, the construction work already performed thereon, buildings which were to be used for construction purposes, cement, construction machinery and reservoir site, and water rights for water with which said reservoir was to be filled. The qualifying words, "other than a loan of \$100,000 from the state of Utah," clearly imply that the state was the only creditor to be excluded from participation in the proceeds to be derived from the stock placed for sale with the trustee. The trustee was given power to sell this stock in accordance with the provision of the sales contract with the Irrigation Investments Company, and he was given the power to sell at a price that would net the Irrigated Lands Company \$33 per share. The trustee contract was abrogated in February, 1909. At that time the board of directors of the Irrigated Lands Company authorized its manager to open and establish agencies for the sale of lands and water rights in the Price project, and to fix the price and terms of sale as he might deem for the best interests of the company; provided, water rights should in no case be sold for less than \$43 per acre. It is argued, and the court found, that the so-called trust fund had been impressed with a lien for the plaintiff, and that he had a lien upon the stock itself. Under the agreement spoken of plaintiff was entitled to payment out of the proceeds of stock sales, but that would not give him a lien upon the stock itself, and unless he had such a lien the power that created the trust could also uncreate it and arrange for sales by the Irrigated Lands Company itself. It is evident that at that time the

directors and stockholders of both companies had high hopes that the shares of stock and also land could be sold, and that sufficient would be realized to pay the 15 notes heretofore mentioned and to complete the reservoir system. If those expectations had been realized the project would probably have been completed, and creditors would have been paid. But the stock was not salable. The \$100,000 received from the \$150,000 in notes had in the meantime been spent. The evidence does not show any waste of this money, or that it was not expended for proper purposes. All the money was used in development of the Price River System. Neither fraud, bad faith, nor culpable negligence were shown on the part of the directors, who are defendants here. George A. Smith, Albert Smith, and Thomas Austin were not directors until after the money realized from the sale of so-called trust stock had been expended, and they certainly could not be held liable on the theory on which the district court held them accountable.

[8] It is well settled in this jurisdiction that directors are prohibited from preferring debts due to themselves when a corporation is insolvent. *Mercantile Co. v. Mt. Pleasant Co-op.*, 12 Utah, 213, 42 Pac. 869. When the notes referred to became due all of the individual defendants were given stock for the money paid out by them for the corporation. That was in the fall of 1909. Defendant George A. Smith received 600 shares of stock in consideration of \$10,000 paid by him for the company, but at that time George A. Smith was not a director of the Irrigated Lands Company, and hence had a right to accept a preference whether the company was insolvent at that time or not. Thomas Austin, who also paid a \$10,000 note on which he had been guarantor, was a director at the time, and if the Irrigated Lands Company was insolvent he should account for the stock that was received by him when he was both director and creditor. But it is said that he was only a guarantor. Assuming that Mr. Austin was a guarantor only, it would not change the principle involved. If a director who is a creditor of an insolvent corporation may not prefer himself, it is immaterial whether he prefers himself as a principal or as a guarantor or indorser or surety. He has no right to do by indirection that which he may not do directly. The adjudicated cases are not in harmony on this subject, but we think the better rule is that an insolvent corporation has no right to prefer the debt of a creditor where a director of a corporation is liable therefor as indorser, guarantor, or surety. *Bosworth v. Jacksonville Nat. Bank*, 84 Fed. 615, 12 C. C. A. 331; *Merchants' Nat. Bank v. McDonald*, 63 Neb. 363, 88 N. W. 492, 89 N. W. 770; *Tillson v. Downing*, 45 Neb. 549, 63 N. W. 836; 7 R. C. L. § 776, p. 761.

[7] The record shows that John Y. Smith was at all times a director of both corporations, and that he received 600 shares of stock in payment of his claim against the Irrigated Lands Company. The court found that Albert Smith received 600 shares of stock. Mr. Albert Smith did not pay as guarantor, but purchased three notes of \$10,000 each on September 21, 1908, paying therefor \$20,000. Mr. Smith testified:

"I was one of the original signers of the 15 \$10,000.00 notes, and the contract of August, 1908, signed by the 15 guarantors. I purchased 3 of those notes September 21, 1908. I paid for them by check. Defendants' Exhibit 4 is one of the checks with which I purchased those notes. I issued another check for the same amount as that. I do not have that check. I have the stub from which I took it. I issued both checks at the same time, each for \$10,000, one of them I can't find. For those two checks I received three notes. When those notes became due I made an effort to collect them. I never did collect them, because the Irrigated Lands Company I suppose didn't have any money to pay me. They offered me 1,800 shares of water stock in October or November, 1909, if I recollect right. I didn't take it until I was forced to. I preferred the money in preference to the water stock. I finally took the water stock. I didn't make any investigation at that time to find out the value of the water stock. I didn't think there was any value on it. If there was it was a fictitious value. I simply had to take the water stock when they told me it was all they could give me. I took it for the money I paid. I took my chances of getting something out of it. I placed my stock on the market. Sold 300 shares at \$11, practically 60 days after I got it. I think I have 250 or 275 shares in my name now."

When Mr. Smith bought the three \$10,000 notes he was not a director, and if the corporation was willing to make the unusually liberal discount of \$10,000 we fail to perceive in the transaction anything that would subject him to the charge of fraud or dishonesty. However, in 1909, when he presented the purchased notes for payment, he was a director, and if the company was then insolvent or in imminent danger of insolvency, he was not justified in accepting the 1,800 water shares and appropriating them for the payment of debts due him and thus deprive other creditors of a fund to which they were primarily entitled. It may be possible that Mr. Smith had no suspicion of the insolvency of the Irrigated Lands Company, if it was insolvent, but it will not do to say that he did not know the financial condition of the corporation of which he was a director. It was his duty to know, and he is presumed to have known, the financial status of the corporation.

[8] The question here arises whether the Irrigated Lands Company was insolvent or in imminent danger of insolvency in 1909.

John Y. Smith, a director of both corporations from the dates of incorporation and continuing as a director thereafter, testified that the Irrigated Lands Company was insolvent when it conveyed the Mammoth Reservoir to the Price River Irrigation Company, and that it was insolvent from October 24, 1908. According to his testimony the Irrigated Lands Company was a venture in high finance, and was little more than a wild speculation, with assets that were at all times dubious. In its answer to plaintiff's amended complaint the Price River Irrigation Company alleges that on January 28, 1910, the Irrigated Lands Company was indebted to various creditors in the sum of \$300,000, and was therefore wholly bankrupt. On the other hand, we find in plaintiff's amended complaint the statement that the property transferred to the Price River Irrigation Company was worth, and still is worth, at least the sum of \$200,000. The issue as to whether the Irrigated Lands Company was insolvent in 1909 is not directly raised in the pleadings, nor is a direct finding made on the subject. With the record in this condition we are not inclined to direct what finding should be made as to insolvency in 1909. Neither are we inclined to direct what findings should be made as to the value of the Price River stock or water shares in 1909. The price fixed in the trust agreement was purely a paper or fictitious value. So was the \$25 par value. It occurs to us that the price at which the directors say they took it, that is, \$18.66% per share, would be a more just basis of liability if the Irrigated Lands Company was insolvent in 1909.

The district court is therefore ordered to permit plaintiff, if he so desires, to amend his supplemental complaint, and permit the parties to offer further testimony on the issue of insolvency of the Irrigated Lands Company in 1908, and 1909, and if the corporation is found to have been insolvent or in imminent danger of insolvency in 1909 the court is further directed to find that the following directors took water shares or stock belonging to the Irrigated Lands Company for money due them at a time when they had no right to be preferred creditors, to wit, John Y. Smith, 600 shares; Thomas Austin, 600 shares; and Albert Smith, 1,800 shares. As to George A. Smith the judgment is reversed. As to John Y. Smith, Thomas Austin, and Albert Smith it is reversed, with directions to proceed further in the case as above indicated, if plaintiff desires to amend his complaint. In all other respects judgment affirmed. All costs to be taxed against Price River Irrigation Company.

CORFMAN, C. J., and FRICK, GIDEON, and THURMAN, JJ., concur.

(55 Utah, 196)

SHEPARD v. UTAH LIGHT & TRACTION CO. (No. 3247.)

(Supreme Court of Utah. Oct. 11, 1919.)

1. APPEAL AND ERROR ⇐866(3)—ASSIGNMENT OF ERROR ON DIRECTION OF VERDICT.

The assignments of error relied on by plaintiff appellant all challenging the action of the court in directing verdict, the question raised on appeal is whether defendant as a matter of law can be held under the facts and circumstances to answer for the damages sustained by plaintiff.

2. COUNTIES ⇐144—RIGHT OF COUNTY COMMISSIONERS TO OBSTRUCT HIGHWAYS.

The county officials have a lawful right to temporarily obstruct highways under their jurisdiction for purpose of making improvements and repairs, and this right, when properly exercised, is paramount to the right of the public to free and unobstructed travel.

3. HIGHWAYS ⇐200—LIABILITY OF TRACTION COMPANY FOR INJURIES DUE TO OBSTRUCTION.

A traction company, which pursuant to an order of county officials removed from its track on a county road dirt and rock and dumped the same on the road at a place designated by the county officials, to be used for repair of an intersecting avenue, held not liable for injuries to a traveler due to obstruction caused by the materials, which had then been received and taken charge of by the county, in view of Comp. Laws 1907, § 511, subd. 24, as amended by Laws 1911, c. 119, § 511x24, and Laws 1909, c. 118, as to jurisdiction of county commissioners over county roads.

4. HIGHWAYS ⇐153 — LIABILITY FOR OBSTRUCTION CAUSED BY LAWFUL ACT.

While work performed on a public highway in an unlawful manner or for no lawful purpose cannot be justified although performed under direction of authorized officers, a lawful act performed in a lawful way cannot create a nuisance, and does not give rise to an action in tort.

Gideon and Weber, JJ., dissenting.

Appeal from District Court, Salt Lake County; J. Louis Brown, Judge.

Action by Lucile Shepard against the Utah Light & Traction Company, a corporation. Judgment for defendant, and plaintiff appeals. Affirmed.

M. E. Wilson, of Salt Lake City, for appellant.

Bagley & Ashton, of Salt Lake City, for respondent.

CORFMAN, O. J. Plaintiff brought this action to recover damages for personal injuries sustained by her through the alleged negligence of the defendant.

In substance the complaint alleges that on September 1, 1917, the defendant, a street car company, removed from its tracks loca-

(184 P.)

ted on State street; Salt Lake City, several cars of dirt and rock, and unlawfully and wrongfully caused the same to be unloaded upon the traveled portion of said street at or near what is known as Oakland avenue, an avenue extending at right angles westward from said State street; that said dirt was wrongfully and negligently permitted to remain upon said street, where it had been dumped and left, until after the accident complained of, without danger signals or other means being taken to prevent persons traveling upon the street from running into it; that said obstruction prevented persons from operating vehicles upon said highway and from having the free use thereof, and rendered the same dangerous to persons operating vehicles thereon. It is further alleged that on September 2, 1917, at about 2 o'clock a. m., while the plaintiff was riding on the back seat of a certain motorcycle operated upon said street by one John F. Husbands from Salt Lake City to Murray, said motorcycle ran into and partially over said obstruction, when with great force, the plaintiff was thrown from her seat on the motorcycle to the pavement on said street, and was thereby severely injured, to her damage in the sum of \$15,000, for which judgment is prayed.

The answer of the defendant denies negligence on its part, admits the removal of the dirt from the roadbed of its railway tracks on State street, and avers that said dirt so removed by it was by order of the board of commissioners of Salt Lake county, and was taken charge of by said county on said State street at a point near Oakland Avenue, to be there used by said county to rebuild and repair certain roads in that vicinity. It is also alleged in the answer that the motorcycle upon which plaintiff was riding was carelessly and negligently operated, and that the plaintiff was guilty of negligence which proximately contributed to the injuries complained of by her while she was engaged in a joint enterprise.

The testimony shows that State street is a public thoroughfare running north and south between Salt Lake City and Murray City, upon which at or near the center the defendant has laid and operates a double-tracked street railway. West of the defendant's car tracks a 16-foot cement pavement is laid for vehicle travel. Immediately west of this paved strip there is about 12 or 13 feet of dirt road, rolled down and also made available for vehicle travel. Oakland avenue is a narrower street than State street, is not paved, and runs at right angles westerly from State street. It has no car tracks upon it. Both State street and Oakland avenue are county roads, within the jurisdiction and under the supervision of the officers of Salt Lake county, and embraced in what is known as road district No. 5. On September 1, 1916, and for some months prior thereto the offi-

cial of Salt Lake county were engaged in the improvement of both State Street and Oakland avenue. The work was being carried on under the immediate supervision of William H. Smith, the county road supervisor of said district No. 5, under the orders and direction of the county commissioners of Salt Lake county. On said day, at about 12 o'clock noon, the defendant, pursuant to an order made by and under the direction of the said county officials, removed from its tracks on State street eight cars of dirt and rock, and hauled and dumped them on said State street at or near Oakland avenue, at the place designated by the county officials. As we read the record, as had been the custom, after the dirt had been dumped by the defendant railway company, the county officials took charge of the dirt, removed it by teams from the car tracks so as not to impede the movement of defendant's cars, and then left it upon the paved track for vehicles on State street to be taken away and used by the county for the improvement of Oakland avenue. The dirt or obstruction thus placed and left upon the highway covered the paved portion of State street for a distance of about 11 feet in width, and in height ranged from about 15 inches at the north end to 27 inches at the south end.

After the dirt had been dumped from defendant's cars and was taken in charge by the county officials, the defendant exercised no further control nor supervision over it. William H. Smith, the county road supervisor, testified:

"I was apprised that the dirt had been delivered as I was going home from town. That was 12 o'clock noon. I shoveled up the loose dirt on the west side and straightened it up. * * * I was going to use the dirt on Oakland avenue for the purpose of grading."

The dirt was left upon the highway rough and uneven, and no warning or danger signals were placed upon it during the daytime of September 1st, nor during the nighttime following. The testimony further shows that on all previous occasions when the defendant had hauled material for the county, under direction of county officials, for the improvement of the highways, after delivery of the material, danger signals or lights were placed upon it by the county road supervisor. On September 2, 1917, at about 1:30 o'clock a. m. the morning following the delivery of the dirt, Mrs. Shepard, the plaintiff, at the invitation of a Mr. Husbands, a police officer, mounted and seated herself on the rear seat of a motorcycle at the corner of Second East and Second South streets in Salt Lake City. The motorcycle was then driven by Husbands south on the west side of State street toward Murray as far as Oakland avenue, where they ran into the dirt and rock thus left lying on State street, and were thrown from the motorcycle to the pavement. The plaintiff was

seriously injured. The testimony further shows that during the nighttime other motor vehicles ran into the same obstruction and were wrecked. The county road supervisor, when asked concerning why he had failed to place lights upon the material on the particular night in question, testified:

"Q. On this dirt that has been referred to in this case did you place red lights upon that dirt on the night of the accident? A. No, sir. Q. Why not, Mr. Smith? A. I forgot it. The first time that I forgot such a thing, but I forgot it that night."

The trial of the case was to a jury. At the conclusion of the testimony defendant moved for a directed verdict, whereupon the court directed, and the jury returned, its verdict, no cause of action.

[1] The assignments of error relied upon by the plaintiff all challenge the action of the court in directing a verdict for the defendant. The question raised, therefore, on appeal is whether or not the defendant as a matter of law can be held, under the facts and circumstances as disclosed by the testimony, to answer for the damages sustained by the plaintiff in the accident.

This is the second time the case has been presented to this court for review. The first time by a unanimous court the order was made that the judgment of the district court be affirmed. Upon application of the plaintiff a rehearing was granted and the case reargued. Upon the former hearing the plaintiff made the contention, and still contends, that the act of the defendant in hauling the dirt and dumping it upon the street was wrongful, that it thereby created a public nuisance, and that it must be held to answer in damages to any person who was injured thereby. In our former opinion we made the statement that—

"Leaving the rock and dirt upon the highway without danger signals or other precautionary methods taken to warn the traveling public of its presence constituted a public nuisance."

We then held that the act of the defendant in dumping the dirt from its cars, under orders from the county officials, for the purpose of improving and repairing the streets, was lawful, and as we then thought clearly pointed out that the wrong committed and the nuisance created was the leaving of the material in the street during the nighttime without lights or other danger signals to warn travelers of its presence. It is the contention of the plaintiff that the hauling and dumping of the material on the highway by the defendant was not only wrongful, but the leaving of it there unguarded during the nighttime following was negligence on the part of the defendant, although it was done as directed by the county officials, and the dirt was afterwards received and taken charge of by the latter. In support of this

contention the plaintiff cites us to the following authorities: *Bowen v. Detroit City Ry. Co.*, 54 Mich. 496, 20 N. W. 559, 52 Am. Rep. 822; *McDonald v. Toledo Consol. St. Ry. Co.*, 74 Fed. 104, 20 C. C. A. 822; *Brady v. Public Service Ry. Co.*, 80 N. J. Law, 471, 79 Atl. 287; *Dixon v. Brooklyn Ry. Co.*, 100 N. Y. 170, 3 N. E. 65; *Houston & T. C. Co. v. Lackey*, 12 Tex. Civ. App. 229, 33 S. W. 768; *Willson v. West & Slade Mill Co.*, 28 Wash. 312, 68 Pac. 716; *Solberg v. Schlosser*, 20 N. D. 307, 127 N. W. 91, 30 L. R. A. (N. S.) 1111; 29 Cyc. 1201; *Wood, Nuisances*, § 875; *Morris v. Salt Lake City*, 35 Utah, 474, 101 Pac. 373; 13 R. C. L. § 190, p. 224; *Frank Bembe v. Commissioners of Anne Arundel Co.*, 94 Md. 321, 51 Atl. 179, 57 L. R. A. 279; *Hartford County v. Wise*, 71 Md. 52, 18 Atl. 31; *Ray v. Manhattan L. H. & P. Co.*, 92 Minn. 101, 99 N. W. 782; *Circleville v. Neuding*, 41 Ohio St. 465; *Philadelphia Coal Co. v. Barrie*, 179 Fed. 50, 102 C. C. A. 618; *Gillis v. Cambridge Gas Light Co.*, 202 Mass. 222, 88 N. E. 779; *City of Portland v. Richardson*, 54 Me. 46, 89 Am. Dec. 720; *Congreve v. Smith*, 18 N. Y. 79; *Congreve v. Morgan*, 18 N. Y. 84, 72 Am. Dec. 495; *Irvine v. Wood*, 51 N. Y. 224, 10 Am. Rep. 603; *Robinson v. Mills*, 25 Mont. 391, 65 Pac. 114; *Shreve v. City of Ft. Wayne*, 176 Ind. 347, 96 N. E. 7; *Brooks v. City of Atlanta*, 1 Ga. App. 676, 57 S. E. 1081; *Elliott, Roads and Streets* (2d Ed.) § 648; *Callanan v. Gilman*, 107 N. Y. 360, 14 N. E. 264, 1 Am. St. Rep. 831; 13 R. C. L. p. 219, § 185; *Trlay v. Richard Canal Co.*, 172 App. Div. 615, 158 N. Y. Supp. 739; *Elam v. City of Mt. Sterling*, 132 Ky. 657, 117 S. W. 250, 20 L. R. A. (N. S.) 512; *City of Louisville v. Tompkins*, (Ky.) 122 S. W. 174; *Dunlap v. Raleigh*, 167 N. C. 669, 83 S. E. 703; *Thornton v. Dow*, 60 Wash. 622, 111 Pac. 899, 32 L. R. A. (N. S.) 968; *First Presbyterian Cong. v. Smith*, 163 Pa. 561, 30 Atl. 279, 26 L. R. A. 504, 43 Am. St. Rep. 808; 1 *Mechem on Agency*, §§ 1451, 1452; *Ellis v. McNaughton*, 76 Mich. 237, 42 N. W. 1113, 15 Am. St. Rep. 308; *Baird v. Shipman*, 132 Ill. 16, 23 N. E. 384, 7 L. R. A. 128, 22 Am. St. Rep. 504; *Devlin v. Smith*, 89 N. Y. 470, 42 Am. Rep. 311; *Penn. Steel Co. v. Elmore* (C. C.) 175 Fed. 176; *O'Brien v. American Bridge Co.*, 110 Minn. 364, 125 N. W. 1012, 32 L. R. A. (N. S.) 980, 136 Am. St. Rep. 503; *Clifford v. Dam*, 81 N. Y. 52; 15 A. & E. Ency. Law, 501; *McDermott v. Conley*, 11 N. Y. Supp. 403; *Hawver v. Whalen*, 49 Ohio St. 69, 29 N. E. 1049, 14 L. R. A. 828; *Bennett v. Lovell*, 12 R. I. 166, 34 Am. Rep. 628; *Ayer v. Norwich*, 39 Conn. 376, 12 Am. Rep. 396; *Topeka Water Co. v. Whiting*, 58 Kan. 639, 50 Pac. 877, 39 L. R. A. 90; *Swords v. Edgar*, 59 N. Y. 28, 17 Am. Rep. 296; *Lydecker v. Board of Chosen Freeholders*, 91 N. J. Law, 622, 103 Atl. 251, L. R. A. 1918D, 351; *Comp. Laws*

*Reported in full in the New York Supplement; reported as a memorandum decision without opinion in 58 Hun, 602.

Utah, §§ 2840, 2845, 2850, 2853, 2735, 7240, and 2185.

The cases cited shed very little light on the questions involved in this action. All of these authorities announce and adhere to the well-established doctrine that one who wrongfully places or leaves an obstruction in a highway becomes liable to the persons sustaining injuries thereby. No criticism is to be made of the authorities cited and the principles announced by them, for they deal with unlawful acts and the liability of persons committing them, as contradistinguished from lawful acts committed in a lawful manner.

We held in our former opinion in this case that the acts of the defendant were lawful in removing the dirt from its roadbed and hauling and dumping it from its cars on the highway by direction of the county officials to be used for the improvement and repair of streets within the jurisdiction and under the supervision of the latter; that these acts of the defendant were not only lawful, but were performed in a lawful manner. Plaintiff did not before, nor does she now, cite us to a single authority holding that where the facts and circumstances are like or similar to those in the case we have under consideration here, in which negligence was held to be established and the defendant required to respond in damages.

By subdivision 24 of section 511, Comp. Laws Utah 1907, as amended by Laws Utah 1911, § 511x, p. 198, it is provided that the board of county commissioners shall have jurisdiction over the county roads, and the following powers:

"To lay out, maintain, control, erect, and manage public roads, turnpikes, ferries and bridges with the county outside of the incorporated cities. * * *

By chapter 118 of Laws Utah 1909, entitled "Powers of county commissioners as to roads," it is provided:

"Sec. 1. Each board of county commissioners shall by proper regulations: 1. Appoint a county road commissioner. * * * 2. Cause to be * * * maintained and worked such public roads as are necessary for public convenience."

"Sec. 4. The county road commissioner, under the direction and supervision of the board of county commissioners, shall: 1. Take charge of the public roads within the county, and employ and direct such competent help as may be necessary to properly perform his duties. * * * 4. Keep the roads clean of obstructions and in good repair. 5. Cause the roads to be graded * * * and keep the same in repair and renew them when necessary."

[2] The county officials have the lawful right to temporarily obstruct the highways under their jurisdiction for the purpose of making improvements and repairs, and this right, when properly exercised, is always paramount to the right of the public in them

for free and unobstructed travel. *Phelan v. Granite Bituminous Paving Co.*, 227 Mo. 660, 127 S. W. 318, 137 Am. St. Rep. 603; *R. C. L. title "Highways,"* § 188; *Pinnix v. City of Durham*, 130 N. C. 360, 41 S. E. 932, 933; *Lund v. St. P., etc., Ry.*, 81 Wash. 286, 71 Pac. 1032, 61 L. R. A. 506, 96 Am. St. Rep. 906; *Stern v. Spokane*, 73 Wash. 118, 131 Pac. 476, 46 L. R. A. (N. S.) 620.

[3] In the case before us the testimony clearly shows that the only acts the defendant was engaged in were the taking of the material from its roadbed, hauling and delivering it on State street to be received, taken, and used for the improvement of the public roads under the jurisdiction of county officials duly authorized and charged with the duty of supervising and keeping them in proper repair. The delivery of the material by the defendant at the time and place where it was delivered was not negligence per se. The only wrong that contributed to the plaintiff's injuries, and the only negligence of which she has any right to complain, was the neglect of the county in leaving the material on the highway during the nighttime unguarded, without warning signals or other means of apprising the public of its presence in the street. The duty of safeguarding the public after the defendant had removed the material from its roadway and had hauled and dumped it from its cars in a lawful manner and it had been received and taken charge of by the county for a lawful purpose devolved upon the county. Further, the testimony is clear that after the material was dumped from the defendant's cars defendant had no further control or supervision over it. It necessarily follows that if the defendant delivered it in a lawful way and at a lawful place, and it was then received and taken charge of by the county, the responsibility of the defendant ended. Moreover, after the county had thus received and taken charge of the material the defendant would have no legal right to control it or exercise dominion over it even had it assumed to do so.

On principle we are unable to distinguish between a street car company delivering material to the legally authorized county officials directly engaged in the repair and improvement of the county highways within their jurisdiction (upon whom rests the statutory duty to "take charge of public roads" and "keep the roads clear of obstruction and in good repair") and the laborer who performs his work in a lawful manner or the merchant or materialman furnishing and delivering tools and material in a lawful way for the improvement of the public highways. Throughout this state at the present time thousands of men are employed in digging and plowing up the highways; many teamsters are engaged in hauling and delivering sand, rock, cement and other materials upon them; machinery and other equipment are being sold and delivered by merchants at

points designated, all to be used in and for the improvement of the public roads. This work is being officially directed by the respective city, county, and state officials who determine when, where, and how the work is to be performed and the materials and equipment furnished. If the employes complete their work in a lawful way and it is afterwards received and taken charge of by their employers, upon what logical basis may the former be held responsible for the injuries occasioned to the traveling public in cases of accident through failure or neglect of their employers to seasonably remove it from the highways or in leaving it and failing to place warning signals upon it, or to make lawful use of it thereafter? There is no principle of law that permits of penalizing lawful conduct. To hold the employes responsible to third parties for injuries received by them through the neglect and failure of their employers after the relationship of employer and employe has terminated would be, in our judgment, neither sound law, correct in principle, nor calculated to promote justice.

[4] We do not wish to be understood as holding, nor do we hold, that work performed on the public highways in an unlawful manner or for no lawful purpose is to be justified in the law, although performed under the direction of authorized officials. What we do hold is that a lawful act performed in a lawful way cannot create a nuisance, nor will it give rise to an action in tort. The hauling and delivery of the dirt in the street were performed in a lawful way, and these acts of the defendant most certainly should not be held a nuisance.

But the plaintiff strenuously contends that the act of the defendant in delivering material on State street to be used on Oakland avenue was a wrongful act; that while it is permissible under the law to temporarily obstruct the highways for the purpose of making improvements and repairs the rule cannot be extended so as to permit the depositing of materials on one highway for the improvement of another. No case in which this question was directly before the court is cited in plaintiff's brief. The case cited (*Louisville v. Tompkins*, supra), upon which plaintiff seems to rely, announces the doctrine, but in that case the question was not properly raised, and was not before the Kentucky court to pass upon. We need not therefore regard that case as a precedent. However, let it be conceded, without our deciding it, that the rule contended for by plaintiff, generally speaking, is a proper one, yet it should not be invoked nor followed in a case in which there is no sound reason to be assigned for doing so. We do not think the rule should be applied in any event in the case before us. State street and Oakland avenue, as pointed out in the testimony, were in the same road district and under the control and supervi-

sion of the same county officials. The testimony further shows that both of these highways at the time of the accident to the plaintiff were being improved at the same time by the taking of material from State street to be used in the grading of Oakland avenue. State street was a wide street traversed by the defendant's railway, which afforded the very best facilities for the removal of the dirt from its roadway and hauling it to a point on State street where it could be taken and used for the improvement of Oakland avenue. Oakland avenue was a narrow street, without railway trackage, intersecting State street. Under these circumstances and conditions we are not prepared to say that the depositing of the dirt on State street to be taken and used by the county officials on Oakland avenue constituted a public nuisance, or that the placing of it there was unlawful in its inception. We think, under the circumstances, it was not only the most practicable and feasible way of hauling the material, but that the county officials who were charged with the statutory duty of improving these streets exercised good judgment in having the dirt hauled and placed on State street at a point where it was available for taking and using it for the improvement of Oakland avenue. Moreover, the county officials had the lawful right to temporarily leave the material upon State street for the purposes for which it was to be used on Oakland avenue. The wrong committed was the leaving of the material during the nighttime upon the highway by the county after it had been rightfully received at the hands of the defendant without placing danger signals upon it. The dirt on the highway did not become a nuisance by any act or omission of the defendant, nor while the defendant had any power or control over it.

We have carefully considered the many cases to which we are cited by plaintiff's brief, but we have not paused to discuss them for the reason that the principles of law they announce are applied to facts and circumstances entirely different from those we have under consideration in the case at bar. After carefully reviewing the authorities cited and the principles of law they announce, we feel convinced that they cannot properly be applied to the facts and circumstances of the case at bar and under which the plaintiff seeks to recover damages at the hands of the defendant.

It therefore follows that the order of the district court directing a verdict for the defendant was right, and the judgment entered thereon should be affirmed, with costs to defendant. It is so ordered. It is further ordered that the foregoing opinion be substituted for the former opinion hereinbefore referred to, and this opinion shall be the opinion officially published.

THURMAN, J., concurs.

FRICK, J. After considerable hesitation, and, I may say, with some reluctance, I am forced to the conclusion that the Chief Justice is right. In concurring in the former opinion I did so upon the sole ground that, the county being immune, therefore the defendant was likewise so. I am now convinced that my conclusion in that regard was erroneous, and that the immunity of the county afforded the defendant no protection if it, as a matter of law, can be held liable. The difficulty that confronts me, however, is to find authority in law for holding the defendant liable. It is quite true that the law is well settled that "an individual who erects an unlawful obstruction to the free use of a highway, in its nature a nuisance, *by reason of his wrongful act* is charged in law as an insurer against accident to a person properly traveling the highway and meeting injury by reason of such unlawful obstruction. * * *

But where the highway is obstructed under license and by authority, the person responsible for such obstruction is chargeable only with ordinary care to see that such obstruction does not become a cause of injury to any person lawfully traveling the highway." (Italics mine.) *Stockton Automobile Co. v. Confer*, 154 Cal. 405, 97 Pac. 883. It is manifest that the defendant does not come within the first sentence of the foregoing quotation. Its act in depositing the dirt on the traveled portion of the highway was not an unlawful act. That, it seems to me, is too clear to require argument. Does it come within the second sentence? For a long time I was under the impression that it did. Upon careful reflection and consideration, however, I was forced to abandon that impression also. Had the defendant been engaged in improving or repairing the highway as an independent contractor it no doubt would come within the proposition of law stated in the second sentence before quoted. It was however, merely acting as the instrumentality of the county in depositing the dirt, and was therefore not "responsible for such obstruction." Moreover, the dirt was deposited for a lawful purpose and at a place the county officials had a right to have it deposited for the purpose of improving or repairing that or any other highway in the immediate vicinity. There was therefore nothing unlawful in defendant's act. Nor did such act in any way invade any rights of the plaintiff. While it is true that in the absence of any warning the plaintiff had the right to assume that the highway was free from obstructions, yet it is also true that the county officials had a legal right to deposit the dirt thereon for the purpose of repairing or improving the same or any other highway in the immediate vicinity. In doing that, however, it became the duty of the county official who was in charge of the work to withdraw either the whole or, at least, a portion of the highway from travel

so as not to mislead the traveling public. In this instance a signal or warning sign sufficient to apprise the traveler of the obstruction would have been a compliance with the duty that the law imposed. The accident in this case was due entirely to the failure to warn the plaintiff of the obstruction. That failure, therefore, was the proximate cause of plaintiff's injury. In view that the county had the lawful right to direct the defendant to deposit the dirt, and that the defendant's acts were lawful in doing so, and that it was not the act of depositing the dirt, but the failure to put up a signal or warning sign, which was the cause of plaintiff's injury, I cannot see how the defendant's act in depositing the dirt can be said to be the proximate cause of the injury. If in this case the county were not immune no one would for a moment hesitate to say that if any one is liable it is the county. In view that the acts of the defendant in depositing the dirt were lawful, it, as I view it, becomes entirely immaterial whether the county is immune or not. The mere fact that the county cannot be sued affords no excuse to the officer upon whom the law imposed the duty of putting up a warning signal or sign in case he was required to leave the dirt upon the traveled portion of the highway longer than he had expected. Had the defendant's act in depositing the dirt been for its own convenience in repairing the highway it would have been its duty to see that proper signals or warning signs were put up to warn the traveler against the obstruction. The dirt was, however, deposited for the convenience of the county and upon the direction of the official in charge of the work, and was lawfully deposited. I therefore cannot see how the defendant can be said to be a wrongdoer in any particular. Under the circumstances the defendant could not have withdrawn the highway from travel. It had no authority over it whatever. To do that was the duty of the county official who directed the work. He failed to do so, and hence his act of omission lies nearest the injury. His omission was in no way connected with the defendant's act in depositing the dirt in the first instance, but was an independent intervening act. I concur, therefore, upon the sole ground that in this case the defendant's acts were no different than would have been the act of any other employé of the county who was directed by the officer in charge of the work to deposit the dirt at the place it was deposited, and that it was not the duty of such employé to put up signals or warning signs.

GIDEON, J. (dissenting). The controlling question for determination in this case, as I view it, is: Did the county commissioners of Salt Lake county, as the custodians of the public highways in said county, have the lawful right to direct the defendant company to

dump dirt from its cars upon State street to be used in the repair of Oakland avenue, a street running at right angles with said State street?

I concurred in the former opinion affirming the judgment of the district court with some doubt as to the correctness of the conclusions reached. After the reargument and a further examination of the authorities, and of the principles which in my judgment are involved, I am convinced that the former decision ought not to stand as the law of this case.

It is conceded that the county commissioners of this state have control of the public highways in their respective counties. The purpose of the law delegating that authority and duty is that some public officer or commission shall be charged with the duty of keeping the highways in repair for the public convenience and travel. It may also be admitted as a legal proposition that the county commissioners have the right to temporarily obstruct any highway for the purpose of making public improvements and all needed repairs. Otherwise the very object sought by granting the power would be defeated, namely, the duty to keep the highways suitable for travel. Keeping in mind the purpose for which highways are constructed and kept in repair, namely, for the safety and convenience of the public traveling on said highways, it must logically follow that public officers charged with the duty of keeping such highways in repair, in the performance of that duty, must so perform their respective duties as not to trespass upon or interfere with the rights of the public to any greater extent than is absolutely necessary for such improvements. Repairing highways is a duty imposed by law, and no right exists in a public official to obstruct a highway except as the same is necessary to perform the duty of repairing such highway. No one will contend that it was absolutely necessary to dump the dirt in question upon State street for the repair of Oakland avenue. True, it was probably more convenient, but an absolute necessity did not exist. That, in my judgment, is the error of the majority opinion. The right of the plaintiff to travel upon State street and to assume that it would be reasonably safe for travel is made subservient to the convenience of the commissioners in the performance of their duty to repair Oakland avenue.

It is admitted that the dirt dumped by the defendant company from its cars upon State street was not to be used for the repair of that street, but was to be used in repairing Oakland avenue, and that fact was known to the company at the time. It is not contended that the defendant company had any right to deposit the dirt on said street except by and under the arrangement with the county commissioners who assumed to grant it

such right. If the commissioners were not lawfully exercising a power vested in them, then the defendant company, by throwing the dirt upon such street along a part of the street used by the public, was thereby acting without lawful authority. If such be the fact I can see no escape from the conclusion that of necessity the defendant company would be liable for any injury caused by such obstruction to any one traveling upon that highway, unless such injury resulted from some act of negligence of the party injured or some other person for whose conduct or acts such injured person is responsible. If the county commissioners were not lawfully exercising their authority in so obstructing State street, then it must follow that the defendant company was not doing a lawful act at the time it unloaded the dirt upon that street. The commissioners being without right or legal authority to so obstruct the street, it necessarily follows that the agent directed by such principal cannot justify its acts and absolve itself from liability by relying upon and pleading the unauthorized act of the party or person who directed such unlawful act. 1 Mechem, Agency (2d Ed.) § 1455; Baird v. Shipman, 132 Ill. 16, 23 N. E. 384, 7 L. R. A. 128, 22 Am. St. Rep. 504; Ellis v. McNaughton, 76 Mich. 237, 42 N. W. 1113, 15 Am. St. Rep. 308; note 32 L. R. S. (N. S.) 972.

The county commissioners, in my judgment, in directing and authorizing the defendant company to unload its cars on State street, were violating one of their primary and fundamental duties. That is, they were obstructing a public traveled street without any justification or legal right so to do. State street was not to be repaired, and, as far as shown by the record, that particular place was not required to be repaired for the public convenience.

The authorities relied on by respondent do not, in my judgment, justify or support its contention. The authorities cited simply announce the general rule that public officials have the right to make needed repairs and for that purpose to obstruct a highway even at the inconvenience of the public. No one disputes that proposition. As pointed out, that would simply be performing a public duty. No authority is cited holding a defendant free from liability under facts similar to the facts shown in this case.

The authorities relied on by appellant possibly do not discuss facts similar to the facts involved here. In *City of Louisville v. Tompkins* (Ky.) 122 S. W. 174, the court seems to have accepted as elementary the rule that the public officials have no right to place material on one street or highway to be used in repairing another street or highway. In principle, in my judgment, that must be so. The officials are required to keep the highways free from obstruction so as not

to interfere with the convenience of the travelling public, and the only exception to that rule is when it is necessary to close or obstruct a highway while making needed repairs or making public improvements.

I am unable to follow the reasoning whereby it is concluded that by depositing the dirt upon State street the defendant company did not invade the rights of the public, including plaintiff. The highway was there, and the plaintiff had the right to travel it and to assume that it was in a reasonably safe condition for travel. By the defendant's acts the highway was rendered dangerous. Now, how can it be said that the plaintiff's rights were not invaded? The defendant does not, as I understand its position, so contend. It claims only that it acted under direction of the officials having control of the highway, and for that reason it cannot be held liable for the injury which resulted, not that its acts were not an invasion of plaintiff's rights.

It is also claimed that to hold the defendant company liable under the facts as disclosed by this record would of necessity make any one liable, even an ordinary teamster who might haul a load of sand and dump it upon the street in front of some citizen's residence when he was directed to so do by the owner of the property whose property or sidewalk was to be repaired, for which purpose the sand was to be used. Conceding that such would be the result, is there any logical reason why a teamster who, without authority, invades the rights of another and injury results should be held free from liability?

The right of the plaintiff to travel upon the highway when the injury occurred cannot be and is not disputed. That right was invaded or obstructed by the dirt thrown upon the highway by the defendant company. The justification for such trespass is, in my opinion, based on an unauthorized and illegal act of a public official. That ought not to be held a defense. State street is the main public highway running south from Salt Lake City to Murray City and other towns in the southern part of Salt Lake county. There are many other highways intersecting it from the east and west. To apply the results of the majority opinion to the facts as they exist would give the defendant company and the county officials the right to dump material on State street for the improvement of all intersecting streets along defendant's line of railway on State street. In other words, respondent and the county officials could rightfully and lawfully use State street between the southern limits of Salt Lake City and the southern boundary of the county as a station or dumping ground from which to haul material to all parts of the county, however remote.

In *Wilson v. West & Slade Mill Co.*, 28 Wash, 312, 68 Pac. 716, the Supreme Court of Washington has stated the rule of law governing the duty and liability of parties obstructing a highway under circumstances similar to those in the case at bar in the following language:

"One who, by himself, or jointly with another or others, places an obstruction in a public street, is in law under an obligation to remove it, and is liable for any damage occasioned thereby during the continuance of the obstruction. The fact that he may have no interest in its maintenance after its creation does not relieve him from such liability."

See, also, 13 R. C. L. p. 224, § 190.

In my opinion the judgment of the lower court in this case should be reversed, and a new trial granted. I therefore dissent.

WEBER, J., concurs with GIDEON, J.

(93 Or. 678)

HALLBERG v. HARRIET et al.

(Supreme Court of Oregon. Oct. 21, 1919.)

REFORMATION OF INSTRUMENTS ~~§~~29—MORTGAGE ASSIGNED TO HOLDERS IN DUE COURSE CANNOT BE REFORMED.

Against persons to whom note and mortgage security were assigned, before maturity and without knowledge of defects, by payee on their agreement to furnish him a home thereafter, their obligation in which respect they have fulfilled, there can be no reformation of the assigned instruments; the assignees being holders in due course, who under L. O. L. § 5890, hold the instruments free from any defenses which might have been available against the payee.

Department 1.

Appeal from Circuit Court, Marion County; Geo. G. Bingham, Judge.

Suit by Marie Hallberg against Cornelia B. Harriet and another. Decree for defendants, and plaintiff appeals. Affirmed.

This is a suit to reform a mortgage and an agreement indorsed upon the back of the promissory note secured thereby, in order that the plaintiff may obtain credit thereon for a certain sewer assessment, amounting to \$934.20. The substance of the complaint, reduced to narrative form, is about as follows:

On April 4, 1911, the plaintiff and Jacob Bezemer entered into a written agreement, whereby the latter agreed to sell, and plaintiff agreed to purchase, a tract of land in the suburbs of Salem, for the sum of \$12,000. By the terms of the writing, a payment of

\$200 was then made, and, upon a further payment of \$1,800, Bezemer was to convey the land to plaintiff, who was to execute and deliver her note for \$10,000, secured by a mortgage upon the property payable in three years, with interest at 6 per cent. per annum. After the execution of the contract of April 4, 1911, it was discovered that by a mutual mistake of the parties an important detail of the agreements had been omitted therefrom, and, in order to more fully express in writing their contract, they caused to be executed a supplemental agreement as follows:

"It is understood between the parties in the foregoing agreement that the purchase price of \$12,000, is to include the sewer assessment now against the land and that if said sewer assessment, by virtue of a court decision, does not have to be paid, it shall be either refunded or indorsed on the note.

"[Signed] Jacob Bezemer.

"Witnesses: Nettie J. Miller."

On April 18, 1911, they undertook to execute the terms of the contract, and, in so doing, Bezemer executed a warranty deed to plaintiff for the property, and the latter, having made the preliminary payments agreed upon, executed her promissory note for \$10,000, and a mortgage upon the property, in which she was joined by her husband; but the mortgage contains no covenant like the supplemental agreement above set out. Under the terms of the mortgage, certain sales have been made of portions of the land, and such tracts have been released from the lien thereof. On April 18, 1914, plaintiff by her agent, R. C. Hallberg, agreed with the defendant Cornelia B. Harriet for an extension of time for the payment of the balance due on the note, to April 18, 1915, and defendant's attorney, in reducing such extension agreement to writing on the back of the note, made a mistake and inserted therein the sum of \$2,820, as the balance due, whereas, in fact, it was no more than \$1,545.14, after deducting \$934.20, on account of the sewer assessment, which had been held to be void in a decision of the Supreme Court filed June 4, 1912. Plaintiff signed said erroneous statement on the note by mistake and inadvertence. Neither party discussed or agreed to fix the amount then due on the note, and there was no consideration for waiving the terms of the original agreement respecting the sewer assessment. Bezemer assigned the note and mortgage to his three children, Cornelia B. Harriet, Anna Eberman, and Klaus Bezemer, and Klaus Bezemer had sold his interest therein to Cornelia B. Harriet, and Anna Eberman has since died, and the defendants claim to be the owners of the note and mortgage, which they took with full knowledge and notice of the terms of the agreement between plaintiff and Bezemer, subject to all the equities and defenses thereto, and plaintiff has demanded credit

upon the note for the sewer assessment, which has been refused. Plaintiff is ready, able, and willing to pay the balance due on the note, and prays for a decree reforming the mortgage so that it shall include the supplemental contract, and the agreement on the note so that it shall not undertake to state the balance then due, and that, upon payment of the sum due after deducting the amount of the sewer assessment and the interest thereon, defendants be required to satisfy and cancel the mortgage.

The answer denies the execution of the supplemental agreement, or any knowledge or notice thereof, and pleads several affirmative defenses, among which are that on July 1, 1912, Jacob Bezemer for a good and valuable consideration sold the note and mortgage to Cornelia B. Harriet, Anna Eberman, and Klaus Bezemer, who were innocent and bona fide purchasers thereof, in the regular course of business, without any knowledge, information, or belief as to any of the alleged equities set forth as existing between plaintiff and Jacob Bezemer. It is also alleged, by way of estoppel, that on April 18, 1914 (being the occasion mentioned in the complaint, when the extension agreement was endorsed on the note), Klaus Bezemer refused to grant any further time for the payment of his share of the debt, and plaintiff then paid to said Bezemer the entire balance due for his one-third of the note, with interest thereon, without making any claim for a deduction on account of the sewer assessment, and that such payment would now require these defendants to suffer more than their just share of such deduction. It is further averred that what occurred on April 18, 1914, at the time when the extension agreement was indorsed on the note and signed by plaintiff, by her agent, constituted an account stated. The reply joins issue upon the affirmative defenses. A trial was had, resulting in a decree dismissing the suit, from which plaintiff appeals.

M. E. Pogue, of Salem, for appellant.

Jas G. Heltzel, of Salem (Max Gehlhar, of Salem, on the brief), for respondents.

BENSON, J. (after stating the facts as above). There is a very decided conflict in the evidence as to the execution of the supplemental agreement mentioned in the pleadings. Jacob Bezemer admits that the signature thereto is his, but disclaims any knowledge as to the circumstances under which he signed it, and insists very positively that there was never any understanding between them in regard to the sewer assessment, and is positive that it was never discussed between them. R. C. Hallberg is equally positive that it was fully discussed and assented to, and that it was cheerfully signed by Bezemer. Other witnesses testify that it

was signed by Bezemer in John McNary's law office, and in their presence. The note and mortgage were executed on April 18, 1911, maturing April 18, 1914. Bezemer assigned the note and mortgage to his three children in July, 1912, upon their agreement to furnish him a home thereafter, and they have fulfilled their obligation in that respect. The evidence is uncontradicted that they had no knowledge of the supplemental agreement until late in the fall of 1915, long after the maturity of the note. On April 18, 1914, the date of the maturity of the note, plaintiff sought an extension of time thereon for another year. Mrs. Harriet, who was acting as the attorney in fact for her brother, Klaus Bezemer, and her sister, Anna Eberman, informed plaintiff's husband, R. C. Hallberg, who has acted throughout as his wife's agent, that Klaus Bezemer would not consent to any extension of time, and must have his share of the debt, with interest, at once, but that she and her sister would extend the time of payment of their portions until April 18, 1915, if plaintiff would agree to pay 8 per cent. interest instead of 6 per cent. Thereupon, the attorney for Mrs. Harriet wrote upon the back of the note the following memorandum, which was signed by Mr. Hallberg:

"Salem, Ore., Apr. 18, 1914.

"In consideration of the extension of the time of the payment of this note until Apr. 18, 1915, I agree to pay 8 per cent. int. on the deferred payment of \$2,820.00.

"Marie Hallberg
"By R. C. Hallberg."

At the same time, Hallberg paid one-third of the amount then due, with the accrued interest thereon, with the understanding that it was to fully satisfy Klaus Bezemer for his share of the note. No reference was then made to the sewer assessment by Hallberg, and Mrs. Harriet was totally ignorant of any agreement in relation thereto. Why Hallberg never mentioned it during the years that he was making payments upon both principal and interest; why, when he paid the share belonging to Klaus Bezemer, on April 18, 1914, he paid the same in full, with interest, and claimed no deduction on account of the sewer assessment—it is difficult to comprehend, and is not satisfactorily explained. However, it is not necessary for us to weigh the conflicting evidence in these particulars, since, in any event, the defendants are holders in due course of the note and mortgage, and hold them free from any defenses which might have been available against the payee. L. O. L. 5890.

The decree of the lower court is affirmed.

McBRIDE, O. J., and BURNETT and HARRIS, JJ., concur.

LJUBICH v. WESTERN COOPERAGE CO.*

(Supreme Court of Oregon. Oct. 7, 1919.)

AMBASSADORS AND CONSULS §8 — CONSUL GENERAL MAY AUTHORIZE ACTION ON BEHALF OF CITIZEN OF HIS COUNTRY.

Under treaties between the United States and Austria-Hungary, which contained the usual most favored nation clause, and treaties between the United States and other countries, *held* that consul general of Austria-Hungary might authorize attorneys to institute action on behalf of an Austro-Hungarian national where conditions were such, because of the war between Austria-Hungary and other countries, that it was practically impossible for the national to directly authorize the institution of the action.

Department 1.

Appeal from Circuit Court, Multnomah County; C. U. Gantenbein, Judge.

Action by Yoze Ljubich against the Western Cooperage Company. From an order staying proceedings until attorneys for plaintiff should produce further authority, plaintiff appeals. Order reversed and remanded, with directions.

This action was originally instituted by and in the name of Yoze Ljubich to recover damages under the Oregon Employer's Liability Act (Laws 1911, p. 16) against the defendant for the death of Yure Ljubich through the alleged negligence of defendant. Deceased was killed on the 13th day of September, 1915, and the complaint was filed March 1, 1916. The complaint is in the usual form, and alleges that plaintiff is the mother of deceased. Under the statute, the right to bring the action is concededly in the mother. The complaint was verified by the attorneys for plaintiff, to the form or substance of which there is no objection.

On the 22d day of March, 1916, defendant's attorneys filed a motion, supported by affidavit, requesting the court to require plaintiff's attorneys to produce the authority under which they claimed to act for plaintiff. The affidavit set forth that affiant was informed and believed that other attorneys in the city of Portland were representing the mother, and that Woerndle and Haas, who claimed to represent her, have no other authority than the direction of the Austro-Hungarian consul at San Francisco to bring this action in the name of the mother. No action was taken by the court until January 12, 1917, the case having meantime been put at issue, and the attorneys for the plaintiff having filed an affidavit, showing that the jurisdiction of the imperial consul of Austria-Hungary at San Francisco embraced the state of Oregon; that affiant knew of no one in Oregon representing the plaintiff; that no definite power of attorney had been secure-

authorizing affiant to institute the action, because of war conditions in that part of Europe where plaintiff was residing, which conditions rendered it impracticable to procure legal documents and forward them; that plaintiff's attorneys instituted the action, pursuant to instructions from the consul general representing Austria-Hungary, which authorization was attached to the affidavit, and which was sufficient in form and substance to authorize plaintiff's attorneys to act if the consul general had power to so direct. Thereupon the court, holding that the letter of the Austrian consul general was not sufficient authority to enable the attorneys to institute the suit, ordered proceedings stayed until they should produce further authority, which, being unable to do, they appealed to this court, and while the appeal was pending here war was declared between Austria-Hungary and the United States.

C. T. Haas, of Portland (Joseph Woerndle, of Portland, on the brief), for appellant.

F. S. Senn, of Portland (Senn, Ekwall & Recken and Dan J. Malarkey, all of Portland, on the brief), for respondent.

McBRIDE, C. J. (after stating the facts as above). Upon the argument here counsel have presented the single question, namely, the right of the consul general of Austria-Hungary, under any circumstances, to authorize an action to be commenced in the name of a national without express authority from the person named as plaintiff in such action. The contention of plaintiff's attorneys, when reduced to its plainest terms, is that the consul, by virtue of his office and the treaty between the United States and Austria-Hungary, was, in effect, the official attorney in fact of all nonresident aliens who were not represented by an attorney in fact of their own selection, and as such was authorized to employ attorneys and institute proceedings to defend or enforce the rights of any of his nationals not otherwise represented. Such right being denied by defendant, and its contention being sustained by the court, we will now proceed to consider the point at issue.

For a proper understanding of the question it will be necessary to examine and consider the various treaties bearing upon the subject of the rights of foreign consuls accredited to this country, and the reciprocal rights of consuls of our own country abroad.

Article 11 of the treaty of August 27, 1829 (8 Stat. 401), between this country and Austria-Hungary, reads as follows:

"The citizens or subjects of each party shall have power to dispose of their personal goods, within the jurisdiction of the other, by testament, donation, or otherwise; and their representatives, being citizens or subjects of the other party, shall succeed to their personal goods, whether by testament, or ad intestato,

and may take possession thereof, either by themselves or by others acting for them, and dispose of the same at their will, paying such dues, taxes or charges, only, as the inhabitants of the country wherein the said goods are shall be subject to pay in like cases."

The following articles of the consular convention, entered into between this country and Austria-Hungary on June 29, 1871 (17 Stat. 825), also have an important bearing upon the question here discussed, and are as follows:

"Art. VIII. Consuls-general, consuls, vice-consuls, or consular agents of the two countries may, in the exercise of their duties, apply to the authorities within their districts, whether federal or local, judicial or executive, in the event of any infraction of the treaties and conventions between the two countries; also for the purpose of protecting the rights of their countrymen. Should the said authorities fail to take due notice of their application, they shall be at liberty, in the absence of any diplomatic representative of their country, to apply to the government of the country where they reside."

"Art. XVI. In case of the death of a citizen of the United States in the Austrian-Hungarian Monarchy, or of a citizen of the Austrian-Hungarian Monarchy in the United States, without having any known heirs or testamentary executors by him appointed, the competent legal authorities shall inform the consuls or consular agents of the state to which the deceased belonged of the circumstances, in order that the necessary information may be immediately forwarded to the parties interested."

"Art. XV. Consuls-general, consuls, vice consuls, and consular agents, also consular pupils, chancellors, and consular officers, shall enjoy in the two countries all the liberties, prerogatives, immunities and privileges granted to functionaries of the same class of the most favored nation."

The effect of the last clause above quoted was to import into the treaty of June 29, 1871, every reciprocal concession granted to any nation by any treaty then or thereafter concluded; and in order to ascertain what provisions or other stipulations were, by the "most favored nation" clause of the Austro-Hungarian convention, incorporated into it, we quote the following excerpts from various treaties between this country and other nations.

Article 9 of the treaty of 1853 between the United States and the Argentine Republic (10 Stat. 1009) is as follows:

"If any citizen of either of the two contracting parties shall die without will or testament, in any of the territories of the other, the consul general, or consul of the nation to which the deceased belonged, or the representative of such consul general or consul, in his absence, shall have the right to intervene in the possession, administration, and judicial liquidation of the estate of the deceased, conformably with the laws of the country, for the benefit of the creditors and legal heirs."

The treaty entered into between the United States and the German Empire, December 11, 1871 (17 Stat. 925), contains the following provision:

"Art. VIII. Consuls-general, consuls, vice-consuls, and consular agents shall have the right to apply to the authorities of the respective countries, whether federal or local, judicial or executive, within the extent of their consular district, for the redress of any infraction of the treaties and conventions existing between the two countries, or of international law; to ask information of said authorities, and to address said authorities to the end of protecting the rights and interests of their countrymen, especially in cases of the absence of the latter; in which cases such consuls, etc., shall be presumed to be their legal representatives. If due notice should not be taken of such application, the consular officers aforesaid, in the absence of a diplomatic agent of their country, may apply directly to the government of the country where they reside."

The treaty between the United States and Peru, dated August 31, 1887 (25 Stat. 1461), contains the following provision:

"Until the conclusion of a consular convention, which the high contracting parties agree to form as soon as may be mutually convenient, it is stipulated, that in the absence of the legal heirs or representatives the consuls or vice consuls of either party shall be ex officio the executors or administrators of the citizens of their nation who may die within their consular jurisdictions, and of their countrymen dying at sea whose property may be brought within their district." (Art. 33.)

Article III of the treaty of August 6, 1900 (31 Stat. 1940), between the United States and Great Britain, is as follows:

"In case of the death of any citizen of the United States of America in the United Kingdom of Great Britain and Ireland, or of any subject of Her Britannic Majesty in the United States, without having in the country of his decease any known heirs or testamentary executors by him appointed, the competent local authorities shall at once inform the nearest consular officer of the nation to which the deceased person belonged of the circumstance, in order that the necessary information may be immediately forwarded to persons interested.

"The said consular officer shall have the right to appear personally or by delegate in all proceedings on behalf of the absent heirs or creditors, until they are otherwise represented."

In the consular convention between the United States and Sweden, March 20, 1911 (37 Stat. 1487), we find the following provision:

"Art. XIV. In the event of any citizens of either of the two contracting parties dying without will or testament, in the territory of the other contracting party, the consul-general, consul, vice-consul-general, or vice-consul of the nation to which the deceased may belong, or, in his absence, the representative of such consul-general, consul, vice-consul-general, or vice-consul, shall, so far as the laws of each country will per-

mit and pending the appointment of an administrator and until letters of administration have been granted, take charge of the property left by the deceased for the benefit of his lawful heirs and creditors, and, moreover, have the right to be appointed as administrator of such estate."

From the above provisions we are of the opinion that the consul general of Austria-Hungary becomes ex officio attorney in fact for any of his nonresident nationals having no other representative in this country, and, while there is a dearth of authority directly deciding this question, there are a number of cases so analogous to it in principle as to render the conclusion above announced inevitable, and such is the result deduced by the text-writers from a review of the authorities.

"A foreign consul, without specific authority, has the general right to protect the rights and property of persons of his nation, within the jurisdiction of his consulate, and he may bring suits for such purpose without any special authority from the parties in interest. He may also interpose claims for the restitution of property belonging to his countrymen; but he cannot receive the actual restitution of the property without specific proof of the individual proprietary interest, and without specific authority from the particular individual who is entitled to it." 2 C. J. 1307, No. 35. To like effect see 9 R. C. L. 157, subd. 4.

It may be remarked here that the statement that a consul cannot receive actual restitution of property awarded to a nonresident national without specific authority from the individual entitled to it seems to be based upon the decision in the case of *The Bello Corrunes*, 6 Wheat. 152, 5 L. Ed. 229, which arose before any of the treaties before quoted were negotiated, and where it was expressly conceded by Webster, of counsel for the consul, that actual payment of the sums claimed by the consul on behalf of his countrymen need not necessarily be made to him; his object being to have the award paid into the registry of the court, to be held for those entitled to it as their interests might thereafter appear, and such was the decree of the court. No reference was made in the arguments or in the opinion to any consular privileges or authority arising out of treaty stipulations, and the case is not in point here, where such stipulations are invoked on behalf of the consul's authority.

When this action was commenced this government was at peace with Austria-Hungary and with Germany. In the treaty with Germany, heretofore referred to, occurs this paragraph applicable to consuls of both countries:

"Especially in cases of the absence of their countrymen, such consuls shall be presumed to be their legal representatives."

The term "legal representatives," as here used, can have but one meaning, namely,

"lawfully entitled to represent" the absent person. Under the "most favored nation" clause of the Austro-Hungarian treaty, this provision, originally applying to Germany, became a part of the treaty with Austria-Hungary, and, in our opinion, conferred full authority upon the consul general to commence this action in the name of the plaintiff, and in her name and for her to prosecute it to a conclusion and receive the proceeds if the plaintiff should recover judgment.

In the case of *Succession of Rabasse*, 47 La. Ann. 1452, 17 South. 867, 49 Am. St. Rep. 433, which involved the right of a delegate of the French consul to appear and represent nonresident heirs in the settlement of a probate proceeding, the court said:

"In our view, the stipulation in this treaty puts the delegate in the position of an agent of the French heirs, with the same effect as if he held their mandate to represent them as heirs. * * * Our decision in this case affirms that the French heirs of this succession are to be deemed represented by the delegate of the French consul, with the same effect as if the delegate held their power."

In *Vujic v. Youngstown Sheet & Tube Co.* (D. C.) 220 Fed. 390, it was held that the Austro-Hungarian consul had authority by virtue of his office to sue as next friend for absent heirs, and to recover moneys due them under the Workmen's Compensation Act on account of the death of their father.

In *re Tartaglio's Estate*, 12 Misc. Rep. 245, 33 N. Y. Supp. 1121, the litigation arose upon the demand of the Italian consul general to have paid over to him the distributive shares due the nonresident widow and children of the deceased. The county treasurer, who was custodian of the fund, refused to pay over the money upon the ground that the consul general had no authority to receive the fund and give a competent acquittance for the same. The clause in the treaty with Italy, relied upon by the consul, provided that the consuls general "may have recourse to the authorities of the respective countries within their respective districts, whether federal or local, judicial or executive, in order to defend the rights and interests of their countrymen." The court held that the term "defend," used in the treaty, should be so construed as to grant the power to proceed affirmatively; that the consul general had the right to demand and receive the money; and that his receipt therefor would be conclusive against the heirs. There was the same holding in *Re Fiorentino's Estate* (Sur.) 89 N. Y. Supp. 537.

Both of these cases are surrogate decisions, and not authoritative, but appear to proceed upon sound lines of reasoning. There are many cases wherein the right of priority of consuls to be appointed administrators is discussed, but these proceed upon different principles, and throw little light upon the present controversy. Here no one is claiming

to have any authorization direct from plaintiff to proceed in the matter. Considering the disturbed state of affairs in Europe for the past four years, it appears highly improbable that the plaintiff could have been communicated with, or that she could have executed and sent a formal power of attorney to the Austro-Hungarian consul or any one else. In the meantime witnesses might disappear or die, and the plaintiff thereby lose the benefit of their testimony. So, upon the face of it, the interposition of the consul general would appear fairly within the line of his duties in the premises.

What would be the effect of the plaintiff appointing another attorney to represent her does not arise in this case. The writer can see no reason why she may not do so, and thereby supersede the authority of the consul general or his successors; but this would be at present a moot question and need not be further discussed. The contention of counsel for respondent is to the effect that the law gives the right of action to the mother, and that contention is correct. His further contention, that because the consul general caused this action to be instituted the mother has not instituted it, rests wholly upon the assumption that the consul general is not the agent of the mother; and having shown, as we believe, that by virtue of the treaty he is such agent, respondent's contention fails.

It follows that the order of the circuit court staying the proceedings must be set aside, and the cause remanded to the circuit court, with directions to proceed in a manner not inconsistent with this opinion.

BURNETT, BENSON, and HARRIS, JJ., concur.

BURNETT, J. (concurring specially). Under the original Constitution of this state, the Supreme Court has jurisdiction to revise only final decisions of the circuit courts. Oregon Constitution, art. 7, § 6. Although the amendment of this article adopted by the plebiscite of November 8, 1910, permits legislation changing this rule, none has yet been enacted. The order, staying proceedings in this case until the attorneys appearing for the plaintiff should produce authority to act for her, was purely interlocutory and not final. There is nothing about it which would have prevented the plaintiff from going on with the trial of the action, and pursuing it to final judgment the next day or at any subsequent time, represented by the same or other attorneys, or appearing in person, provided of course the authority of the attorneys so to act was made to appear. The order does not determine any issue in the case nor prevent a final judgment in the action within the meaning of section 548, L. O. L., as amended by chapter 88, Laws 1915, defining appealable orders. Although erroneous, it is not every determination of an inferior court

that is appealable. Appeal does not lie as of right in all cases. It depends entirely upon the statute allowing it and is not to be extended to orders not within the enabling statute. The order under consideration is not one from which an appeal will lie, because it is not final. We are confronted with a moot question only. On the hypothesis that this court has jurisdiction to review such an order, which I do not concede, I concur in the reasoning of Mr. Chief Justice McBRIDE to the effect that a foreign consul has presumptive authority to represent his nonresident countrymen in the courts of this country, my contention being that the question is not properly before us.

(84 Or. 487)

GARVIN, Alien Property Custodian, v. WESTERN COOPERAGE CO.

(Supreme Court of Oregon. Oct. 7, 1919.)

1. MASTER AND SERVANT §401—COMPLAINT SUFFICIENT WITHOUT ALLEGING MASTER'S REJECTION OF WORKMEN'S COMPENSATION ACT.

There being no presumption under the Workmen's Compensation Act as to whether the employer is subject thereto, the injured servant's complaint is not insufficient for failure to allege that defendant had elected not to come under the act, the matter being one of affirmative defense.

2. AMBASSADORS AND CONSULS §8—NONRESIDENT ALIEN'S ACTION FOR SON'S DEATH PROPERLY BROUGHT BY DIRECTION OF FOREIGN CONSUL.

Under the treaties of the United States with Austria-Hungary, the Austrian consul general has authority to direct an attorney to bring an action under the Employers' Liability Act on behalf of a mother who is a subject and resident of Austria for the death of her son.

3. DEATH §81(2)—NONRESIDENT ALIEN MAY SUE EMPLOYER FOR DEATH OF SON.

A nonresident alien may maintain an action, under the Employers' Liability Act, for the death of her son against his employer.

4. EVIDENCE §293—SUFFICIENCY TO ESTABLISH RELATIONSHIP.

In an action by a nonresident alien for the death of her son, testimony of a relative and frequent visitor of the family that plaintiff treated decedent as her son and called him her son, and decedent treated plaintiff as his mother and had spoken of her as his mother, was competent to establish the relationship, being direct evidence thereof.

5. EVIDENCE §297—WRITTEN DECLARATION OF ALIEN RELATIVE PRIOR TO ACTION ADMISSIBLE TO SHOW RELATIONSHIP.

In an action by the nonresident alien mother of deceased servant against the latter's employer, a letter written by deceased's brother in Austria to a relative in this state, made at a time when no controversy existed as to rela-

tionship of mother and son, was admissible evidence on the question of pedigree.

6. EVIDENCE §207(2)—ADMISSION OF RELATIONSHIP BY DEFENDANT'S ATTORNEY IN ANOTHER ACTION INADMISSIBLE.

In an action by a nonresident alien mother for the death of her son against the latter's employer, a statement, made in argument in support of defendant's motion for nonsuit, in a cause in which this plaintiff was not a party, that it was disclosed by evidence that deceased had a mother so that his administrator could not bring action for his death, is not admissible as an admission by defendant of the relationship of mother and son.

7. WITNESSES §269(15)—QUESTION ESTABLISHING AFFIRMATIVE DEFENSE NOT PROPER CROSS-EXAMINATION.

In an action for the death of a servant by collision of a truck with an engine upon which the servant was riding, it was error for defendant to ask plaintiff's witness what kind and make the truck was, when witness had not testified as to the trucks, since such question was clearly directed toward establishing an affirmative defense and was not proper cross-examination.

8. WITNESSES §379(9)—INCONSISTENT TESTIMONY IN FORMER PROCEEDING CONCERNING THE SAME ACCIDENT ADMISSIBLE.

In view of L. O. L. § 861, it was proper, in an action against employer for the death of a servant, to ask a witness about his testimony at a coroner's inquest relative to same accident, for the purpose of impeachment, where there was an apparent inconsistency.

9. MASTER AND SERVANT §270(11)—EVIDENCE OF USE OF SAFETY APPLIANCES ADMISSIBLE TO SHOW PRACTICABILITY.

In an action under the Employers' Liability Law for death in a collision between an engine and a runaway logging car, testimony that witness had worked for years in nearly every possible capacity in logging camps using trucks, and that on logging roads where there are grades safety lines, safety rails, and derrails are used, was competent on the question of practicability of such safety devices.

10. TRIAL §253(4)—INSTRUCTION LIMITING JURY TO ONE ITEM OF NEGLIGENCE PROPERLY REFUSED.

In an action under the Employers' Liability Law for a servant's death in a collision between an engine on which he was riding and a runaway logging car, where there was evidence of negligence in not using snubbing lines and safety switches, an instruction limiting the jury to consideration of one item of negligence, based upon a defective drift pin, which permitted the brake to loosen, was properly refused.

11. DEATH §95(2)—PROPER MEASURE OF DAMAGES FOR SON'S DEATH.

In a mother's action under the Employers' Liability Act for the death of her son, an instruction that the jury might consider his age, life expectancy, health, ability, habits, mental and physical skill, and the amount which he would probably have saved from his earnings, held proper.

Department 1.

Appeal from Circuit Court, Multnomah County; Robert G. Morrow, Judge.

Action by Marja Rjadic against the Western Cooperaage Company, in which Francis P. Garvin, as alien property custodian, was substituted for the plaintiff. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

This is an action wherein it is sought to recover damages for the death of one Mjo Rjadic, of whom the plaintiff claims to be the mother. The substantial facts, as alleged in the complaint, are that Mjo Rjadic was a member of the section crew upon defendant's logging railroad; that at the time of the accident resulting in his death he was riding upon one of defendant's engines; that at the same time other employes were loading a logging car, and that after it was partially loaded a bolt in the hand brake attached to the car broke, thereby releasing the brake, whereupon the car "ran wild," colliding with the engine upon which Rjadic was riding, and thereby caused the injuries which resulted in his death. The alleged negligence upon which the right of recovery is based consisted in spotting the car upon a dangerous and steep grade without using the necessary methods of anchoring the car during the operation of loading it, as follows:

(1) The defendant failed to provide "snubbing lines," consisting of a steel cable, one end of which is attached to the car, and the other end to some stationary object, which would safely hold the car in place.

(2) It neglected to safeguard the car with "safety chains," with which the car might be chained to the track.

(3) It neglected to provide safety or derailing switches with which to derail a "run-away" car.

(4) That the defendant, at the time of the accident, had a derailing switch installed below the grade where the car was being loaded, but it was spiked to the main line so as to be useless as a safety device.

(5) That it neglected to provide sound and substantial brakes on the logging car, and failed to take measures to see that the brakes were in good working condition.

The answer, after denials, pleads affirmatively as follows:

That on or about the 13th day of September, 1915, defendant was, and for some time prior thereto had been, conducting a logging business in Clatsop county, Or.; that in connection with said logging business defendant operated a logging railroad; that on or about the said 13th day of September, 1915, Mjo Rjadic was in its employ as a section hand, and at the time of his accident aforesaid he was riding on a locomotive belonging to defendant; that some distance away from the point of the accident a set of log-

ging trucks were being loaded with logs at a logging rollway; that said trucks were practically new, and had been purchased from a reputable concern, and had been manufactured by a reputable manufacturer; that the said trucks were of standard make, such as are used commonly in work of that kind, and had been properly inspected by the defendant; that each truck had a standard brake, with a brake-staff which could be tightened from the side; that when tightened the said brake-staff was held in place by means of a pawl, which fitted into a ratchet; that the said ratchet was attached to said brake-staff by means of a metal pin, which ran through the said ratchet and said brake-staff; that while the said trucks were being loaded with logs the pin holding the ratchet attached to the forward brake-staff broke in some manner, thereby allowing the brakes to loosen from the wheels, and the said trucks, loaded with two logs, started down the track, colliding with the trucks loaded with logs attached to the locomotive aforesaid, on which locomotive the said Mjo Rjadic was riding; that by reason of said collision the said Mjo Rjadic received injuries from which he afterward died; that the pin which broke appeared amply sufficient, and was put in place by the manufacturers; that an inspection would not disclose any defect in said pin, and so far as this defendant knew, or could have known by the exercise of ordinary care, said pin was in good, first-class condition; and so far as defendant is concerned said accident was wholly unavoidable, accidental, and unforeseen, and could not have been prevented by it through the exercise of ordinary care.

A reply having been filed, there was a trial, resulting in a verdict and judgment for plaintiff, and defendant appeals.

F. S. Senn, of Portland (Senn, Ekwall & Recken, of Portland, on the briefs), for appellant.

Chas. T. Haas and M. H. Clark, both of Portland (Woerndle & Haas, A. E. Clark, and John A. Collier, all of Portland, on the briefs), for respondent Western Cooperaage Co.

A. P. Dobson, of Portland, for respondent Garvin.

BENSON, J. (after stating the facts as above). [1] The first assignment of error is that the complaint is insufficient because it fails to allege that defendant had elected not to come under the Workmen's Compensation Act (Laws 1913, c. 112). The contention thus presented has been settled adversely to defendant's theory in *Olds v. Olds*, 88 Or. 209, 171 Pac. 1046.

[2] It is then urged that the court erred in permitting plaintiff's attorney to testify that he was authorized and requested to commence the action in behalf of plaintiff at the

(184 P.)

request of and under the direction of the Austrian consul general. The objection to this evidence was based upon the ground that under the statute no one but the mother is entitled to bring action, and that the consul cannot authorize the proceeding. This question also has been set at rest in the recent case of *Ljubich v. Western Cooperage Co.*, 184 Pac. 551 (not yet officially reported), wherein it is held that, under the treaties of the United States with Austria-Hungary, the consuls of that country are, in effect, ex officio attorneys in fact, with ample authority in cases like the one at bar.

[3] The next assignment is that the court erred in holding that the plaintiff can maintain this action, being a nonresident alien. Although this question has been frequently discussed and passed upon in many other states, this is the first time that it has been presented for our consideration. The leading case in the United States supporting defendant's theory of the law is that of *Deni v. Pennsylvania R. Co.*, 181 Pa. 525, 37 Atl. 558, 59 Am. St. Rep. 676, which has been followed by a few of the other states, notably Wisconsin and Indiana, but a great majority of the states have held to the contrary. A leading case in support of plaintiff's right to maintain the action is that of *Mulhall v. Fallon*, 176 Mass. 268, 57 N. E. 386, 54 L. R. A. 934, 79 Am. St. Rep. 309, wherein the court, speaking by Mr. Chief Justice Holmes, says:

"In all cases the statute has the interest of the employes in mind. It is on their account that an action is given to the widow or next of kin. Whether the action is to be brought by them or by the administrator, the sum to be recovered is to be assessed with reference to the degree of culpability of the employer or negligent person. In other words, it is primarily a penalty for the protection of the life of a workman in this state. We cannot think that workmen were intended to be less protected if their mothers happen to live abroad, or less protected against sudden than against lingering death. In view of the very large amount of foreign labor employed in this state, we cannot believe that so large an exception was silently left to be read in."

In the comparatively recent case of *Anus-takas v. International Contract Co.*, 51 Wash. 119, 98 Pac. 93, 21 L. R. A. (N. S.) 267, 130 Am. St. Rep. 1089, the Supreme Court of Washington in an interesting opinion, wherein are cited a large number of the cases supporting either contention, speaking by Mr. Justice Rudkin, says:

"The plea of alienage is not favored in law, and we are of opinion that the rule which permits nonresident aliens to maintain actions of this kind is supported by the weight of authority, and is more in harmony with the liberal cosmopolitan spirit of the age than the narrow provincial rule which would close our courts to widows and orphans solely because they happen to be nonresident aliens."

This case is also reported in 21 L. R. A. (N. S.) 267, where it is followed by an interesting note, citing practically all of the cases upon the subject.

At the conclusion of a brief and lucid discussion of the subject in 1 R. O. L. 825, is found this language:

"Since the statutes of the various states giving a right of action for negligent killing are copied from Lord Campbell's Act, the construction placed upon that act by a decision of the King's Bench in 1898 greatly influenced the courts which denied the right of action in the earlier cases; and, therefore, the disapproval of that decision in the later case before the same court, but by different judges, in 1901 would seem to weaken, to some extent at least, the weight of those earlier decisions of the state courts. It thus appears that the weight of authority, both in England and the United States, is that alienage is not a condition affecting a recovery for the death of a relative under the statutes allowing such an action."

We therefore adopt the doctrine that a nonresident alien is not precluded from maintaining the action.

[4] Error is assigned upon the action of the court in refusing to strike from the record the testimony of the witness Mike Ers-tich. The substance of the testimony of this witness is to the effect that his father and decedent's father were first cousins; that decedent and himself were both born at Dinovo, Austria, a village containing about 300 houses; that their homes were separated by the distance of about 15 minutes' walk; that they had both lived at Dinovo all of their lives, until Mjo Rjacich had come to Portland, about six years before his death, to which place the witness had followed about two and a half or three years later; that he had known the plaintiff from his earliest recollection; that he had been a frequent visitor at her home, which had also been the home of the decedent all of his life until he came to Portland; that in the home at Dinovo the plaintiff had treated the deceased as her son and called him her son; and that deceased had treated plaintiff as his mother, and had spoken of her as his mother. The witness also testified that the decedent had sent money to his mother, and that after decedent came to Portland, and before the witness left Dinovo, he saw the mother receive money which had been sent to her by decedent. It is urged that this evidence is incompetent for the reason that there is no other evidence in the record concerning the relationship of plaintiff and decedent, and that since this evidence consists of the declarations of the plaintiff, who is beyond the jurisdiction of the court, and of Mjo Rjacich, who is dead, that it belongs to that class of hearsay evidence which is admissible only when there is evidence dehors the declarations of the relationship of the declarant to the family. A careful analysis of this testimony

shows that the witness himself is a relative; he says that he has known both declarants all of his life; that they bore the same family name, lived in the same house, conducted themselves toward each other as mother and son, and each addressed the other in a way to indicate such relationship. It will be at once observed that here is evidence, outside of the declarations of the plaintiff and Mjo Rjacich, tending to establish the relationship, being the direct evidence of the witness Erstich. In a very carefully considered case (*State v. McDonald*, 55 Or. 419, 103 Pac. 512, 104 Pac. 967, 106 Pac. 444) testimony of this nature is held to be competent, and it was not error to admit it.

[5] Our attention is then directed to the fact that the court admitted in evidence a letter purporting to have been written by Matt Rjacich (a brother of Mjo Rjacich), mailed by him at a post office in Austria near Dinovo, and addressed to the witness Mike Erstich, who testified that it was a reply to one written by him, and that he recognized the handwriting as that of Matt Rjacich. The letter, as translated by the interpreter then in attendance upon the court, reads as follows:

"Dinovo, date March 1, 1916.

"My dear Matt: I am letting you know that we are in good health, thank God, wishing that this letter will also reach you in good health. My dear Matt, I'm in receipt of your letter, and properly understand everything what you wrote me to send a power of attorney, and I'm afraid it would not be all right if we did not put all names and dates of birth of our family. Mother was called to the court yesterday, and they want us to give all names and date of birth and the court will mail it to you. If you had written us right away you would have got it long ago. Dear Matt, I ask you to do everything you can in this case. Dear Matt, answer right away. You will receive the power of attorney at any time. You can tell the court that you wrote for the power of attorney and that it did not get there yet. Dear Matt, nothing else to write, receive my sympathy from me.

"Your dear cousin, Matt Rjacich.

"Good-bye, awaiting your answer."

This letter was written before the present action was begun, and before there was any controversy as to the identity of Mjo Rjacich's mother, and it was offered in evidence for the purpose of showing relationship. The defendant maintains that it is incompetent as being hearsay and a self-serving declaration, made after the death of Mjo Rjacich, and therefore inadmissible. The plaintiff insists that it constitutes the declaration of a member of the family (who is out of the jurisdiction and whose declaration is therefore competent evidence) upon the question of pedigree. We are not much impressed with the probative value of the contents of the letter, and in fact find nothing of value in it, but, so far as it tends to

establish the question of relationship, we think it is clearly competent. In *Thompson v. Woolf*, 8 Or. 454, this court says:

"Declarations of a deceased person or persons out of the state, who are related to a family, may be admitted to prove pedigree. But before such declarations can be admitted, the relationship of the defendant to the family must be proved by other evidence than his declarations."

Here we have the evidence of Erstich that the author of the letter is a brother of the decedent, Mjo Rjacich, and that he is out of the state, living in Dinovo, Austria. We know of no authority which makes any distinction between a written declaration and one that is spoken.

The fact that the letter was written after the death of Mjo Rjacich does not affect the admissibility of the declaration, unless it was made after the controversy had arisen, and upon this point the rule appears to be that the evidence is properly admitted if the declaration was made at a time when no controversy existed as to the precise question in regard to which the declaration is made. 2 *Wigmore on Evidence*, § 1483. In the present case the letter from Matt Rjacich was written before this action was begun, and before any question of the identity of the mother had arisen. We therefore conclude that the letter was properly admitted.

[6] The next assignment of error is based upon the action of the court in permitting J. F. Wood, the official court reporter, to testify from his report of the evidence in a former case the statement of W. E. Thomas, one of the defendant's attorneys, in a motion for a nonsuit, as follows:

"The defendant at this time moves for a nonsuit. This is made upon the ground that this action has not been brought by a person who is entitled to bring the action under the laws of this state, in a case of this kind. This action, the fact is, as disclosed by the evidence in this case, and as alleged in the pleadings, brings this case within the Employers' Liability Law, clearly and unquestionably. That being the case, an administrator of an estate cannot bring an action against a defendant under the conditions existing in this case. It is disclosed by the evidence that the deceased has a mother. Under the Employers' Liability Act of 1911 [Laws 1911, c. 3], § 4, this action cannot be brought by an administrator. The question was thereupon argued at length, and at the conclusion of said argument the court sustained the motion of defendant for a nonsuit, to which action of the court in sustaining said motion plaintiff then and there by counsel duly excepted."

The introduction of this portion of the record of a former action in which the administrator sought to recover upon the same cause of action, was objected to by the defendant as irrelevant, incompetent, and immaterial, and tending to prove no issue in the case. The plaintiff argues that the statement

above quoted contains a formal admission that the decedent had a mother living, and that, being inconsistent with defendant's attitude in the present action, the statement of its attorney is binding upon the client in this proceeding. In support of her contention, plaintiff calls our attention to certain cases, which we briefly consider. The first is Heywood v. Doernbecher, 48 Or. 359, 86 Pac. 357, 87 Pac. 530. From the opinion in this case counsel quotes the following:

"The admissions of an attorney, made within the scope of his authority and during the continuance of his employment, bind his client to the same extent as a stipulation."

The effect of the language quoted is distinctly modified, however, by the next sentence, which reads thus:

"This rule is not invoked to charge the plaintiff with an acknowledgment of a fact prejudicial to its interests, but as tending to show the theory of its counsel as to the basis of the second cause of action."

The next citation is *Missouri & K. Telephone Co. v. Vandevort*, 67 Kan. 269, 72 Pac. 771. This was a case in which the court admitted in evidence an admission of an attorney made in an opening statement to the jury in a former trial of the same case. In holding that it was properly admitted, the court says:

"In the statement was the admission of a material fact as to the action of the telephone company in the premises. From a reading of the record the admission appears to have been distinctly and formally made. In *Lindley v. Railroad Co.*, 47 Kan. 432, 28 Pac. 201, it was held that the court is warranted in acting on the admission of a party made in the opening statement of a case to the court and jury, and might make a final disposition of the case where such statement absolutely precluded a recovery by him."

The holding in this case appears to be opposed to the great weight of authority. In 1 *Ency. of Evidence*, 469, we find the rule stated thus:

"The admission, to be binding, must be so made as to be a part of the evidence in the case, or formally made to avoid or excuse the making of proof. Therefore the mere admission or statement of counsel in an opening statement is not such as to amount to a binding admission."

"But there may be exceptions to this rule. Indeed, it has been held that an admission made by counsel in the opening statement may be conclusive of the case, and warrant a judgment without further proceeding" (citing a large number of authorities).

1 *Greenleaf on Ev.* § 186, states the rule thus:

"The admissions of attorneys of record bind their clients in all matters relating to the progress and trial of the case; but to this end they must be distinct and formal, or such as are

termed solemn admissions, made for the express purpose of alleviating the stringency of some rule or practice, or of dispensing with the formal proof of some fact at the trial."

The next case to which our attention is called is *Oscanyan v. Arms Co.*, 103 U. S. 261, 26 L. Ed. 539, which was a case wherein the attorney for plaintiff made an opening statement which disclosed that he was seeking to recover upon a contract which was corrupt, immoral, and contrary to public policy. The defendant thereupon moved for a directed verdict, and the court asked the attorneys for the plaintiff if they claimed or admitted that the statements which had been made were true, and counsel replied in the affirmative, whereupon the motion was granted. This appears to be a clear case of an exception to the general rule, and properly so.

Our consideration is also invoked for a statement of the rule found in 16 *Cyc.* 965, as follows:

"Relevant, judicial statements made or adopted by a party, although made without the knowledge or consent of his attorney, are when received by the court, admissible, not only in the case in which they are made, but in any subsequent trial or proceedings connected with it and in other cases in which the facts covered thereby are relevant. * * * Judicial admissions are frequently those of counsel or attorneys of record. When these are made in good faith, in the counsel's professional capacity, for the purpose of dispensing with evidence, and to that end are distinct and formal, they bind the client, whether made before, on, or after the trial."

In attempting to relate these authorities to the case at bar, counsel has apparently overlooked certain important considerations. The statement of Mr. Thomas was made in argument in support of his motion for a nonsuit, in another action, in which the present plaintiff was not a party. In the case of *Brown v. Oregon Lumber Co.*, 24 Or. 315, 33 Pac. 557, Mr. Chief Justice Lord says:

"A motion for a nonsuit is in the nature of a demurrer to the evidence; it admits not only all that the evidence proves, but all that it tends to prove. The evidence given for the plaintiff must be taken to be true, together with every inference of fact which the jury might legally draw from it."

In effect, then, Mr. Thomas' statement amounts to saying:

"If we admit, and for the purpose of this motion we do, that every item of evidence offered by plaintiff is true, nevertheless plaintiff, as administrator, cannot maintain this action, because he has offered evidence to prove that the decedent has a mother living, to whom the statute gives the exclusive right of action."

If an admission of this sort is binding upon the client in a subsequent action, properly brought, then every motion for a nonsuit be-

comes an admission against interest. We have been unable to find authorities which would justify such a conclusion. The admission of the statement was error.

[7] It is then argued that the court erred in sustaining plaintiff's objection to the following question asked of the witness Robinson upon cross-examination: "Do you know what kind, what make, of truck this was?" This witness, who was superintendent of logging operations for the defendant company, had been called as a witness for the plaintiff, and had been examined as to the various precautions in regard to safety of employes, but had not been examined with reference to the trucks. Plaintiff objected to the question upon the ground that it was not proper cross-examination, but was a part of defendant's direct case. It will be noted that the answer alleges that the truck was of a standard make, practically new, etc. The question was clearly directed to establishing an affirmative defense, and was not proper cross-examination. It may also be observed that upon the defense witnesses were permitted, without objection, to describe the truck in detail. There was no error in the ruling of the court.

[8] The same witness, who had at a prior time testified at the coroner's inquest relative to the same accident, gave some testimony which appeared to be inconsistent with his testimony at such inquest; whereupon over the objection of defendant, counsel for plaintiff was permitted to question him as to his former statements, and, he having denied making such statements, they were read into the record, and this is assigned as error. This assignment is fully answered by section 861, L. O. L., and the case of *State v. Steeves*, 29 Or. 85, 43 Pac. 947.

[9] The witness Lew McCutcheon testified that he had worked in logging camps for 15 or 16 years, and has worked in nearly every possible capacity, and that his work had been altogether in camps using trucks. He then testified, from his observation and experience, in regard to the use of snubbing lines, safety chains, safety and derailing switches, and other safety appliances, and was then asked this question: "Would you or would you not say now that on logging roads where there are grades safety lines are used, and safety rails and derails, and the means you have described as means of safety?" The answer of the witness was, "Yes, sir." To this question and answer the defendant objected upon the ground "that it is incompetent, irrelevant, and immaterial, and no proper foundation laid, and does not prove any issue in the case, and calls for a conclusion." It is argued that this was error, and in support of such contention our consideration is directed to the case of *Trickey v. Clark*, 50 Or. 528, 93 Pac. 457. In that case the defendants called expert mill men, who testified that the lever

in use at the time of the accident was provided with a reasonably safe and proper lock and fastener. This court very properly held that such evidence was incompetent, since it was directed to the principal issue in the case, i. e., was it negligence upon the part of the defendants to use the device which they did use? The jury had before them a model of the device, and its workings were fully explained to them, so that they were as competent as any expert to determine its utility. The testimony of McCutcheon in the present case stands upon a very different footing. The case upon which appellant relies was one founded upon the common law, that an employer must provide for his servant a reasonably safe place to work and reasonably safe appliances. The vital point for the jury to determine was whether or not the device used was reasonably safe; and no witness could be permitted to answer that question for them. The present action is based upon the Employers' Liability Law, § 1, which requires the employer to—

"use every device, care and precaution which it is practicable to use for the protection and safety of life and limb, limited only by the necessity for preserving the efficiency of the structure, machine or other apparatus or device, and without regard to the additional cost of suitable material or safety appliance and devices."

It must be noted that the testimony of the witness was directed to the practicability of certain safety devices, and the fact that in other places he had seen them in use. In *Love v. Chambers Lumber Co.*, 64 Or. 129, 129 Pac. 492, we find this language:

"The complaint alleged that it was practicable for defendant to have so guarded the machinery as to have prevented the accident without interfering with its ordinary use. This was denied in the answer, so it became necessary for plaintiff to establish the proposition that it could be so guarded. No better evidence could have been introduced for this purpose than to show that after the accident the machinery had been so guarded, and that such safeguards had not in any way impeded or interfered with its operation."

In *Camenzind v. Freeland Furniture Co.*, 89 Or. 158, 174 Pac. 139, this court held that it was proper to admit evidence of a safety appliance then in use in Switzerland, although nothing like it was known in the United States. We are therefore of the opinion that the evidence was properly admitted.

[10] Defendant further assigns as error the refusal of the court to give certain requested instructions, the first of which reads thus:

"Defendant company further states that the cause of the runaway was the breaking of a drift pin which passed through the ratchet and brake-staff; that there was a defect in this pin which the defendant company did not know or could not have known was present; and that such

defect was a latent or hidden defect, and that the defendant could not have known of this defect by the exercise of that degree of care which the law requires."

This requested instruction is of value only when read in connection with the next one, and counsel for defendant very properly presents them in his argument together. The other one reads thus:

"The defendant company was not an insurer of the safety of its car and appliances; it was required to use every degree of care and caution which it was practicable to use in carrying on its work; and if you find that his casualty resulted because of the breaking of the drift pin through the ratchet and brake-staff, and that this pin was crystallized, or had in it a hidden defect which this company did not know, or could not have known by the exercise of that degree of care which the law requires, then I instruct you that the plaintiff cannot recover in this action, and your verdict must be for the defendant."

The theory of defendant appears to be that, since an employer is not liable for hidden defects in the appliances furnished, if he had used every care and precaution practicable in the inspection of the devices actually in use he is absolved from all liability for injuries resulting from such latent defects. It may be that the authorities under the common law, and prior to the enactment of the Employers' Liability Act, would have justified such a contention, but that statute has very greatly enlarged the legal obligations and liabilities of the employer. It declares that the employer—

"shall use every device, care and precaution which it is practicable to use for the protection and safety of life and limb, limited only by the necessity for preserving the efficiency of the structure, machine or other apparatus or device, and without regard to the additional cost of suitable material or safety appliance and devices."

Section 4 of the act provides for the recovery of damages for any loss of life resulting from any violation of the requirements of the law. The complaint charges negligence in not using snubbing lines, safety switches, derailing devices, etc., and there was evidence supporting such allegations. The jury, therefore, could not be limited to a consideration of the one item of negligence based upon the defective drift pin, and the instruction was properly refused.

[11] The last assignment of error is that the court refused to give the instruction requested by defendant upon the subject of the

measure of damages. The portion thereof which is contended for reads thus:

"Your verdict must be based on the pecuniary loss which the plaintiff has suffered, and in arriving at this amount you may take into consideration the money support which the deceased, in your judgment, would have contributed to the mother during the mother's lifetime. You may consider the age of the mother, if you know her age, and ascertain the probable length of her life; you may consider whether he would have contributed to the mother in the future, and for what length of time."

Instead of this the court gave the following instruction:

"In ascertaining such damages you may take into consideration the age of the deceased, his expectancy of life as disclosed by the evidence, his health, ability, habits of industry, mental and physical skill; if you find that any such qualities are established by the evidence, his capacity for earning money by rendering service to others, or accumulating money or property, if any, the amount which deceased would probably have saved from his earnings or by his skill or bodily labor, if any, during the expectancy of his life. That is the measure of damages."

It is conceded that this instruction as given is in harmony with the rule as enunciated by this court in *McClagherty v. Rogue River Electric Co.*, 73 Or. 135, 140 Pac. 64, 144 Pac. 569. But it is urged that the rule thus declared is inconsistent with the doctrine of *McFarland v. Oregon Electric Co.*, 70 Or. 27, 138 Pac. 453, Ann. Cas. 1916B, 527, and that the latter is the more logical conclusion. We have examined both cases with care, and fail to find the inconsistency which appellant seeks to point out. In the case of *McFarland v. Oregon Electric Railway Co.* the court simply held that in an action under the Employers' Liability Act, the plaintiff is not entitled to recover for the loss of the society of the deceased, for that was the specific question which was submitted. But if it were otherwise, the later case of *McClagherty v. Rogue River Elec. Co.* has met the approval of this court in *Yovovich v. Falls City Lumber Co.*, 76 Or. 585, 149 Pac. 941, and impresses us as most satisfactorily declaring the measure of damage in this class of cases.

For the error in admitting in evidence the statement of Mr. Thomas in arguing a motion for nonsuit in a former action, the judgment must be reversed, and the cause is remanded for a new trial.

McBRIDE, BURNETT, and HARRIS, JJ., concur.

(93 Or. 684)

PENINSULA LUMBER CO. v. ROYAL INDEMNITY CO.

(Supreme Court of Oregon. Oct. 21, 1919.)

1. REFORMATION OF INSTRUMENTS ⇨43—BURDEN OF PROOF ON PLAINTIFF TO PROVE MISTAKE.

In action to correct alleged mutual mistake in indemnity policy, plaintiff has burden of proving the mistake by a preponderance of evidence.

2. REFORMATION OF INSTRUMENTS ⇨36(1)—COMPLAINT MUST ALLEGE ORIGINAL AGREEMENT AND POINT OUT MUTUAL MISTAKE.

In suits to reform a written instrument on the ground of mistake, the complaint must clearly state what the original agreement of the parties was, and point out with precision wherein there was a misunderstanding, that the mistake was mutual and did not arise from the gross negligence of the plaintiff, or that the misconception originated in the fraud of the defendant.

3. INSURANCE ⇨130(1)—APPLICATION FOR LIABILITY POLICY PRESUMABLY FOR ORDINARY POLICY.

Where application was made for employer's liability policy without going into any details as to the conditions to be placed in the policy, it will be presumed that the ordinary form of policy was to be used.

4. REFORMATION OF INSTRUMENTS ⇨45(14)—EVIDENCE INSUFFICIENT TO SHOW MUTUAL MISTAKE.

In action to correct employer's liability policy upon ground that words "No exceptions" had by mistake been placed after printed statement that no such insurance had "been canceled or the renewal thereof refused, except as follows," evidence held to preponderate against the claim that the mistake was mutual.

5. INSURANCE ⇨288(1)—STATEMENT AS TO OTHER INSURANCE CONSTRUED AS ABSOLUTE.

Insured's statement that no insurance of specified kinds "has been declined, nor has any such insurance been canceled or the renewal thereof refused, except as follows," if followed by no exception, must be taken to be absolute, since it is incumbent upon insured to qualify statement if there is an exception, the exception being presumably within his knowledge, and the legal effect of such unqualified statement, where exception is within knowledge of insured, but unknown to insurer, being same as if words "no exception" followed.

Department 1.

Appeal from Circuit Court, Multnomah County; Calvin U. Gantenbein, Judge.

Suit by the Peninsula Lumber Company against the Royal Indemnity Company. Judgment of dismissal, and plaintiff appeals. Affirmed.

This is a suit by the insured to correct an alleged mistake in an indemnity policy issued by the defendant. The plaintiff was engaged

in the manufacture of lumber and took the insurance to save it harmless against damages it might be compelled to pay to employees injured in its service. The policy was issued in consideration of a money premium deposited and, as worded in the instrument, "of the statements contained in the schedule indorsed hereon, which statements the insured by the acceptance of this policy warrants to be true and which are hereby made part hereof." The twelfth of these statements recites several kinds of insurance, among others, "workmen's compensation and employer's liability," and declares that none of such insurance is carried. As appears on the policy, statement No. 13 is printed in this language:

"No insurance of the kinds specified in statement 12 proposed by or on behalf of the insured has been declined, nor has any such insurance been canceled or the renewal thereof refused, except as follows."

Following this in typewriting are the words, "No exceptions." The plaintiff avers:

"That the insertion of said words, 'No exception,' in No. 13 of the schedule of statements, was made by the scrivener or copyist who was employed by defendant's said agent, Gerlinger-Richards Company, and who wrote said policy, by mistake, and was not inserted at the instigation of either the plaintiff or defendant. That said statement was never made by plaintiff, or by any one on its behalf, or by its authority, or with its knowledge, or consent, and constituted no part of said contract of insurance between the parties. That the error in the insertion of said words 'No exception' in said schedule 13, as aforesaid, was not noticed by plaintiff when said policy was delivered to it, nor until the defendant attempted to repudiate liability thereon, as hereinafter stated."

Other allegations of the complaint are designed to support a recovery on the policy as reformed, and are not important to the consideration of the case on the issue of mistake. The prayer is that the words "No exceptions" be stricken out, and otherwise for a recovery on the policy. The quoted allegation of the complaint, with others, is denied, but the issuance of the policy in the form stated is admitted. It also appears by the pleadings that a previous insurance in favor of the plaintiff on the same risk coming within the description in statement No. 12 had been canceled just prior to the issuance of the policy in suit, and that no disclosure respecting the same was made to the defendant by or on behalf of the plaintiff.

In substance, the answer is that the plaintiff applied to the defendant for the policy of insurance, and it was agreed by them that the defendant would issue and the plaintiff would accept the defendant's ordinary form of such insurance, and that in pursuance thereof the policy was issued in the form

stated in the complaint. This in turn was denied by the reply.

The court made findings of fact and conclusions of law in favor of the defendant and dismissed the suit, from which decree the plaintiff appeals.

R. Sleight, of Portland (James B. Kerr, of Portland, on the briefs), for appellant.

R. W. Wilbur, of Portland, and H. B. M. Miller, of San Francisco, Cal. (Wilbur, Spencer & Beckett, of Portland, and Watt, Miller, Thornton & Watt, of San Francisco, Cal., on the brief), for respondent.

BURNETT, J. (after stating the facts as above). [1] In effect, the plaintiff alleges a mutual mistake in the writing, and the defendant denies this. As this is the issue, it is incumbent upon the plaintiff to prove the affirmative of the same by a preponderance of the evidence. Without dispute, it clearly appears that a former policy of the same nature, issued to the plaintiff by another company on the same risk, had been canceled, all within the knowledge of the plaintiff, and that nothing was said by its representatives to those of the defendant about this during the negotiations for the policy in suit. The instrument was written by a stenographer in the office of the agents of the defendant, under the direction of and from memoranda written by the man having charge of that particular kind of insurance. He testifies to the effect that he took the ordinary printed blank policy customarily used by the defendant in such business and designedly and purposely caused to be put into the blank after the thirteenth statement the words "No exceptions," that he wrote them in the memoranda furnished to the stenographer, and that the latter followed them according to his directions. The substance of the testimony of the witnesses for the plaintiff is that nothing was said about previously canceled insurance. The then secretary of the plaintiff, who appears to have conducted the negotiations in the main on behalf of the company, testifies thus:

"Q. As a matter of fact, this policy involved in this action was issued to you because you wanted it, was it not? A. Oh, yes; we wanted the policy.

"Q. And you made application to the proper person to get it, did you not? A. We gave them a chance to figure on the business; yes, sir.

"Q. And at the time of the issuance of the policy I suppose you told them what you wanted was employer's liability insurance? A. I think I did; yes.

"Q. And the nature of the property that you had? A. I don't think I went into details. They were familiar with it themselves.

"Q. You didn't go into any of the details at all as to any of the conditions that should be placed in the policy? A. I did not.

"Q. You know that the company to whom this application was made was a company that

was issuing policies of that kind? A. Yes, sir.

"Q. And you simply made application that a policy—an employer's liability policy—be issued to you covering your plant, without going into any details at all as to any of the conditions or statements provided in the policy? A. I did."

In connection with this testimony, it is thus laid down as a rule in *Cleveland Oil Co. v. Norwich Insurance Society*, 34 Or. 228, 55 Pac. 435, in an opinion by Mr. Justice Moore:

"So, too, the law will presume that the minds of the parties met upon an agreement containing the terms and conditions of a policy such as is usually issued by the contracting insurance company covering like risks. 1 May on Insurance (3d Ed.) § 28; *Barre v. Council Bluffs Insurance Company*, 76 Iowa, 609, 41 N. W. 373; *Smith v. State Insurance Company*, 64 Iowa, 716, 21 N. W. 145; *Hubbard v. Hartford Insurance Company*, 33 Iowa, 325, 11 Am. Rep. 125; *De Grove v. Metropolitan Insurance Company*, 61 N. Y. 594, 19 Am. Rep. 305; *Eureka Insurance Company v. Robinson*, 56 Pa. St. 256, 94 Am. Dec. 65; *Fuller v. Insurance Company*, 36 Wis. 599; *Salisbury v. Hekla Insurance Company*, 32 Minn. 458, 21 N. W. 552."

[2] In this state the precept is thoroughly established and of long standing that in suits to reform a written instrument on the ground of mistake the complaint must clearly state what the original agreement of the parties was, and point out with precision wherein there was a misunderstanding; that the mistake was mutual and did not arise from the gross negligence of the plaintiff, or that the misconception originated in the fraud of the defendant. *Boardman v. Insurance Co. of Pennsylvania*, 84 Or. 60, 164 Pac. 558; *Evarts v. Steger*, 5 Or. 147; *Lewis v. Lewis*, 5 Or. 169; *Stephens v. Murton*, 6 Or. 193; *McCoy v. Bayley*, 8 Or. 196; *Foster v. Schmeer*, 15 Or. 363, 15 Pac. 626; *Hyland v. Hyland*, 19 Or. 51, 23 Pac. 811; *Meler v. Kelly*, 20 Or. 86, 25 Pac. 73; *Epstein v. State Insurance Co.*, 21 Or. 179, 27 Pac. 1045; *Kleinsorge v. Rohse*, 25 Or. 51, 34 Pac. 874; *Osborn v. Ketchum*, 25 Or. 352, 35 Pac. 972; *Thornton v. Krimbel*, 28 Or. 271, 42 Pac. 995; *Mitchell v. Holman*, 30 Or. 280, 47 Pac. 616; *Sellwood v. Henne-man*, 36 Or. 575, 60 Pac. 12; *Stein v. Phillips*, 47 Or. 545, 84 Pac. 793; *Bower v. Bowser*, 49 Or. 182, 88 Pac. 1104; *Smith v. Interior Warehouse Co.*, 51 Or. 578, 94 Pac. 508, 95 Pac. 499; *Howard v. Tettelbaum*, 61 Or. 144, 120 Pac. 373; *Suksdorf v. Spokane, P. & S. Ry. Co.*, 72 Or. 398, 143 Pac. 1104; *Hyde v. Kirkpatrick*, 78 Or. 466, 153 Pac. 41, 488.

[3, 4] In a sense, stating an account of the evidence, we have for the plaintiff the statement that nothing was said about the existence or cancellation of previous insurance of the kind in contemplation. On behalf of the defendant there is the testimony of its agent that he designedly inserted the words "No

exceptions," which the plaintiff would elide, and that the policy was the one in ordinary use by the defendant company for such risks. Added to this on behalf of the defendant is the testimony of the plaintiff's secretary, already quoted, giving rise to the presumption, as a piece of evidence in favor of the defendant, that the ordinary form of policy was to be used. In our judgment, the positive testimony on behalf of the defendant, coupled with the presumption already quoted, constitutes a preponderance of the testimony against the mutuality of the mistake so necessary to be shown if any correction should be made in the document.

[5] We note also that the only change the plaintiff seeks is to strike out the typewritten words, "No exceptions." By the terms of the policy these numbered statements are imputed to the applicant for insurance, for at the outset in the instrument it is said to have been issued in consideration of the money premium and of the statements contained in the schedule which the insured warrants to be true. The statement as printed was that:

"No insurance of the kinds specified in statement 12 proposed by or on behalf of the insured has been declined, nor has any such insurance been canceled or the renewal thereof refused, except as follows."

If no exception followed, this statement must be taken to be absolute and, being a warranty, must be strictly true as stated. *Buford v. New York Life Insurance Co.*, 5 Or. 334. If the party making this absolute statement would qualify it by an exception, it is incumbent upon him to state the exception, because it is presumably within his knowledge. In this instance the testimony shows that the exception was within the knowledge of the assured, but was unknown to the insurer. Consequently, it is immaterial whether or not the words "No exceptions" be stricken from the policy, because the legal effect of the clause is the same whether the two words in question be retained or discarded.

But aside from this possibly technical ground, the weight of the testimony is in favor of the proposition that the alleged mistake was not mutual, and that the most which can be said of the situation is that the plaintiff did not notice that provision in the policy, while the defendant designedly inserted the words complained of and purposely used the form of policy employed. To reform the policy so as to make its legal effect different from what it appears on its face under the circumstances would be to make a new contract for the parties contrary to the understanding of at least one of them. The testimony on behalf of the plaintiff falls short of pointing out with clearness what the original agreement of the parties was. It only

states in substance that the words "No exceptions" were not to be put into the contract, and that nothing was said about previous insurance. What, if anything, in the main, was to be affirmatively stated as the binding agreement between the parties is left to conjecture. But, above all, the preponderance reveals that the mistake, if any, was not mutual. The result is that the decree of the circuit court must be affirmed.

MCBRIDE, C. J., and BENSON and HARRIS, JJ., concur.

(94 Or. 260)

FARMERS' NAT. BANK OF PONCA CITY,
OKLA., v. RENFRO et al.*

(Supreme Court of Oregon. Oct. 21, 1919.)

1. JUDGMENT \S 823—IN SUIT BY CREDITOR TO SUBJECT LANDS TO JUDGMENT, DEFENDANT CAN QUESTION ORIGIN OF CREDITOR'S CLAIM.

Where a judgment was rendered in Oklahoma against defendant's husband and the judgment creditor then sued defendant and husband in Oregon, asserting that a conveyance by the husband to defendant was fraudulent, and seeking to subject to its claim Oregon lands acquired by defendant with the proceeds of the property conveyed to her, *held* that defendant might inquire into the origin of the claim of the judgment creditor.

2. FRAUDULENT CONVEYANCES \S 160 — DEFENDANT GRANTEE MUST BE WITHOUT NOTICE OF FRAUD, AND HAVE PAID VALUABLE CONSIDERATION.

Under L. O. L. §§ 7397, 7400, 7401, three things must concur to protect the title of a purchaser of property where the conveyance is attacked by creditor of the vendor as fraudulent: (1) He must buy without notice of bad intent on the part of vendor to defraud; (2) he must be a purchaser for valuable consideration; and (3) he must have paid the purchase money before he had the notice of fraud.

3. FRAUDULENT CONVEYANCES \S 295(1)—EVIDENCE INSUFFICIENT TO SHOW TRANSACTION FRAUDULENT.

In a suit by an Oklahoma corporation which had recovered in courts of that state a judgment against defendant's husband attacking as fraudulent a conveyance of property by the husband to her, and seeking to reach land acquired in Oregon by defendant with the proceeds of the property conveyed, etc., evidence *held* insufficient to show that the transaction was fraudulent, and open to attack, within L. O. L. §§ 7397, 7400, 7401.

4. JUDGMENT \S 815—FOREIGN JUDGMENT ENTITLED TO FULL FAITH AND CREDIT.

A judgment of the courts of one state is, as to matters adjudicated, entitled to full faith and credit in another state.

Department 1.

Appeal from Circuit Court, Lane County;
G. F. Skipworth, Judge.

*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

*Rehearing denied December 9, 1919.

Suit by Farmers' National Bank of Ponca City, Okl., a corporation, against C. R. Renfro and others. From a decree for plaintiff, defendants appeal. Reversed, and suit dismissed.

The plaintiff, an Oklahoma corporation, having recovered judgment in a court of that state against C. R. Renfro, one of the defendants here, as for money had and received, brought an action against him in the circuit court of Lane county, in this state, upon said judgment, and recovered an Oregon judgment for \$3,482, with interest, together with costs and disbursements. This suit by the bank is against Renfro, his wife, Margaret Renfro, and his brother, A. R. Renfro. In substance, the complaint charges that the husband, Renfro, being indebted to the plaintiff in Oklahoma for more than \$3,000 for money had and received, conveyed to his wife certain realty in that state, with the intent and purpose on his part, known and participated in by the wife, to defraud the plaintiff as his creditor; that the wife afterwards sold the Oklahoma realty, and invested the proceeds in other lands and certain merchandise in Lane county. A. R. Renfro, the brother, is made a party because he has a mortgage for \$4,000 given by the husband and wife upon the Lane county land, which the plaintiff alleges is fraudulent. Except as to the relationships of the defendants, the complaint is denied.

The defense principally relied upon is to the effect that prior to the commencement of the plaintiff's action in Oklahoma, and while the husband and wife had no knowledge whatsoever of the claim on the part of the plaintiff against either of the defendants, the wife bought from the husband the Oklahoma realty already mentioned, paying therefor a valuable consideration, and took conveyance from her husband, which was duly recorded prior to the commencement of the plaintiff's action, and that afterwards the wife paid off and extinguished the mortgage already upon the land when she bought it, sold the property, and invested the proceeds in the Lane county lands and the merchandise mentioned, all in good faith, for a valuable consideration, and without any knowledge or notice whatsoever of any claim on the part of the plaintiff. This new matter was traversed by the reply.

After the testimony was closed the court reopened the case at the instance of the plaintiff, took additional testimony by deposition of witnesses in Oklahoma on behalf of the plaintiff, and subsequently rendered a decree to the effect that the defendant husband is the owner of the Lane county land; that the wife holds title to it in fraud of the plaintiff, and that the same should be subjected to an execution on plaintiff's Lane county judgment. The defendants appeal.

L. Bilyeu and E. O. Potter, both of Eugene (L. Bilyeu and Potter & Immel, all of Eugene, on the briefs), for appellants.

J. M. Devera, of Eugene (J. S. Medley, of Cottage Grove, and Charles A. Hardy, of Eugene, on the briefs), for respondent.

BURNETT, J. (after stating the facts as above). The chronology of the events involved in this litigation is substantially this: The plaintiff claims that it bought certain alleged state warrants, which afterwards proved to be forgeries; that the defendant husband acted as an intermediary between the officer of the state, who uttered the forged paper, and the Guthrie National Bank, passing the invalid warrants from the officer to the bank for the account of the plaintiff. This transaction took place in the latter part of January, 1911. The husband suffered a stroke of paralysis on May 7, 1911, and became unable to attend to his business. The Oklahoma land in question did not constitute the whole of his possessions. He had other realty at the time, and was engaged in a prosperous drug business at Guthrie, Okl. It is claimed on the part of the defendants that the husband was greatly worried about the \$3,000 mortgage on the land, and to relieve him the wife paid him out of her own funds about \$5,000, and took title from him by deed of February 19, 1912. There is evidence to the effect that a previous deed had been made in December before, but was informal in some particulars, requiring the instrument already mentioned as a means of correction. The next event was the departure of the husband and wife to take up their residence in Oregon, in the latter part of February, 1912. Succeeding this, on March 8, 1912, the plaintiff began the action against the husband, the Guthrie National Bank, and its cashier, to recover as for money had and received to the use of the plaintiff. Judgment was not rendered in that action until April 27, 1915, more than three years after its commencement. Action upon the Oklahoma judgment was begun in Lane county, Or., on November 13, 1915, resulting in a judgment against the husband on March 3, 1916, as already stated. Afterwards came the instant suit.

There is a dispute in the testimony between the husband and the cashier of the Guthrie bank, Sohlburg by name, about who took the initiative in bringing about the transaction concerning the warrants. Renfro testifies, in substance, that he was approached by Sohlburg, inquiring for warrants, while the latter contends that Renfro took up the subject with him. This is not necessarily material in the inquiry. It seems from the testimony that banks in Oklahoma were anxious to buy state warrants as an investment because they were not taxable. There is no testimony whatever tending to show that Renfro knew that the warrants in question were forged.

and he is uncontradicted in his statement that the first he knew of any claim against him on account of his connection with the transaction was when Sohlburg sent him a copy of the papers served in the Oklahoma action.

As to the origin of the funds which the wife claims to have paid to her husband for his interest in the Oklahoma lands, we have only the testimony of the husband and wife. She states that she married her husband in 1891, and that he was then a prosperous druggist at Guthrie, and had plenty of money. They both agree that at the beginning of their married life he gave her regularly \$10 every month for her own use, independent of the expenses of the household. Soon afterwards he increased this to \$50 per month. They also say that she invested her money and reinvested it and was frugal in her habits, so that at the time of the conveyance she had accumulated in the neighborhood of \$5,000. He tells of giving her money at different times, among others \$300, being half of a \$600 bet he won on an election. She narrates her purchase for \$450 of some lots she afterwards sold for \$2,100. They do not produce any books of account showing all these transactions, but there is nothing to contradict them in their positive statement.

[1-4] The deposition of Sohlburg is to the effect that Renfro brought the bonds to the former's bank, and that the check which the agent of the plaintiff gave in payment was carried to Renfro's account in the Guthrie bank. Renfro testifies substantially that he simply acted as messenger from the state official to the Guthrie National Bank; that in return for the warrants he received a cashier's check on that bank, whereupon he protested that it should not have been drawn in his name, as he was not selling them, but that Sohlburg put him off with the statement that the books had been made up, as the transaction had occurred after banking hours, and that it would not make any difference, whereupon Renfro indorsed the check to the state official. The witnesses account for this being after banking hours by the fact that, owing to the train schedule, the officer could not arrive at Guthrie until evening. There is no testimony tending to show that Renfro knew that the warrants were invalid. Neither is there any evidence indicating that his wife knew of any claim of the plaintiff against him prior to the commencement of the action. It will be noted that all of the money which the wife had, in whatever manner she acquired it, was accumulated prior to the transaction concerning the warrants. The conveyance for which she paid was made before the commencement of the action, and, so far as the testimony shows, was executed and delivered before the grantor therein had any notice of the plaintiff's claim against him. That the defendant's wife has a right to inquire into the origin and circumstances of the plaintiff's de-

mand against her husband is taught in *Barnes v. Spencer*, 79 Or. 205, 153 Pac. 47. There the defendant Spencer had acquired judgment against the husband of Mrs. Barnes in California, had sued upon it in Oregon, and recovered a domestic judgment here. He was attempting to levy an execution upon property which Mrs. Barnes claimed was purchased with her money by the husband, who took title in himself contrary to her instructions. The court there permitted her to inquire into the origin of the claim of the judgment creditor. This ruling depended upon the principle that she was not bound by any judgment to which she was not a party. So here Mrs. Renfro is not concluded in this suit by the mere rendition of a judgment in any court unless she was a party to it. She is entitled to put in evidence all the circumstances attendant upon the origin of the claim, not only to show that her husband had no intent to defraud his creditors, having no knowledge of any such claim, but also that, even if there were such a fraudulent design on his part, she knew nothing of it, and did not participate in the deceit. There is nothing against the claim of the husband and wife that she paid him a valuable consideration for the property in Oklahoma. To a financially interested critic there might be suspicion that she could not acquire \$5,000 during the 20 years of her married life. Mere suspicion, however, is not enough to overthrow a positive statement which is not unreasonable. It is further suggested that there were no books of account offered, nor any details given about the numerous transactions which would lead to the accumulation of that amount of money. We must remember, however, that it is not improbable that a husband engaged in prosperous business should give his wife money continually and systematically. Neither is it beyond belief that while they prospered and were harmonious in their domestic life business was not transacted between them with that same punctilious accuracy that would characterize dealings between strangers, both of whom were business men.

The legislative department of the government has codified the rules relating to conveyances with intent to defraud creditors. They are here set down:

7397, L. O. L. "Every conveyance or assignment in writing or otherwise of any estate or interest in lands or in goods or things in action, or of any rents or profits issuing therefrom, and every charge upon lands, goods, or things in action, or upon the rents or profits thereof, made with the intent to hinder, delay or defraud creditors or other persons of their lawful suits, damages, forfeitures, debts, or demands, and every bond or other evidence of debt given, suit commenced, decree or judgment suffered, with the like intent, as against the persons so hindered, delayed, or defrauded, shall be void."

7400, L. O. L. "The question of fraudulent intent in all cases arising under the provisions

of this chapter shall be deemed a question of fact, and not of law."

7401, L. O. L. "The provisions of this chapter shall not be construed in any manner to affect or impair the title of a purchaser for a valuable consideration, unless it shall appear that such purchaser had previous notice of the fraudulent intent of his immediate grantor, or of the fraud rendering void the title of such grantor."

The opinion in *Garnier v. Wheeler*, 40 Or. 198, 66 Pac. 812, written by Mr. Justice Moore, is authority for this principle:

"Three things * * * must concur to protect the title of the purchaser: (1) He must buy without notice of the bad intent on the part of the vendor; (2) he must be a purchaser for a valuable consideration; and (3) he must have paid the purchase money before he had notice of the fraud."

And it is said by Mr. Justice Bean in *Bond v. Ellison*, 80 Or. 634, 639, 157 Pac. 1103, 1104:

"In order to avoid a sale upon the ground of fraud, the vendee must have had notice of the vendor's fraudulent designs. Notice of the fraudulent intent of the vendor may be inferred from the circumstances; but the mere negligence or want of diligence in not inquiring into the facts known to him, and calculated to put him upon inquiry, is not sufficient to charge him with notice of fraud."

See, also, *Coffey v. Scott*, 66 Or. 465, 135 Pac. 88.

The testimony shows without dispute that when the husband gave money to his wife he had a right to give it, making it hers as against all the world, because it was given to her long before the transaction concerning the warrants was had or thought of. They explain the transfer of the property on the ground that the husband had suffered a stroke of paralysis and his tenure upon life at that time seemed to be precarious; that he was worried by that fact and the further circumstance that there was a mortgage of \$6,000 upon the land; that to remove the worry and to dispose of the property so that she could handle it without being complicated with his estate in case of his death the conveyance was made, and that all the while they were both entirely unaware of any claim on behalf of the plaintiff against the husband on any account. It is not improbable, much less impossible, that during her 20 years of married life, with a separate income of \$50 per month and her investments and reinvestments, the wife accumulated \$5,000. That she paid this to her husband is not disputed by any testimony. It constitutes the valuable consideration mentioned in section 7401, L. O. L. It is utterly uncontroverted that she had no notice whatever of any fraudulent intent on the part of her husband, and the testimony is clear that the latter had no such intent, because he was not

aware of any claim against him on behalf of the plaintiff. The case made by the defendants conforms to the standard of testimony announced in *Garnier v. Wheeler*, supra. Moreover, it appears without dispute in the testimony that the husband had upwards of \$5,000 worth of other property, part of it realty, in the state of Oklahoma, independent of the transferred land, even if the latter were a pure gift. The plaintiff may have lost money in its endeavor to acquire nontaxable securities as an investment, and we cannot disturb the judgment which it has against the defendant husband, for the determinations of the courts of a sister state are entitled to full faith and credit here. But the evidence does not disclose anything to contradict the position of the wife that she paid a valuable consideration for the property without notice of any fraudulent intent on the part of her husband. We think that the plaintiff's showing is not sufficient under the rules laid down by our Code on the subject, to sweep away the wife's accumulations of 20 years, in the interest of the plaintiff.

The decree is reversed and the suit dismissed.

McBRIDE, C. J., and BENSON and HARRIS, JJ., concur.

(96 Or. 53)

STATE v. SAVAGE.

(Supreme Court of Oregon. Oct. 21, 1919.)

1. CONSTITUTIONAL LAW §209—NO BURDEN NOT IMPOSED ON SIMILAR CLASS CAN BE IMPOSED ON ONE CLASS.

Generally, no one may be subject to any greater burdens and charges than are imposed on others in the same calling or condition, or in like circumstances; and no burden can be imposed on one class of persons, natural or artificial, which is not, in like conditions, imposed on all other classes.

2. CONSTITUTIONAL LAW §209—EQUAL PROTECTION OF LAW DENIED UNLESS CLASSIFICATION IS NOT ARBITRARY.

If statute applies only to one class of persons, and imposes upon them duties not common to others, there must exist in the relations of such persons to the state, to the public, or to individuals some reasonable ground of distinction sufficient to show that the classification is not merely personal and arbitrary, else there will be a denial of the equal protection of the law.

3. FISH §2—LAW APPLICABLE TO FISH APPLIES TO CRABS.

Crabs are fish, and the law applicable to fish is applicable to crabs.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Fish.]

4. FISH \S 1—PROPERTY RIGHTS IN FISH IN STATE FOR BENEFIT OF CITIZENS.

The title to migratory fish, *ferae naturae*, while in a state of freedom, so far as a right of property can be asserted, is in the state, not as a proprietor, but in its sovereign capacity, for the benefit of and in trust for citizens of the state in common.

5. CONSTITUTIONAL LAW \S 208(3)—PROHIBITING TAKING OF SALT-WATER CRABS, CLASS LEGISLATION.

Laws 1915, p. 31, and Laws 1917, p. 848, amending L. O. L. \S 5360, prohibiting the taking of salt-water crabs from Coos county for purpose of sale, by making statute inapplicable to those engaged in canning business, without a good reason for so doing, *held* discriminatory class legislation, and void under Const. art. 1, \S 20.

6. STATUTES \S 143 — VOID AMENDMENT LEAVES STATUTE UNCHANGED.

Where amendments to section of the statute are void, the section itself remains intact and valid.

7. FISH \S 8—RESTRICTION AS TO CATCHING IN CERTAIN SEASON OR FOR YEARS OR FOR SALE, VALID.

Legislature has the power to enact laws prohibiting the catching of fish or the killing of game for a certain term of years, or for a certain portion of the year, or in certain localities, where the conditions are different from those in other portions of the state, or for purposes of sale, or may restrict quantity of fish or game that may be caught or killed.

8. CONSTITUTIONAL LAW \S 70(1) — LOCAL LAWS CANNOT BE DECLARED INVALID UNLESS DISCRIMINATORY OR ARBITRARY.

Where there is no express constitutional restriction against the passage of local laws by a state Legislature, the courts cannot hold such laws void for want of constitutional authority to enact them unless they are clearly discriminatory or merely arbitrary.

9. CONSTITUTIONAL LAW \S 211—EQUAL PROTECTION OF LAWS DEFINED.

The equality clause, U. S. Const. 14th Amend., requires that the law, when impartially applied, shall operate equally and uniformly upon all persons in similar circumstances, and confers like privileges to all who may comply with its terms or come within its provisions, and does not prohibit legislation which is limited, either in the objects in which it is directed or by the territory within which it is to operate.

10. FISH \S 9—STATUTE PROHIBITING TAKING SALT-WATER CRABS IN CERTAIN COUNTY CONSTITUTIONAL.

L. O. L. \S 5360, prohibiting the taking of salt-water crabs from Coos county for purpose of sale, as it exists apart from the void amendments of 1915 and 1917, is an equal law, and is valid, since it confers equal rights on all citizens, subjects them to equal burdens, and imposes equal penalties on those who violate it.

11. STATUTES \S 86 — CONSTITUTIONALITY OF LAW PROHIBITING TAKING SALT-WATER CRABS IN COUNTY NAMED FOR PURPOSES OF SALE.

L. O. L. \S 5360, prohibiting the taking of salt-water crabs from Coos county for purpose of sale, as it exists apart from the void amendments of 1915 and 1917, is not such a special or local law as comes within the inhibition of Const. art. 4, \S 23, which inhibits the enactment of special or local laws "for the punishment of crimes and misdemeanors," since the provision for punishment as a misdemeanor for violation is merely incident to the act.

Department 2.

Appeal from Circuit Court, Coos County; John S. Coke, Judge.

Norman C. Savage was convicted of having transported two salt-water crabs from Coos county to Portland for sale, and he appeals. Affirmed.

The defendant Norman C. Savage was convicted and fined \$25 for having on the 27th day of March, 1919, shipped or transported from Coos county to Portland, for sale, two salt-water crabs taken within said Coos county, and appeals from the judgment of conviction.

L. A. Liljeqvist, of Marshfield, for appellant.

John F. Hall, Dist. Atty., of Marshfield (George M. Brown, Atty. Gen., on the brief), for the State.

BEAN, J. A demurrer was filed to the complaint against defendant, which was first filed in the justice's court, from which an appeal was taken by defendant to the circuit court, and it is contended that the statute which the defendant is accused of violating is unconstitutional, as in violation of section 20 of article 1 of the Constitution, which provides:

"No law shall be passed granting to any citizen or class of citizens, privileges or immunities which, upon the same terms, shall not equally belong to all citizens."

An act "to provide for the preservation and protection of salt water crabs within the county of Coos, to regulate the sale and transportation thereof, to prohibit common carriers from conveying the same from said county, and providing penalties for violation of this act," was first enacted by the Legislature in 1905, General Laws of Oregon 1905, p. 312. The first act contained a provision as follows:

"That this act shall not apply to the canning of salt-water crabs within said county or other exportation of the canned product thereof."

The act was amended by chapter 40, General Laws of Oregon 1907, p. 52, which is section 5360, L. O. L., and reads as follows:

"It shall be unlawful for any person within the county of Coos, state of Oregon, or within or upon the waters thereof, including all bays, harbors and inlets of said county, to kill, take, capture or destroy any greater number than fifty salt-water crabs in one day; and it shall be unlawful for any person or persons, firm or corporation within said county or upon the water thereof, to sell or offer for sale, exchange or transport outside of the said county, or have in possession, for the purpose of such sale or exchange or transportation from said county, any of the aforesaid salt-water crabs; and it shall be unlawful for any steamboat company, express company, or any other common carrier, or corporation, or the officers or agents thereof, or any other person, to transport or carry out of said county, or to receive or have in possession for the purpose of such transportation therefrom, any salt-water crabs, except for the purpose of exhibition or propagation: Provided, that this act shall apply to the canning product of salt-water crabs within the said county and the exportation of the same therefrom."

By chapter 16, Gen. Laws of Oregon 1915, p. 31, this section was amended by changing the proviso so as to read:

"That this act shall apply to the canning product of salt-water crabs within the said county and the exportation of the same therefrom, except the operation of any and all crab canneries, factories or the handling, transportation or exporting of the product of any of such canneries as may have been in operation in said county of Coos at the time of the passage of chapter 40, by the legislative assembly of the state of Oregon, in the year 1907, and all that may be in operation on and after January 1, 1917."

In 1917 the Legislature enacted chapter 400, Laws of Oregon 1917, p. 848, amending section 5360 so that it would read the same as above quoted, except that it "provided that this act shall apply to the canning product of salt-water crabs within the said county and the exportation of the same therefrom; provided, that this shall not apply to canneries now in existence until July 1, 1918." It will be seen that the section of the Code as last amended provided that it should not apply to canneries then in existence until July 1, 1918, and that the act of 1915 did not apply to the canning factories, or the transportation or exportation of the product of such canneries as had been in operation in Coos county at the time of the passage of chapter 40 by the legislative assembly in 1907, and that might be in operation on and after January 1, 1917. Section 2 of the act of 1905, and the same number of section of the act of 1907 which is section 5361, L. O. L., provides that any person violating any of the provisions of the act shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine of not less than \$25 or more than \$500, together with costs, and in default of the

payment of such fine shall be imprisoned one day for every \$2 thereof.

It will be noticed that a person engaged in the cannery business would have the privilege of catching any number of salt-water crabs, and transporting the same beyond the limits of the county of Coos for the purposes of sale, without violating the terms of the statute, while other citizens doing the same thing, in substantially the same manner, would be subject to a penalty or imprisonment.

[1] The general rule is that no one may be subject to any greater burdens and charges than are imposed on others in the same calling or condition or in like circumstances, and no burden can be imposed on one class of persons, natural or artificial, which is not, in like conditions, imposed on all other classes. A statute infringes this guaranty if it singles out for discriminatory legislation particular individuals not forming an appropriate class, and imposes upon them burdens or obligations, or subjects them to rules, from which others are exempt.

[2] If the statute applies only to one class of persons, and imposes upon them duties not common to others, there must exist in the relations to such persons to the state, to the public, or to individuals some reasonable ground of distinction sufficient to show that the classification is not merely personal and arbitrary, else there will be a denial of the equal protection of the law. 6 R. C. L. p. 403, § 398; *Barbier v. Connolly*, 113 U. S. 27, 5 C. Ct. 357, 28 L. Ed. 923; *Yick Wo v. Hopkins*, 118 U. S. 356, 6 Sup. Ct. 1064, 30 L. Ed. 220; *Cotting v. Kansas City Stock Yards Co.*, 183 U. S. 79, 22 Sup. Ct. 30, 46 L. Ed. 92; *State v. Richcreek*, 167 Ind. 217, 77 N. E. 1085, 5 L. R. A. (N. S.) 874, 119 Am. St. Rep. 491, 10 Ann. Cas. 899; *In re Opinion of Justices*, 207 Mass. 601, 94 N. E. 558, 84 L. R. A. (N. S.) 604; *Boone v. State*, 170 Ala. 57, 54 South. 109, Ann. Cas. 1912C, 1065; *Stratton Claimants v. Morris Claimants*, 89 Tenn. 497, 15 S. W. 87, 12 L. R. A. 70; *Nitka v. Western Union Tel. Co.*, 149 Wis. 106, 135 N. W. 492, 49 L. R. A. (N. S.) 337, Ann. Cas. 1913C, 863.

The general principle seems to be that if legislation, without good reason and just basis, imposes a burden on one class which is not imposed on others in like circumstances or engaged in the same business, it is a denial of the equal protection of the laws to those subject to the burden and a grant of immunity to those not subject to it. Particular laws, granting special privileges and immunities, must run the gauntlet of both the provisions of the Fourteenth Amendment to the federal Constitution, which secures the equal protection of the laws, and those of the state Constitutions, which prohibit the enactment of special laws granting privileges and immunities. The tests, as to both, are substantially similar. Also the inherent lim-

itations on legislative power may themselves be sufficient to nullify such laws. The provisions of the state constitution are the antithesis of the Fourteenth Amendment, in that they prevent the enlargement of the rights of some in discrimination against the rights of others, while the Fourteenth Amendment prevents the curtailment of rights. 6 R. C. L. § 400, p. 406; 12 C. J. § 827, p. 1111; Cooley's Const. Lim. p. 561 et seq.; State v. Nashville, etc., R. Co., 124 Tenn. 1, 135 S. W. 773, Ann. Cas. 1912D, 805.

[3] There is no question but that crabs are fish, and the law applicable thereto applies. 19 Cyc. 987; 35 Cyc. 1454.

[4] The title to migratory fish, *feræ naturæ*, while in a state of freedom, so far as a right of property can be asserted, is in the state, not as a proprietor, but in its sovereign capacity for the benefit of and in trust for citizens of the state in common. State v. Hume, 52 Or. 1, 5, 95 Pac. 808; State v. Catholic, 75 Or. 367, 147 Pac. 372, Ann. Cas. 1917B, 913; Portland Fish Co. v. Benson, 56 Or. 147, 154, 108 Pac. 122.

[5] No good reason is suggested or can be conceived that in the protection of fish a portion of the people should be subject to prosecution and punishment for the catching or transportation for mercantile purposes of salt-water crabs taken in Coos county, while another class of persons operating canneries should have the exclusive privilege of taking and shipping the same kind of fish beyond the limits of the county for the purposes of sale. The act of 1915 and that of 1917 clearly grants a special privilege or monopoly to those engaged in the cannery business without any good reason therefor, and is discriminatory class legislation, and repugnant to article I, § 20, of the Constitution and void. Monroe v. Withycombe, 84 Or. 328, 336, 165 Pac. 227; Hume v. Rogue River Packing Co., 51 Or. 237, 259, 83 Pac. 391, 92 Pac. 1065, 96 Pac. 865, 31 L. R. A. (N. S.) 396, 131 Am. St. Rep. 732; Eagle Cliff Fishing Co. v. McGowan, 70 Or. 1, 15, 137 Pac. 766; Jones v. Union County, 63 Or. 566, 574, 127 Pac. 781, 42 L. R. A. (N. S.) 1035; State v. Wright, 53 Or. 344, 348, 100 Pac. 296, 21 L. R. A. (N. S.) 349, and note; Maxwell v. Tillamook County, 20 Or. 495, 26 Pac. 803.

The legislative enactments of 1915 and 1917, above referred to, amending section 5360, L. O. L., being void, the question arises as to the validity of this section prior to the amendments. It will be noticed that section 5360, enacted in 1907, is not subject to the objection which we have just considered, and applies to all persons alike.

The rule is stated in 6 R. C. L. p. 118, § 117, as follows:

"An unconstitutional law cannot operate to supersede any existing valid law (Chicago I. & L. R. Co. v. Hackett, 228 U. S. 559 [33 Sup. Ct. 581, 57 L. Ed. 966]), and accordingly, where a clause repealing a prior law is inserted in an

act, which act is unconstitutional and void, the provision for the repeal of prior laws will fall with it, and will not be permitted to operate as repealing such prior laws."

[6] In the present case the amendment itself, according to the authorities above noticed, is void. There was no attempt to enact a change of the statute, other than by the amendment, or to repeal the law as expressed in section 5360, L. O. L. If there was no amendment of section 5360, then it follows that this section remains intact and valid. Portland v. Coffey, 67 Or. 507, 515, 135 Pac. 358; City of Portland v. Schmidt, 13 Or. 17, 6 Pac. 221.

A further objection to the constitutionality of the law in question is made that it is in violation of subdivision 2, § 23, art. 4, of the Constitution, which inhibits the enactment of special or local laws "for the punishment of crimes and misdemeanors." This objection, if tenable, is applicable to section 5360, L. O. L., prior to the void amendments. It is also urged that the law is special for the reason that it applies only to Coos county. Counsel for defendant cites a wealth of authorities from other states where the constitutions are different from ours.

[7] It must be conceded that it is within the province of the lawmakers of the state to properly protect fish and game by the passage of appropriate laws. 12 C. J. p. 1172, § 915. We think it is valid for the Legislature to enact a law prohibiting the catching of fish or the killing of game for a certain term of years, or for a certain portion of the year, or to prohibit the taking of fish or the killing of game in certain localities, where the conditions are different from those in other portions of the state, or that the taking of such fish, or the killing of such game, may be restricted in quantity or number, or by not permitting the same for purposes of sale. 19 Cyc. 1009, note 19; Osborn v. Charlevoix Circuit Judge, 114 Mich. 655, 72 N. W. 982.

[8] Where there is no express constitutional restriction against the passage of local laws by a state Legislature, the courts cannot hold such laws void for want of constitutional authority to enact them, unless they are clearly discriminatory or merely arbitrary. There is a distinction between special laws and class legislation.

[9] The equality clause only requires that the law, when impartially applied, shall operate equally and uniformly upon all persons in similar circumstances, and confers like privileges to all who may comply with its terms or come within its provisions. It does not prohibit legislation which is limited either in the objects in which it is directed, or by the territory within which it is to operate. It merely requires that all persons subjected to such legislation shall be treated alike under like conditions. 6 R. C. L. § 413, p. 417, § 414, p. 418.

In *Matter of N. Y. Elevated Railroad Co.*, 70 N. Y. 327, 346; *People v. Squire*, 107 N. Y. 593, 14 N. E. 820, 1 Am. St. Rep. 893, note 903; *People v. Judge*, 17 Cal. 547; *State v. Ellet*, 47 Ohio, 90, 23 N. E. 931, 21 Am. St. Rep. 772, note 780-789.

[10] Section 5360, L. O. L., as enacted in 1907, confers equal rights on all citizens of the state, and subjects them to equal burdens, and imposes equal penalties on every person who violates it. Although no one can ordinarily enjoy the right, or be subject to the burden, or infringe its provisions, without going to, or being within Coos county, it is an equal law and valid. *State v. Griffin*, 69 N. H. 1, 39 Atl. 260, 41 L. R. A. 177, 76 Am. St. Rep. 139, note 147-154; *Arms v. Ayer*, 192 Ill. 601, 61 N. E. 851, 58 L. R. A. 277, 85 Am. St. Rep. 357, 360; *Wanser v. Hoos*, 60 N. J. Law, 482, 38 Atl. 449, 64 Am. St. Rep. 600, 614. There is nothing in our Constitution to prevent the enactment of a local law for the protection of fish and game. *Fouts v. Hood River*, 46 Or. 492, 504, 81 Pac. 370, 1 L. R. A. (N. S.) 483, 7 Ann. Cas. 1160, is an analogous case on this point. There are numerous laws in this state which have stood the test of many years, prohibiting the killing or slaughtering of game or the catching of fish at certain seasons of the year in certain localities. If all persons who catch fish or kill game in a certain place within this state are subject to the same law, and the law applies to every one alike, it is a general law. In *State v. Sturgess*, 9 Or. 537, 539, this court recognized the validity of a local act of October 16, 1878, establishing "such regulations for the protection of salmon in the particular locality embraced by it, as the Legislature deemed necessary and expedient, in view of the peculiar condition of the Columbia river. * * *" *State v. McGuire*, 24 Or. 366, 33 Pac. 666, 21 L. R. A. 478. In *Portland Fish Co. v. Benson*, 56 Or. 147, 108 Pac. 122, it was held, in relation to closing portions of a stream, that this affects the locality, and not the individual. Mr. Justice Eakin said:

"A law that operates only in a limited territory to accomplish a specific purpose does not deny equal protection of the laws, as it affects all persons equally and impartially who are similarly situated. 6 Am. & Eng. Enc. Law (2d Ed.) 80."

In *State v. Marco*, 188 Pac. 653, decided September 9, 1919, a statute making it unlawful to take certain fish by means of purse seines east of a described line in the Columbia river, was enforced. In *Ladd v. Holmes*,

40 Or. 167, Mr. Justice Wolverton at page 172 of the opinion, 66 Pac. 714, at page 716 (91 Am. St. Rep. 457), said:

"A law may be general, however, and have but a local application, and it is none the less general and uniform because it may apply to a designated class, if it operates equally upon all the subjects within the class for which the rule is adopted; and, in determining whether a law is general or special, the court will look to its substance and necessary operation, as well as to its form and phraseology."

In principle the question is settled in this state. The county of Coos was mentioned in the statute as a convenient method of describing the waters thereof, including all bays, harbors, and inlets of the county. It is not suggested that on account of the description of the restricted area the practical application of the law would work any inequality on any particular body of water or stream, but the contention is that the act must apply to the whole state in order to be valid.

[11] Section 5360, L. O. L., is not such a special or local law as comes within the inhibition of section 23, art. 4, of the Constitution, for the reason it provides for the punishment as a misdemeanor for a violation of its provisions, as that is merely incident to the act. If the Legislature can enact a law for the protection of fish and game in a certain section or part of the state, then it follows that the law may be enforced by the punishment of a violation thereof. The apparent purpose of the act is for the protection of salt-water crabs. *Ladd v. Holmes*, 40 Or. at page 177, 66 Pac. 714, 91 Am. St. Rep. 457; *Harper v. Galloway*, 58 Fla. 255, 265, 51 South. 226. The second proviso of the act of 1917 is to the effect that it shall apply to canneries after July 1, 1918. According to our view holding this section of the law prior to the two later attempted amendments valid, it is unnecessary to consider the effect of this last proviso in the act of 1917, as the same result would be obtained whichever way it might be decided in regard thereto.

Since the act with which the defendant was charged by the complaint, and for the commission of which he was convicted and fined, was in violation of section 5360, which is a valid law, it follows that the demurrer filed by the defendant was properly overruled, and that the judgment of the lower court should be affirmed. It is so ordered.

McBRIDE, C. J., and JOHNS and HARRIS, JJ., concur.

(76 Okl. 174)

BUELL v. OIL WELL SUPPLY CO.
(No. 10152.)

(Supreme Court of Oklahoma. Oct. 14, 1919.)

*(Syllabus by the Court.)***APPEAL AND ERROR ¶786—DISMISSAL OF APPEAL AS FRIVOLOUS.**

Where plaintiff sues upon a promissory note, and defendant answers by unverified general denial, and, upon motion of plaintiff, judgment is rendered for plaintiff on the pleadings, an appeal, assigning the rendition of such judgment as error, without stating any defense to plaintiff's action, will be dismissed as frivolous.

Error from District Court, Creek County; Ernest B. Hughes, Judge.

Action by the Oil Well Supply Company against J. Garfield Buell on a promissory note. Judgment for plaintiff, and defendant brings error. Dismissed.

John B. Meserve, of Tulsa, for plaintiff in error.

J. B. Bartlett, of Tulsa, and Smith & Walker, of Sapulpa, for defendant in error.

PER CURIAM. On motion to dismiss the appeal, it appears defendant in error, Oil Well Supply Company, brought suit upon a promissory note against plaintiff in error, J. Garfield Buell. The petition was verified, a copy of the note being attached as an exhibit and made a part of the petition. Defendant, Buell, by way of answer filed an unverified general denial. Upon motion of plaintiff, judgment was rendered on the pleadings, from which judgment this appeal was prosecuted.

Under the provisions of section 4759, R. L. 1910, the allegations of the petition must be taken as true, since the answer, by way of general denial, was not verified, and on authority of *Bilby v. Nat. Reserve Bank*, 53 Okl. 566, 157 Pac. 1198, and *Bilby v. Cochran*, 47 Okl. 545, 149 Pac. 143, the appeal will be dismissed, as frivolous.

It is so ordered.

(76 Okl. 179)

HART v. GROVE. (No. 8772.)

(Supreme Court of Oklahoma. Oct. 14, 1919.)

*(Syllabus by the Court.)***1. JUSTICES OF THE PEACE ¶53—CAN PERFORM OFFICIAL ACTS ONLY IN HIS OWN TOWNSHIP.**

A justice of the peace being a township officer under the Constitution and laws of this state, he can perform his official acts only in his own township.

[Ed. Note.—For other definitions, see *Words and Phrases*, Second Series, *Township Officer*.]

2. JUSTICES OF THE PEACE ¶53—AUTHENTICATION OF RECORD WHILE RESIDING IN ANOTHER STATE VOID.

The act of the justice of the peace in signing and authenticating the record herein while residing in a sister state was void.

3. JUSTICES OF THE PEACE ¶164(2)—APPELLATE JURISDICTION BASED ON THAT OF JUSTICE.

Proceedings in the appellate court are based upon the justice of the peace transcript, without which it has no jurisdiction of the subject-matter.

Error from District Court, Payne County.

Action between D. E. Hart and H. E. Grove. From the action of the district court in dismissing an appeal from a justice of the peace, the former brings error. Affirmed.

Geo. E. Bingham, of Drumright, John P. Hickam, of Stillwater, and McNeill & McNeill, of Pawnee, for plaintiff in error.

Biddison & Gore, of Tulsa, for defendant in error.

KANE, J. This is an appeal from the action of the district court of Payne county in dismissing an appeal from a judgment of a justice of the peace.

One of the grounds upon which the appeal was dismissed by the district court arose as follows: It seems that after the judgment was rendered in the justice court, and before a transcript of the record was made up and authenticated, the justice of the peace became ill and was removed to the Soldiers' Home at Leavenworth, Kan., where the transcript was finally signed and authenticated by him.

[1-3] It is the contention of counsel for defendant in error that, a justice of the peace being a township officer under the Constitution and laws of this state, he can perform his official acts only in his own township. The act of the justice of the peace in signing and authenticating the record herein was void, and, there being no transcript before the district court, it properly dismissed the appeal on that ground.

We think this contention is well taken. In *Leiber v. Argabright*, 25 Okl. 177, 105 Pac. 341, it was held that a justice of the peace is a township officer, under the Constitution, and cannot be a county or state officer. It is true that justices of the peace are, in a sense, justices of the peace in their respective counties, and also in the state. It is true that a justice of the peace may, in his own township, perform the duties of an examining magistrate in cases, or hear cases arising in any part of his county; it is also true that he may, within his own township, issue criminal process, to be served in any part of the state; but it does not follow, from these powers given, that he

may go into any part of the county, or any part of the state, and there perform official acts. He can perform his official acts only in his own township.

The action of the justice of the peace being void, the motion to dismiss the appeal was properly sustained, under the general rule which is stated in 24 Cyc. 708, as follows:

"Proceedings in the appellate court are based upon the justice of the peace transcript, without which it has no jurisdiction of the subject-matter. The contents of the transcript on appeal are prescribed by statute, and usually consist of a certified copy of the record of the proceedings before the justice of the peace and all the original papers and process and the original appeal bond."

This ground for dismissing the appeal being well taken, it is unnecessary to notice the other grounds.

For the reasons stated, the judgment of the court below is affirmed.

OWEN, C. J., and SHARP, HARRISON, JOHNSON, and PITCHFORD, JJ., concur.

McNEILL, J., disqualified, not participating.

(76 Okl. 58)

BASS v. CITY OF ATOKA et al. (No. 9466.)

(Supreme Court of Oklahoma. Oct. 14, 1919.)

(Syllabus by the Court.)

APPEAL AND ERROR §1001(1) — JUDGMENT REASONABLY SUPPORTED BY EVIDENCE CONCLUSIVE.

Where the only error complained of is that the verdict of the jury and the judgment thereon are not supported by the evidence, where there is any evidence reasonably tending to support the verdict, the same must be sustained. *Held*, from an examination of the record, the evidence reasonably tends to support the verdict of the jury and the judgment of the court approving same.

Error from District Court, Atoka County; J. H. Linebaugh, Judge.

Action by Amos K. Bass against the City of Atoka and J. E. Davis. Judgment for defendant City of Atoka, and plaintiff brings error. Affirmed.

McPharren & Cochran, of Durant, for plaintiff in error.

Ira J. Banta and I. L. Cook, both of Atoka, for defendant in error city of Atoka.

OWEN, C. J. This action was begun by plaintiff in error, Bass, against the city of Atoka, to recover on a claim alleged to be due from the city to J. E. Davis, and by Davis, assigned to Bass. The city answered, denying any indebtedness to Davis. The

case was tried to a jury, and verdict rendered in favor of the city. The only error presented by counsel is that the verdict of the jury and the judgment thereon are not supported by the evidence.

There was a sharp conflict in the evidence—the city claiming to have paid Davis the full amount due under his contract; Davis admitting he received the amount, but claiming a portion of the amount, by an arrangement with the mayor, was to reimburse him for expense incurred, and was not applied to the credit of the city's indebtedness to him. This issue was submitted to the jury under proper instruction, and, the evidence reasonably tending to support the verdict, such verdict and judgment thereon must be sustained. *Muskogee Elec. Tract. Co. v. Rye*, 38 Okl. 93, 132 Pac. 336.

Therefore the judgment of the trial court is affirmed.

KANE, JOHNSON, McNEILL, and HIGGINS, JJ., concur.

(76 Okl. 175)

ELLIS et al. v. MID-CONTINENT OIL & GAS CO. (No. 5279.)

(Supreme Court of Oklahoma. Oct. 14, 1919.)

(Syllabus by the Court.)

APPEAL AND ERROR §773(2)—ABANDONMENT PRESUMED ON FAILURE TO FILE BRIEF.

Where a cause has been regularly assigned for submission, and the plaintiff in error fails to file brief, or offer any excuse for not doing so, it will be presumed that the appeal has been abandoned, and the same will be dismissed. *Rule 7 of this Court* (165 Pac. vii).

Error from District Court, Muskogee County; R. C. Allen, Judge.

Action by Kenneth H. Murchison against the Mid-Continent Oil & Gas Company, with garnishment against the Cudahy Refining Company, and intervention by Jeff D. Ellis and A. W. Patterson, claiming money in hands of the garnishee. Judgment for defendant, and interveners bring error. Dismissed.

Preston C. West, of Tulsa, for plaintiffs in error.

Ramsey & Thomas, of Muskogee, for defendant in error.

PER CURIAM. This proceeding in error is brought to review the judgment of the district court of Muskogee county, Okl., in the case where Kenneth H. Murchison was plaintiff and Mid-Continent Oil & Gas Company, a corporation, was defendant, and the Cudahy Refining Company was a garnishee. In

said cause plaintiffs in error intervened, claiming the moneys in the hands of the Cudahy Refining Company, a garnishee, which was also claimed by the Mid-Continent Oil & Gas Company. Judgment was rendered in favor of the Mid-Continent Oil & Gas Company, and the interveners, plaintiffs in error, appealed.

Neither party to this appeal has served or filed briefs, as required by the rules of this court, or offered excuse for failure to do so. Where a cause has been regularly assigned for submission, and submitted, and the plaintiff in error fails to file a brief, or to offer any excuse for not so doing, it will be presumed that the appeal has been abandoned, and the same will be dismissed; and it is so ordered.

(76 Okl. 183)

ST. LOUIS & S. F. R. CO. v. BLASSINGAME & WOODWARD. (No. 4458.)

(Supreme Court of Oklahoma. Oct. 14, 1919.)

(Syllabus by the Court.)

APPEAL AND ERROR \S 655(3) — **DISMISSAL FOR FAILURE TO FILE CASE-MADE IN TRIAL COURT.**

Where the case-made was not filed among the papers in the case in the trial court, as required by section 5242, Rev. Laws 1910, the case-made will be stricken from the files of this court, and the appeal by such case-made dismissed.

Error from District Court, Jackson County; Frank Mathews, Judge.

Action between the St. Louis & San Francisco Railroad Company and Blassingame & Woodward, a copartnership. Judgment for the latter, and the former brings error. Dismissed.

W. F. Evans, of St. Louis, Mo., and R. A. Kleinschmidt and J. H. Grant, both of Oklahoma City, for plaintiff in error.

G. E. Thorpe, of Altus, J. Winfield Scott, of Durant, and S. B. Garrett, of Altus, for defendant in error.

PER CURIAM. This cause was dismissed, in an opinion prepared by Commissioner Brewer, for the reason that the case-made did not appear to have been filed among the papers in the case in the trial court, as required by section 5242, Rev. Laws 1910. The motion to reinstate the cause was sustained, and plaintiff in error granted leave to withdraw the case-made for the purpose of correction, and to show that same was in fact filed with the clerk of the trial court. The trial judge refused to order the correction, and the case-made was returned to this court, together with controverting

affidavits. Upon further consideration it does not sufficiently appear that the case-made was filed with the clerk in the trial court, as required under the provisions of section 5242, supra. Therefore the case-made must be stricken from the files in this court (Wyant v. Beavers, 49 Okl. 30, 150 Pac. 480), and, there being no transcript of the record of proceedings in the trial court, the appeal will be dismissed.

(76 Okl. 226)

CURTIS v. HARRIS et al. (No. 10048.)

(Supreme Court of Oklahoma. Oct. 28, 1919.)

(Syllabus by the Court.)

1. MINES AND MINERALS \S 73—**OIL AND GAS LEASE CONSTRUED STRONGLY AGAINST LESSEE.**

Oil and gas leases in this jurisdiction are construed strongly against the lessee and in favor of the lessor, and where its terms will permit, under the rules of law, such lease will be construed so as to promote development and prevent delay.

2. MINES AND MINERALS \S 78(1)—**TIME AS ESSENCE OF OIL AND GAS LEASE.**

Where an oil and gas lease expressly provides that rights of parties shall terminate if no well be drilled within a fixed period, unless the lessee on or before that date shall pay or tender to the lessor a fixed sum, the right to defer drilling is an option, and time is of the essence of the contract.

3. MINES AND MINERALS \S 78(2)—**QUIETING TITLE UNDER OIL AND GAS LEASE TERMINATES BY ITS TERMS.**

A court of equity will refuse to quiet title under an oil and gas lease where a well was not completed or payment tendered within a period fixed under an express provision that the lease should terminate as to both parties, unless a well was completed or payment tendered. To refuse plaintiff relief is not to declare a forfeiture, the lease having terminated by its express terms.

4. APPEAL AND ERROR \S 1011(1)—**JUDGMENT CONCLUSIVE ON CONFLICTING EVIDENCE.**

Where there is a conflict of evidence as to whether the agent of the lessor verbally agreed with the lessee for an extension of time in which to complete a well or make payment, and the trial court makes a general finding in favor of the lessor, the judgment will not be set aside unless against the clear weight of the evidence.

Error from District Court, Wagoner County; W. J. Campbell, Judge.

Action to quiet title by M. Curtis against Lucinda Harris and others. Judgment for defendants, and plaintiff brings error. Affirmed.

Norman Barker, of Bartlesville, Watts & Summers, of Wagoner, and McGuire & Devereux, of Tulsa, for plaintiff in error.

W. O. Rittenhouse, of Wagoner, and Benj. C. Conner, of Tulsa, for defendants in error.

OWEN, C. J. The lease, under which this action was brought, was for a term of five years, and as long thereafter as oil or gas might be produced from the premises, but contained the express provision:

"If no well be completed on said land on or before the 8th day of January, 1917, this lease shall terminate as to both parties unless the lessee on or before that date shall pay or tender to the lessor * * * the sum of \$40, which shall operate as a rental and cover the privilege of deferring the completion of a well for twelve months from said date."

The question presented is whether the lease expired by its terms on January 8, 1917, no well having been completed or payment tendered prior to that time.

Counsel urge that to deny plaintiff judgment quieting title is to declare a forfeiture of his lease; that time is not of the essence of the contract, and forfeiture should not be declared for the reason that payment was tendered within a reasonable time after it was due.

[1] Oil and gas leases in this jurisdiction are construed strongly against the lessee and in favor of the lessor. *New State Oil & Gas Co. v. Dunn*, 182 Pac. 514; *Superior Oil Co. v. Mehl*, 25 Okl. 809, 108 Pac. 545, 138 Am. St. Rep. 942. And where its terms will permit, under the rules of law, such lease will be construed so as to promote development and prevent delay. *New St. O. & G. Co. v. Dunn*, supra; *Paraffine Oil Co. v. Cruce*, 162 Pac. 716.

[2-4] Under the express and unequivocal terms of the lease, the rights of both parties were to terminate January 8, 1917, if a well was not completed, unless the lessee elected to avail himself of the option to delay the completion of such well by paying the stipulated rental in advance. The lessee was not bound to pay the rental, but payment was a condition precedent to his right to defer drilling. The rule contended for, which seeks to prevent forfeiture, has no application. The lease terminated by its terms on the 8th of January, no well having been drilled, no payment tendered, and no facts appearing that amount to a sufficient legal excuse to relieve the lessee from the effect of neither completing a well nor paying the stipulated rental. Lessee's right to defer drilling was merely an option and time is of the essence of the contract. He lost his opportunity to defer the drilling, by not performing a condition required of him, and which right was to be paid for in advance when obtained. *Ross v. Sanderson*, 162 Pac. 709, L. R. A.

1917C, 879; *Maud Oil & Gas Co. v. Bodkin*, 180 Pac. 959; *Bearman v. Dux Oil & Gas Co.*, 166 Pac. 199; *Pom. Eq. Jur.* § 455.

It is contended by plaintiff that he had an oral agreement with the son of Lucinda Harris, with whom he negotiated the lease, to the effect he would be given the full period of one year from delivery of the lease in which to complete a well or make payment, and that the lease was not delivered to him until January 13th. The evidence was conflicting as to whether there was such an understanding. The trial court made a general finding in favor of the defendant, and, not being clearly against the weight of the evidence, that finding will not be disturbed.

The judgment of the trial court is affirmed.

SHARP, PITCHFORD, McNEILL, and HIGGINS, JJ., concur.

(78 Okl. 277)

UNCLE SAM OIL CO. v. RICHARDS et al.
(No. 4916.)

(Supreme Court of Oklahoma. Oct. 14, 1919.)

(Syllabus by the Court.)

1. MINES AND MINERALS §74—CONSTRUCTION OF OPTION CONTRACT—"AFTER THE COMPLETION OF A WELL."

The words "after the completion of a well," as used in the option contract involved herein, are words of plain meaning and significance (citing *Words and Phrases*, Complete).

2. MINES AND MINERALS §74—TIME OF COMPLETION OF A WELL UNDER OPTION CONTRACT.

Record examined, and held that, giving these words their ordinary meaning, the uncontradicted evidence shows that the well involved in this action was completed on the 28th day of November, 1912, after it had been successfully shot, and commenced flowing oil in large quantities.

Error from District Court, Pawnee County; L. M. Poe, Judge.

Suit for injunction by the Uncle Sam Oil Company against A. M. Richards and others. Temporary injunction dissolved upon final hearing, and decree entered for defendants, and plaintiff brings error. Reversed and remanded, with directions to enter judgment for plaintiff.

Albert L. Wilson and Mark T. Wilson, both of Kansas City, Mo., for plaintiff in error.

Dillard & Blake, of Tulsa, for defendants in error.

KANE, J. This was a suit in equity, commenced by the plaintiff in error, plaintiff below, against the defendants in error, defendants below, for the purpose of enjoining

and restraining two of the defendants from assigning a certain oil and gas lease and all the defendants from entering upon the leased premises or otherwise interfering with the development and control thereof by the plaintiff. Hereafter, for convenience, the parties will be designated "plaintiff" and "defendants," respectively, as they appeared in the trial court.

After the petition was filed the trial court granted a temporary injunction as prayed for, which was dissolved upon final hearing, and a decree entered in favor of the defendants. It is to reverse this action of the trial court that this proceeding in error was commenced. As the only question necessary to notice turns upon an examination of the evidence, no detailed statement of the issues joined by the pleadings is required. The record shows that the evidence over which there is no conflict establishes the material facts to be substantially as follows:

The defendant Richards was the owner and holder of two oil and gas leases covering the north half of a certain section of land, which he had been holding without drilling for about two years prior to the execution of the contracts with the plaintiff which form the basis of this action; that prior to August 12, 1912, the defendant Richards conveyed an undivided one-eighth interest in said leasehold to the defendant Blake; that on the 28th day of August, 1912, Richards and Blake, being desirous of having their leasehold tested for oil and gas, assigned one of said leases to the plaintiff, by the terms of which assignment the Uncle Sam Oil Company, the plaintiff, obligated itself to go upon said premises and complete a well thereon for oil and gas to the Bartlesville sand within 60 days, or pay to said Richards and Blake the sum of \$4,000, and on the same day Richards and Blake also executed an option contract covering the northwest quarter of said section, which contained the following provision:

"It is understood and agreed that the said the Uncle Sam Oil Company shall have the rights and privileges under this option for a period of thirty (30) days after the completion of a well by the said the Uncle Sam Oil Company, on the said southeast quarter of the northwest quarter of section 9, township 20 north, range 8 east 1. M., in Pawnee county, Oklahoma, and it shall pay one-half of the purchase price of said lease and leasehold, the sum of two thousand dollars (\$2,000), and shall have ninety (90) days from the date of the first payment in which to pay the balance or two thousand dollars (\$2,000); the said sum of four thousand dollars (\$4,000) being the amount to be paid in full for said lease and leasehold."

After the execution and delivery of these contracts the defendant William Blake assigned to the plaintiff his undivided one-eighth interest in the northwest quarter of said section. Immediately after the delivery

of these instruments the plaintiff went into possession of the leased premises and commenced to drill a test well in strict compliance with the terms of its contract, reaching the Bartlesville sand on the 28th day of October, 1912; that at this depth, on the 31st day of October, the well commenced flowing oil and water to the amount of 70 barrels per day, which was kept blown out of the well by a strong pressure of natural gas, which caused the oil and water to blend in such combination as to produce a valueless substance known in the oil business as B. S. At this point the well was plugged, and thereafter successfully shot, and on the 27th day of November following it commenced flowing oil at the rate of 800 barrels per day. It is not charged that there was any bad faith or lack of diligence on the part of the plaintiff in its efforts to comply with the terms of its option contract with Richards and Blake; the sole question in the case being: When, in these circumstances, was the well completed?

The plaintiff contends that it was completed on the 28th day of November, 1912, after it had been successfully shot and commenced flowing oil in large quantities. On the other hand, the defendant contends that the well was completed on the 28th day of October, 1912, when the Bartlesville sand was reached. If the first contention is sustained, it is conceded that the plaintiff strictly performed the conditions of its option within the time stipulated and should prevail, and that if the second contention is sustained the defendants must prevail. We think there is but one reasonable answer to the question thus presented, and that is, that the well was completed on the 28th day of November, 1912, when it was successfully shot and commenced to flow oil in large quantities.

[1, 2] It is obvious that the parties entered into the contracts hereinbefore referred to for the sole purpose of testing the leasehold involved for oil and gas. It was assumed that completing a well to the Bartlesville sand would be adequate for this purpose, and so it was. Drilling to the Bartlesville sand demonstrated at once that the leasehold contained both oil and gas, but the mere drilling to this depth did not determine whether these substances could be produced in paying quantities. The well, as we have seen, commenced flowing oil and water, which was being blown out by such a strong pressure of natural gas as to produce a valueless substance known as B. S. At this period it was impossible to say whether the well would prove to be a paying gas well, an oil well, or a dry hole. Obviously it was still incumbent upon the plaintiff to do something else in order to complete the well to a point where it could be determined to which of these classes the well belonged. This the plaintiff did in the concededly approved manner for doing such

work in that field, with very satisfactory results. In the circumstances, no good reason appears for giving the words "completion of a well," or the word "complete," any peculiar meaning or significance. Webster's New International Dictionary defines "completion," the word used in the option, as follows: "Act or process of making complete." The same work defines the word "completed" as follows:

"Filled up; with no part, item, or element lacking; free from deficiency; entire; perfect; brought to an end; a final or intended condition; concluded; completed."

For Judicial definitions see 2 Words and Phrases, 1366.

Giving these words their ordinary meaning, we are fully convinced that there is not a particle of evidence in the record sustaining the conclusion of the trial court, that the well was completed, that is, that it was brought to an end, or to a finish, or an intended condition, on the 28th day of October, 1912. The briefs of counsel disclose some controversy as to the rule which should govern this court in examining the evidence; that is, whether the rule applicable to suits in equity or the rule applicable to actions at law should be applied. We think this is immaterial. In our judgment there is no material conflict in the evidence, and no evidence whatever which in either event reasonably tends to sustain the conclusion reached by the trial court.

For the reasons stated, the judgment of the court below is reversed, and the cause remanded, with directions to enter judgment in favor of the plaintiff.

All the Justices concur, except McNEILL, J., not participating.

(76 Okl. 177)

J. B. KLEIN IRON & FOUNDRY CO. v. A. B. MAYS & CO. (No. 9454.)

(Supreme Court of Oklahoma. Oct. 14, 1919.)

(Syllabus by the Court.)

1. MECHANICS' LIENS §239, 280(4)—ON ENFORCEMENT OF SUBCONTRACTOR'S LIEN, EVIDENCE OF PAYMENTS BY OWNER ADMISSIBLE.

In an action against the owner of a building to enforce a subcontractor's lien, evidence of payments made by the owner to the contractor, who in turn paid the money thus received to subcontractors, laborers, and artisans during the 60 days within which they otherwise would have been entitled to file liens, is admissible; and, where the cost exceeds the contract price, the owner is entitled to credit for such payments to the extent of the pro rata amounts which the other subcontractors, etc., would have been entitled to if their liens had been filed.

2. MECHANICS' LIENS §254(2)—IN ACTION TO ENFORCE LIEN OF SUBCONTRACTOR, OWNER MAY SET OFF DAMAGES BY CONTRACTOR'S DELAY.

In a suit by a subcontractor to enforce a lien against the owner of the building, the owner may offset any actual damages which he has sustained, caused by the contractor's failure to complete the building in time, provided the damages are such as may be said to have been in the contemplation of the parties when the contract was made.

Error from District Court, Bryan County; Jesse M. Hatchett, Judge.

Action by J. B. Klein Iron & Foundry Company against A. B. Mays & Co., contractor, W. T. Bennett, owner, and other claimants, with claim for set-off by the owner. From a judgment allowing certain credits to the owner and giving the lien claimants a percentage of their claims with judgment for foreclosure, plaintiff and other claimants bring error. Affirmed.

Utterback & MacDonald, of Durant, for plaintiffs in error.

Hayes & McIntosh, Victor O. Phillips, and W. H. Ritchey, all of Durant, for defendants in error.

KANE, J. This was an action to foreclose a subcontractor's lien commenced by the plaintiff in error, against A. B. Mays, the contractor, W. T. Bennett, the owner, and various other lien claimants. The petition was in the usual form and stated facts sufficient to constitute a cause of action. The answer of Bennett, the owner, consisted of a general denial and affirmative defenses to the effect that, by reason of the failure of A. B. Mays & Co., to carry out the terms of his building contract, said Bennett was compelled to take charge of the construction of said building, which he did, and to complete said building as per the terms of said contract; that he expended in finishing said building the sum of \$4,160, all of which was for labor and material within the purview of said original contract; that, while the amount the owner agreed to pay the original contractor was the sum of \$6,600, the total paid to the contractor in completing said building aggregated \$9,700; that, by reason of the contractor failing to finish the building within the time prescribed by the contract, said owner was damaged in the sum of \$970, the sum being the amount of rent lost upon the ground floor and the sum of \$300, the sum being the amount of rent lost by reason of being unable to rent the second floor; that for over-seeing the completion of said building said owner's services were reasonably worth \$5 per day, which sum he prayed shall be added to the amount expended by him and made a set-off against the claim of the plaintiff and the other lien claimants.

The court found the facts to be substantially as alleged in the answer of the owner, and further found:

"That prior to the time he (the owner) took over the building he had paid the contractor \$4,498.27. The evidence shows that a good portion of that money was paid out for material and labor, but does not show the exact amount. The evidence does show that payments were made during the course of the building on estimates furnished by the architect, and that at the time Bennett took over the building there was unpaid a total sum of \$1,241.85. I therefore find that the amount of money of the payments made by Bennett to the contractor which was applied to the payments of labor and material bills was the total sum less the amount of the claims, which would make the total amount applied to the material and labor bills \$3,256."

From these facts the court made the following conclusions of law:

"I conclude from the foregoing facts that the defendant Bennett should be entitled to full credit for the amount he paid out on the building, to wit, \$4,185, and the amount of damages, to wit, \$600, making a total of \$4,785, which leaves a balance of \$1,816. That he is entitled to credit pro rata for the amount of money paid to the contractor which was applied to material and labor bills, to wit, \$3,256. Therefore the total amount of the claims of the various lien claimants, to wit, \$1,241.85 and \$3,256, making a total of \$4,498, should be paid off pro rata out of the \$1,816 balance. \$1,816 is 40 per cent. of the total of \$4,498.

"Therefore the various lien claimants are entitled to recover 40 per cent. of the amount of their claims, and they are granted judgment for such sum and a foreclosure of their liens against the property involved herein to pay the same."

The appealing lien claimants J. B. Klein Iron & Foundry Company, Rockwell Bros. & Co., and M. Brame take no exceptions to these findings of fact; but they claim that the trial court erred in holding as a matter of law that the owner was entitled to the credits claimed in his answer. They say the rights of the plaintiff in error and the defendants in error Rockwell Bros. & Co., and M. Brame are founded upon section 3864 of the Revised Laws of Oklahoma 1910, and that the ruling of the trial court contravenes said section of the statute, which reads as follows:

"Any person who shall furnish any such material or perform such labor as a subcontractor, or as an artisan or day laborer in the employ of the contractor, may obtain a lien upon such land, or improvements, or both, from the same time, in the same manner, and to the same extent as the original contractor, for the amount due him for such material and labor; and any artisan or day laborer in the employ of, and any person furnishing material to such subcontractor, may obtain a lien upon such land, or improvements, or both, for the same time, in the same manner, and to the same extent as the subcontractor, for the amount due him for such material and labor, by filing with the

clerk of the district court of the county in which the land is situated, within sixty days after the date upon which material was last furnished or labor last performed under such subcontract, a statement, verified by affidavit, setting forth the amount due from the contractor to the claimant, and the items thereof, as nearly as practicable, the name of the owner, the name of the contractor, the name of the claimant, and a description of the property upon which a lien is claimed, and by serving a notice in writing of the filing of such lien upon the owner of the land or improvements, or both: Provided, that if with due diligence the owner cannot be found in the county where the land is situated, the claimant, after filing an affidavit setting forth such facts, may serve a copy of such statement upon the occupant of the land, or the occupant of the improvements, as the case may be; or, if the same be unoccupied, he may post such copy in a conspicuous place upon the land or any building thereon. Immediately upon the filing of such statement, the clerk of the district court shall enter a record of the same in the docket provided for in the preceding section, and in the manner therein specified; provided, further that the owner of any land affected by such lien shall not thereby become liable to any claimant for any greater amount than he contracted to pay the original contractor. The risk of all payments made to the original contractor shall be upon such owner until the expiration of the sixty days herein specified, and no owner shall be liable to an action by such contractor until the expiration of said sixty days; and such owner may pay such subcontractor the amount due from such contractor for such labor and material, and the amount so paid shall be held and deemed a payment of said amount to the original contractor."

[1, 2] The Supreme Court of Kansas from which the foregoing statute was taken seems to have passed upon all the questions involved in this case in the case of *Fossett v. Rock Island Lumber & Mfg. Co.*, 76 Kan. 428, 92 Pac. 833, 14 L. R. A. (N. S.) 918.

The applicable paragraphs of the headnotes read as follows:

1. In a suit against the owner of a building to enforce a subcontractor's lien, evidence of payments made by the owner to other subcontractors during the 60 days within which they were entitled to, but did not, file liens, is admissible; and, where the cost exceeds the contract price, the owner is entitled to credit for such payments to the extent of the pro rata amounts which the other subcontractors would have been entitled to if their liens had been filed.

2. In a suit by a subcontractor to enforce a lien against the owner of the building, the owner may offset any actual damages which he has sustained, caused by the contractor's failure to complete the building in time, provided the damages are such as may be said to have been in the contemplation of the parties when the contract was made.

The only difference between the principal case and the case at bar is that in the case at bar the owner made the payments directly to

the original contractor, who applied the money thus received in payment of the claims of certain subcontractors, laborers, and artisans who otherwise would have been entitled to liens under the statute, while in the Kansas case the owner made the payments direct to the subcontractors, laborers, etc., during the 60 days in which they were entitled to file liens. It is not contended that this difference is sufficient to distinguish the two cases, nor do we believe that it is. Counsel for plaintiff in error rely entirely upon the case of *W. E. Caldwell v. John Williams-Taylor Co.*, 50 Okl. 798, 150 Pac. 698, to support their side of the case. We do not think this case is in point. The only question involved in that case was whether or not a subcontractor, furnishing material actually used in the construction of a building, has a lien, when he gave the statutory notice of filing his lien within 60 days of the time he furnished the material, in a case where the contractor abandoned his contract, after he had been paid the full contract price, prior to the expiration of 60 days. The court properly answered this question in the affirmative.

But there was no claim, and no attempt was made to show, that any portion of the money paid the original contractor was ever used by him for the purpose of paying the subcontractors or other persons entitled to liens, or that the owner was entitled to any damages sustained by the contractor's failure to complete the building. These are the precise questions presented for review in the case at bar, and the only case directly in point which has been called to our attention is the Kansas case. While the reasoning and conclusion reached by the learned justice who prepared the opinion in the Kansas case is not wholly convincing to the writer of this opinion, the court, in view of the similarity of the two statutes and of the questions involved and the dearth of authority thereon from other jurisdictions, is constrained to follow the precedent established by the principal case.

For the reasons stated, the judgment of the court below is affirmed.

All the Justices concur, except McNEILL, J., not participating.

(76 Okl. 180)

SPALDING v. ENID CEMETERY ASS'N.
(No. 9410.)

(Supreme Court of Oklahoma. Oct. 14, 1919.)

(Syllabus by the Court.)

1. CORPORATIONS §308(1, 6)—RIGHT OF OFFICERS AND DIRECTORS TO COMPENSATION FOR SERVICES.

Officers of a corporation, who are also directors, and who, without any agreement, ex-

press or implied, with the corporation or its owners, or their representatives, have voluntarily rendered their services, can recover no back pay or compensation therefor, and it is beyond the powers of the board of directors, after such services are rendered, to pay for them out of the funds of the corporation, or to create a debt of the corporation on account of them; but such officers, who have rendered their services under an agreement, either express or implied, with the corporation, its owners or representatives, that they shall receive reasonable, but indefinite, compensation therefor, may recover as much as their services are worth, and it is not beyond the powers of the board of directors to fix and pay reasonable salaries to them after they have discharged the duties of their offices.

2. CORPORATIONS §308(1)—RIGHT TO COMPENSATION FOR SERVICES RENDERED BY OFFICERS OR AGENT.

The general rule must yield some of its force when applied to cases where the officer or agent had already and continuously received for several years a regular salary, legalized or ratified by the continuous acquiescence of the corporation.

3. CORPORATIONS §308(11) — PRESUMPTION SLIGHT THAT SERVICES OF OFFICERS AND AGENTS WERE GRATUITOUS.

The presumption that such services were gratuitous may be overcome by slight evidence.

4. CORPORATIONS §308(1, 11)—FAILURE TO FIX SALARIES OF OFFICERS NOT DEPRIVING THEM OF COMPENSATION.

Record examined, and held: (1) That the mere omission to fix the salary of the officers in the by-laws of the association was not sufficient to deprive them of the right to compensation for the reasonable value of their services; (2) that the findings of fact and conclusions of law of the referee in relation to the gate item are correct and should be sustained.

(Additional Syllabus by Editorial Staff.)

5. LIMITATION OF ACTIONS §104(1)—ACTION AGAINST TREASURER FOR AN ACCOUNTING.

In action by incorporated cemetery association against its treasurer for accounting for money retained on items of expense, etc., where referee found that expense for iron gate purchased by treasurer was fraudulently contracted and fraudulently concealed, and where nothing in corporation minutes showed disparity between its true value and amount allowed, and it did not know of fraud until beginning of action, the statute of limitations was tolled.

Error from District Court, Garfield County; James B. Oullison, Judge.

Action for an accounting by the Enid Cemetery Association against the estate of H. M. Spalding and E. L. Spalding. Findings in judgment for defendant E. L. Spalding and against defendant H. M. Spalding, and after the death of H. M. Spalding the action was revived in the name of Elinor L. Spald-

ing, as administratrix, who from the judgment brings error. Judgment modified and cause remanded, with directions.

P. C. Simons, of Enid, for plaintiff in error.

John F. Curran and A. L. Zinser, both of Enid, for defendant in error.

KANE, J. This was an action in the nature of an accounting commenced by the defendant in error, plaintiff below, against H. M. Spalding, E. L. Spalding, and J. A. Spalding, as defendants. As no service of summons was ever had upon J. A. Spalding, he dropped out of the case. The findings and judgment below were in favor of E. L. Spalding, and against H. M. Spalding on three of the items claimed. No appeal having been taken from the judgment in favor of E. L. Spalding, the sole remaining defendant was H. M. Spalding. Thereafter H. M. Spalding died, whereupon the action was revived in the name of Ellnor L. Spalding, his administratrix, and entitled as above in this court. For convenience, the parties will be designated "plaintiff" and "defendant," respectively, as they appeared in the trial court.

The petition of the plaintiff alleged in substance that the plaintiff was a benevolent corporation, organized under the laws of the territory of Oklahoma, owning and holding certain real estate in Garfield county, to be used as a burial ground for the dead; that the defendants H. M. Spalding, E. L. Spalding, and J. A. Spalding were treasurer, president, and secretary, respectively, of said corporation for many years prior to the 1st day of July, 1913, and that during all of the time prior to the 1st day of July, 1913, said defendants were members of the board of directors of said corporation; that the defendants H. M. Spalding and E. L. Spalding during their term of office unlawfully misappropriated and converted to their own use money belonging to the corporation in the sum of \$6,013.65, and other and additional sums, the exact amount being unknown to the plaintiff. Wherefore the plaintiff prayed that an accounting be had between the plaintiff corporation and the defendants, and that judgment be rendered against the said defendants for the sum of \$6,013.65 and such additional sums as the evidence may disclose said defendants unlawfully misappropriated and converted to their own use, and for the costs of said action, and for such other relief as may be just and equitable in the premises.

The answer, in addition to a general denial, pleaded the three-year statute of limitations. While the petition alleged numerous fraudulent misappropriations of large sums of money belonging to the corporation by the defendants, the findings of the referee in favor of the plaintiff embraced but

three items, to wit: (1) A sum of money which was retained by the defendant H. M. Spalding as compensation for his services as superintendent of the cemetery for a number of years; (2) a sum of money which it was shown was paid to the secretary of the corporation as compensation for his services extending over a period of years; (3) the sum of \$330, which the referee found was the difference between the reasonable value and the price paid for an iron gate purchased for the cemetery by the defendant during his term of office.

The findings and judgment entered on the first two items were based solely upon the theory that, inasmuch as the laws of the state provide that the salary of the officers of a cemetery association shall be fixed by the by-laws of the corporation, it was beyond the power of the board of directors to make a valid charge for compensation for such services, in the absence of such by-law or a resolution passed by the board of directors authorizing such salary. The allowance of the third item was based upon findings of fact and conclusions of law which will be noticed later.

There was no conflict in the evidence on any material point, and there does not seem to be any serious disagreement between counsel on any particular proposition of law. It is conceded that neither the salary of the superintendent nor of the secretary were fixed by the by-laws of the corporation, or authorized in advance by resolution of the board of directors. The undisputed evidence shows that the officers of the corporation consisted of H. M. Spalding, superintendent and treasurer, E. L. Spalding, president, and J. A. Spalding, secretary, and that these persons were also the sole directors and officers of the association from 1906 to 1910. There was no express agreement or understanding that these officers were to be paid for their services, but it appears that from time to time they would make claims for services rendered, which claims were allowed by the board of directors, and an entry made on the minutes showing the amount allowed and the purpose for which it was allowed. There was also uncontradicted evidence tending to show that the services rendered by the officers were reasonably worth the amount thus allowed them.

After finding the facts to be substantially as stated above, the referee found, as conclusions of law, as follows:

"(1) I am of the opinion that, in order for E. L. Spalding, J. A. Spalding, or H. M. Spalding to make a valid charge for salary against the Enid Cemetery Association while serving as directors or officers of said association, express authority must be shown for the charge so made.

"(2) The laws of this state authorize a salary to the superintendent of a cemetery asso-

ciation, but provide that the salary shall be fixed by the by-laws of such corporation. As no salary for the superintendent was fixed by the by-laws of the Enid Cemetery Association, and no resolution was passed by the board of directors of the Enid Cemetery Association, authorizing a payment of a salary to the superintendent, I consider the charge of \$3,152 made by H. M. Spalding to the Enid Cemetery Association for his salary as superintendent to be unauthorized and invalid, and that said amount should be recovered by the Enid Cemetery Association. As the by-laws made no provision for a salary to the secretary of the Enid Cemetery Association, and no salary was provided by a resolution of the directors of the Enid Cemetery Association, or the stockholders of the Enid Cemetery Association, I consider the payment of \$390 made by H. M. Spalding to J. A. Spalding, as a purported salary of secretary, to be unauthorized and invalid, and an amount which should be recovered by the Enid Cemetery Association."

[1, 2] As to the questions of law involved, counsel for both parties agree that the general rule is correctly stated in *Fields v. Victor Building & Loan Co.*, 175 Pac. 529, as follows:

"A president and general manager of a corporation cannot maintain an action based on a quantum meruit for past services rendered as president and manager, when no compensation for such services is provided in the charter or by-laws, and no compensation is fixed by any valid resolution passed prior to the rendition of such services, providing for compensation for such services."

But counsel for defendant contends that the case at bar is not governed by the general rule, but falls within one of the well-established exceptions thereto found stated in 2 *Thompson on Corporations*, § 1736. Counsel for plaintiff do not notice this contention in their brief, apparently relying for success upon the authority of *Fields v. Victor B. & L. Co.*, supra. So in its last analysis the real question is whether the case is governed by the general rule, or does it fall within one of the recognized exceptions thereto? We are of the opinion that the case falls within the exceptions mentioned by Mr. Thompson and the other authorities relied on by counsel for the defendant in his brief. Mr. Thompson, in the section of his work just referred to, says:

"There is a class of cases which, relaxing in some respects the rigid rule of the earlier cases, and establishing what may, perhaps, be called the modern doctrine of compensation, hold that the officers of a corporation may, under certain circumstances, recover compensation for their services within the line of their duties, on a quantum meruit or an implied promise to pay therefor; that where there is no prior express request, but where the services are rendered under such circumstances as to imply a promise, then the officer may recover. The presumption that the services were gratuitous may be overcome by slight evidence."

Among the cases cited by the learned author in support of the text is *Nat. L. & I. Co. v. Rockland*, 36 O. C. A. 370, 94 Fed. 335, where he says (and we agree with him)—

"the rule was fully and admirably stated by a federal court thus: 'A thoughtful and deliberate consideration of this entire question, and an extended consideration of the authorities upon it, has led to the conclusion that this is the true rule: Officers of a corporation, who are also directors, and who, without any agreement, express or implied, with the corporation or its owners, or their representatives, have voluntarily rendered their services, can recover no back pay or compensation therefor; and it is beyond the powers of the board of directors, after such services are rendered, to pay for them out of the funds of the corporation, or to create a debt of the corporation on account of them. But such officers, who have rendered their services under an agreement, either express or implied with the corporation, its owners or representatives, that they shall receive reasonable, but indefinite compensation therefor, may recover as much as their services are worth; and it is not beyond the powers of the board of directors to fix and pay reasonable salaries to them after they have discharged the duties of their offices.'"

[3, 4] In the case at bar, any presumption that the services were gratuitous was certainly overcome by the fact that the minutes of the corporation clearly showed that the officers were not only expecting and claiming compensation for their services, but that they had been receiving compensation therefor from the very commencement of their term of office. Referring to other cases which seem to be in point here the learned author says:

"The Supreme Court of Louisiana, while recognizing the general rule that there can be no recovery of compensation for services by directors and officers in the absence of agreement, say that the rule is not without exception; that where the duties of the president or of a director are onerous and toilsome, and have been performed by him, he may recover; and it was said that the rule must yield some of its force when applied to cases where the officer or agent had already and continuously received for several years a regular salary, legalised or ratified by the continuous acquiescence of the corporation. A distinction was made between the case where a president or director was suing for his salary, and where in the course of the business he had retained his salary, and the corporation was suing to recover the amount thus retained. In a Kentucky case it was said that it was the right and duty of the directors to elect officers, and that it was their duty to fix a reasonable compensation for their services, and that where officers had rendered services under such election, in the absence of a salary fixed by the directors, the law raised an *assumpsit* on the part of the company to pay an officer a reasonable compensation for his services; and where, in that state, the law required the corporation, a bank, to appoint a clerk, but neither the law nor any by-law or

resolution of the board fixed his compensation, it was held that he might recover in an action of assumpsit."

The cases referred to in the note are *Campbell v. Lambert*, 36 La. Ann. 35, 51 Am. Rep. 1, and *Grundy v. Pine Hill Coal Co.*, 9 S. W. 414, 10 Ky. Law Rep. 833, and seem to fully sustain the doctrine laid down in the text. Other cases to the same effect are *Taussig v. St. Louis & K. Ry. Co.*, 166 Mo. 28, 65 S. W. 969, 89 Am. St. Rep. 674; *Railroad Co. v. Richards*, 8 Kan. 101.

In the case at bar, as we have seen, the office of superintendent is created by a statute, which also clearly provides that his compensation shall be fixed by the by-laws, thus showing that there is nothing inherently wrong in the mere fact that these officers were being paid for their services. In these circumstances, the authorities hold that the mere omission to fix his salary does not deprive the officer rendering services for the corporation of his right to recover; the law in proper cases raising an assumpsit on the part of the company to pay a reasonable compensation for his services. We think the foregoing authorities fully sustain the right of the superintendent and secretary to compensation for the services rendered in the circumstances disclosed by the record.

The finding of fact of the referee on the gate item is as follows:

"The defendant H. M. Spalding while acting as treasurer, superintendent, and a director of the Enid Cemetery Association, paid to J. A. Spalding, who was also acting as director of said corporation, the sum of \$400 for a gate for the Enid Cemetery Association. The referee finds that the reasonable value of said gate was \$70, and that a charge of \$330 was thereby fraudulently made against the Enid Cemetery Association."

And his conclusion of law was as follows:

"I consider the payment of \$400 by H. M. Spalding to J. A. Spalding for a gate for the Enid Cemetery Association to be an extortionate charge made by two directors of this corporation, and was excessive to the amount of \$330, which amount should be recovered by the Enid Cemetery Association."

We think this finding and conclusion are correct, and should be sustained.

[8] There is some contention that this item was barred by the three-year statute of limitations, but the findings of the referee show that it was not only fraudulently contracted, but that it was fraudulently concealed from the corporation. It is true that the minutes show that the sum of \$400 was paid for a gate for the cemetery; but there was nothing in the minutes tending to indicate what the true value of the gate was, or the great disparity between its true value and the amount allowed, and the corporation

does not seem to have been apprised of the fraud that was perpetrated upon it in this matter until about the time of the commencement of this action. These circumstances were sufficient to toll the statute of limitations.

For the reasons stated, the findings of fact and conclusions of law of the referee and the judgment entered thereon are modified as herein indicated, and the cause remanded, with directions to enter judgment in accordance with the views herein expressed.

All the Justices concur.

(76 Okl. 175)

DICKINSON v. BLACKWOOD, County Treasurer. (No. 9883.)

(Supreme Court of Oklahoma. Oct. 14, 1919.)

(Syllabus by the Court.)

1. TOWNS \S 48, 60—TRANSFER OF UNEXPENDED BALANCE FROM ONE FUND TO ANOTHER.

The transfer by the excise board of an unexpended balance from the "road dragging fund" to the "general fund" of a township is a violation of that part of section 19, art. 10, Williams' Constitution, which provides that "no tax levied and collected for one purpose shall ever be devoted to another purpose," and in excess of the authority conferred upon the board by the statutes in force at the time such transfers were made.

2. TOWNS \S 54—TAX LEVY REQUIRED BECAUSE OF WRONGFUL TRANSFER OF FUNDS VOID.

Where such a transfer necessitates a larger levy for road dragging purposes than otherwise would have been required, such levy is void to the extent of such excess.

Error from District Court, Cotton County; Cham Jones, Judge.

Proceeding by Jacob M. Dickinson, as receiver of the Chicago, Rock Island & Pacific Railway Company, against G. C. Blackwood, as County Treasurer of Cotton County, Okl., and personally, to recover taxes paid under protest. Demurrer to petition sustained, and plaintiff brings error. Reversed and remanded for a trial upon the merits.

See, also, 180 Pac. 990.

C. O. Blake and John E. DuMars, both of El Reno, for plaintiff in error.

Lon Morris, of Walters, for defendant in error.

KANE, J. This is an appeal from the action of the district court of Cotton county in sustaining a demurrer to plaintiff's petition, in a statutory proceeding to recover taxes paid under protest. The petition alleges in substance that the township officers of Cache

and Texas townships submitted proper estimates of the required needs of their respective townships for the ensuing year; that said estimates showed that each of said townships had on hand in its road dragging fund an unexpended balance from the previous year; that the excise board illegally transferred a portion of the unexpended balance on hand in each of these townships to the general fund thereof and proceeded to levy taxes against the property of the plaintiff, based upon the estimates as modified by the transfers made by the board.

Plaintiff contends in substance that if the money on hand in the road dragging fund of the respective townships, at the close of the fiscal year 1915-16, had been applied on the estimates submitted to the excise board, a levy of .35 mills, instead of the levy of 1.5 mills which was made, would have been sufficient in Texas township, and that a levy of .75 mills, instead of 1.5 mills, would have been sufficient in Cache township. Plaintiff paid its taxes as levied, for the first half of the year 1916-17 under protest, and brought suit against the county treasurer to recover the sums of \$33.71 and \$93.85 alleged excess collections for Texas and Cache townships respectively.

[1] It is first urged that the transfer of the unexpended balances from the road dragging funds to the general or current funds of the respective townships was void because in violation of section 19, art. 10, Constitution of Oklahoma, which provides:

"Every act enacted by the Legislature, and every ordinance and resolution passed by any county, city, town, or municipal board or legislative body, levying a tax shall specify distinctly the purpose for which said tax is levied, and no tax levied and collected for one purpose shall ever be devoted to another purpose."

We think this contention is well taken.

The law providing for the road dragging tax, in effect at the time of the acts complained of, was section 10, art. 2, c. 173, Session Laws 1915, which provides, in part:

"At every February meeting, or as soon thereafter as possible, the township board of each township shall select from its township road system the roads to be dragged for one year, to be known as dragable roads, and shall employ a superintendent of the township road system, who shall give bond for the faithful performance of his duties in such sum as said board may direct. Said superintendent shall have general supervision of all dragging, and repair work on the township road system. * * *

After further defining the duties of the superintendent, the act recites:

"For this purpose there shall be expended, under the direction of the township board, through the road superintendent, upon the township road system not more than two mill drag tax herein authorized to be levied."

The act was declared valid in the cases of *Lusk et al. v. Eminhiser*, 53 Okl. 785, 158 Pac. 915; *Lusk et al. v. Starkey*, 53 Okl. 794, 158 Pac. 918.

In the case of *City of Louisville v. Button*, 118 Ky. 732, 82 S. W. 293, the question for consideration was whether the transfer of money from the fund for "general purposes" to the fund for "street sprinkling purposes" violated section 180 of the Kentucky Constitution, which is the same in effect as the provision herein involved. In passing upon this question the learned justice who delivered the opinion of the court said:

"The question then narrows itself down in this case to the one whether 'street sprinkling' is embraced in the term 'general purposes.' Without undertaking to define here what may be included in the latter term, we are clear that its being enumerated with some dozen other divisions, each of which is required to be provided for expressly, if at all, negatives the proposition that one embraces the other. For, if that were true, it would be within the power of the council to levy the whole tax under the head of 'general purposes,' defeating entirely the motive of the legislation requiring a particularization of subjects for which taxes are to be levied."

Carroll v. Williams, 202 S. W. 504, where a similar provision of the Constitution of the state of Texas was construed, is also in point to the same effect. Moreover, at the time the transfers complained of were made, there was no statute or provision of law authorizing the excise board to transfer moneys derived from taxation from one fund to another.

That the transfer of money from the road dragging tax funds to the general township funds increased plaintiff's road dragging taxes is not disputed. In *St. L. & S. F. Ry. Co. v. Thompson*, 35 Okl. 188, 141, 128 Pac. 686, 686, in discussing the power of the county excise board to levy tax, this court said:

"Its authority to levy taxes to raise funds to meet the estimated expenses each year is granted solely by the statute, and the measure of its power relative thereto must be found in the terms of the statute. The statute contemplates that each year shall take care of itself; that no greater amount of taxes shall be levied during any one year than shall be necessary to take care of the obligations of the municipality, incurred or maturing during that year, which shall be fixed by an approved estimate before the tax is levied."

In *A., T. & S. F. Ry. Co. v. Eldredge*, 169 Pac. 1071, it is said:

"Plaintiff contends that the Excise Board had no authority to increase the estimate made by the Board of County Commissioners, and that the levy made in pursuance of the increase was excessive and illegal."

After quoting the foregoing from *St. L. & S. F. Ry. Co. v. Thompson*, it is said:

"Applying the doctrine of that case, it follows, because the excise board was without authority to increase the estimate made by the board of county commissioners, that any increase made by it and any taxes collected by reason thereof would be illegal."

The following cases are also in point to the same effect: *St. L. & S. F. Ry. Co. v. Tate*, County Treasurer, et al., 35 Okl. 563, 130 Pac. 941; *A. T. & S. F. Ry. Co. v. Wiggins*, Treasurer, 5 Okl. 477, 483, 49 Pac. 1019, 1020.

It seems clear from the foregoing authorities that the transfer of funds by the excise board from the road dragging fund to the general township fund was illegal and void. But granting the transfers were illegal, and that they increased the plaintiff's taxes as alleged, the question still remains whether, in these circumstances, the plaintiff, the railway company, has been injured in such a manner that it has a right to recover the excess thus paid. Counsel for defendant in his brief insists that the additional levies made on account of the transfer of funds did not increase the combined levies beyond the statutory limit. This contention is untenable. It is shown that the transfer from the road dragging funds, to the general township funds, of money on hand at the time the levy was made, increased the levy beyond what it would have been had the transfer not been made. It may be true that the increase was not to the full extent of the limit allowed by law, but it is not contemplated that the townships shall levy for road dragging purposes the limit allowed by law, regardless of whether or not this money is needed for road dragging purposes. The excise board is required to act on the estimates submitted by the county officers. It may modify these estimates, as provided by law, but it is not authorized to levy any more money for any one year than is required for that year.

[2] The case at bar is not governed by the rule applicable where the taxing officers squander or embezzle moneys coming into their hands from taxation. In such cases the municipal needs must be met by additional taxation. Here the excise board merely sought to transfer money from one fund to another without authority and apparently for the purpose of evading certain statutory limitations upon the taxing power. We conclude therefore that the levy as made for Texas and Cache townships of Cotton county was void to the extent it was increased by transfer of money on hand at the time the levy for 1917 was made, available for road dragging purposes for 1917, and not needed for any deficits or any prior indebtedness.

The judgment of the trial court in sustaining defendant's demurrer is therefore revers-

ed, and the cause remanded for trial upon its merits.

All the Justices concur, except McNIELL, J., not participating.

(76 Okl. 279)

ST. LOUIS & S. F. R. CO. et al. v.
BLOCKER et al. (No. 9299.)

(Supreme Court of Oklahoma. April 24, 1919.
Rehearing Denied Oct. 23, 1919.)

(Syllabus by the Court.)

1. CARRIERS \Leftrightarrow 113—LIABLE FOR DESTRUCTION OF FREIGHT BY FIRE AFTER CAR INSPECTED AND SEALED.

Where it was a custom for a common carrier to furnish cars to a shipper at a certain point where cotton was loaded for shipment, after which same was inspected by an employé of the Western Weighing and Inspection Bureau, whose duty it was to make out and deliver to the carrier a certificate of inspection, and the cars were sealed by said inspector, and where after the cotton was inspected the shipper had nothing further to do in order to start the cotton in transit, *held*, that when cars were delivered by the carrier and loaded by the shipper and inspected and sealed by the inspector the liability of the shipper as a common carrier attached, and where the cotton was thereafter destroyed by fire the carrier is liable for the value thereof.

2. CARRIERS \Leftrightarrow 47(1)—INSPECTOR OF COTTON SHIPPED AS EMPLOYER OF CARRIER.

When a carrier requests that cotton be inspected and inspection certificate issued before cotton is shipped, and where the inspector is permitted to seal cars when inspected by him, *held*, that the facts stated are sufficient to sustain a finding that the inspector is an employé of the carrier.

Error from District Court, Choctaw County; C. E. Dudley, Judge.

Action by E. E. Blocker and N. F. Miller, partners doing business under the firm name and style of the Blocker-Miller Company, against the St. Louis & San Francisco Railroad Company and James W. Lusk and others, its receivers. Judgment for plaintiffs, and defendants bring error. Affirmed.

W. F. Evans, of St. Louis, Mo., R. A. Kleinschmidt, of Oklahoma City, and Jones & Foster, of Muskogee, for plaintiffs in error.

McDonald & Jones, of Hugo, and C. M. Smithdeal, of Dallas, Tex., for defendants in error.

HARDY, C. J. E. E. Blocker and N. F. Miller, as partners under the firm name of Blocker-Miller Company, commenced this action against the St. Louis & San Francisco Railway Company, a corporation, and James

W. Lusk, W. C. Nixon, and W. B. Biddle, as receivers of said corporation, to recover the value of 100 bales of cotton destroyed by fire on defendants' premises in the city of Hugo, during the night of December 17, 1914. The liability sought to be enforced against defendants is that of a common carrier. The cotton was loaded by the Trans-Continental Compress Company, at Hugo, in two cars of defendants which were placed beside the plant of the Compress Company on a spur track belonging to defendants a day or two prior to December 17th. It was a requirement of defendants and a custom always conformed to in the dealing between plaintiffs and defendants that cotton should be inspected by an inspector of the Western Weighing and Inspection Bureau, and a certificate of inspection issued by him before the cotton would be shipped. The local agent at Hugo had instructions from the general offices of defendants at St. Louis to ship no cotton until inspection was made and certificate issued. Plaintiffs nor the Compress Company had any connection with, or authority over, the inspector who performed these duties.

On the 16th day of December, the cotton was inspected and some of it found to be wet. On the morning of the 17th, a portion of it was unloaded and permitted to dry and was reloaded on the afternoon of the same day, when an inspector inspected the cotton and sealed, or caused the cars to be sealed and prepared an inspection certificate, the original of which was delivered to the defendants on the following morning, and a copy to the Compress Company. The certificate is as follows:

"Western Weighing and Inspection Bureau.
"Cotton Inspection Certificate.

"Hugo, Okla., Dec. 17, 1914.

"This is to certify that we have inspected the following described cotton at Trans Contl No. of bales 50 for account of Frisco Shipper Blocker Miller Co. Seals K. C. 222 K. C. 225. Condition of car O. K."

That night about 10 p. m. the cotton caught fire and was burned.

[1] Defendants demurred to plaintiffs' evidence and moved for an instructed verdict, both of which were overruled, and error is assigned thereon. The cause was submitted to the jury upon the theory that, if the inspector or his principal was in the employment of defendants, plaintiffs were entitled to recover, and error is urged thereon for the reason that there were neither allegations nor proof that said inspector or his employer was in the service of defendants. The liability of defendants as common carriers depends upon the question whether the cotton had been delivered to and accepted by them for shipment at the time the fire occurred. The true test for determining whether the liability of a common carrier has attached

is not the execution and delivery of a bill of lading (Elliott on Railroads, § 1415; 4 R. C. L. 695, § 174); but, when the goods are placed in a condition ready for shipment at a point where the carrier has directed said goods to be placed, and the carrier has been notified of the delivery and furnished with shipping directions (K. C., M. & O. Ry. Co. v. Cox, 25 Okl. 774, 108 Pac. 380, 32 L. R. A. [N. S.] 313), or where the goods have been delivered to the carrier according to the custom and course of dealing between the shipper and the carrier, with shipping directions furnished, and nothing remains to be done by the shipper to place the goods in course of transit, this liability commences (4 Elliott, Railroads, § 1404; Hutchinson on Carriers [3d Ed.] § 124; 4 R. C. L. 688, § 167). In the absence of a special contract or custom, it is not sufficient to place the property at a point on the carrier's premises from which it might readily be taken by the carrier, but there must be notice to the carrier of the delivery and intention to place the goods in the custody of the carrier for transit. 10 O. J. 222. But it is generally held that this rule is subject to any conventional arrangement between the carrier and its patrons, or to the custom or usage in their dealings which dispenses with giving of actual notice to the carrier of the delivery of the goods. In other words, when by special contract, custom, or usage goods are placed by the shipper at a point at which they are accustomed to be deposited, this will be sufficient delivery and acceptance to charge the carrier as an insurer, although no actual notice is given or assent shown. 10 O. J. 223; 4 R. C. L. 691, §§ 169, 170, 172.

It is shown that the custom of dealing between plaintiffs and defendants was that cars were placed upon the track alongside the plant of the compress company; that bills of lading were prepared by plaintiffs and delivered to defendants for execution, and cotton loaded by the compress company, after which inspection thereof was made by a representative of the Western Weighing and Inspection Bureau, whose duty it was to furnish to defendants an inspection certificate, and that when cotton was loaded and inspected, plaintiffs nor the compress company were required to do anything else in order to start the cotton in transit. These facts were sufficient to establish the relation of shipper and carrier, and impose upon defendants the liability of a common carrier from and after the time the cotton had been inspected and the cars sealed by the inspector.

[2] It was not error to submit to the jury the question as to whether the inspector or his employer was agent of and acting for defendants. The general office of defendants in St. Louis had instructed the local agent at Hugo to ship no cotton until inspection was made and certificate issued, and it is

shown to be the custom as between plaintiffs and defendants for the inspector to inspect the cotton and seal the cars and deliver inspection certificate to the local agent who thereupon signed bills of lading which had been previously prepared by plaintiffs containing specific shipping instructions. The certificate of inspection in this case shows on its face that it was made "for account of Frisco," and these circumstances were sufficient to warrant the jury in finding that the inspector or his employer was in the service of defendants, and that when the cotton was inspected and the cars were sealed defendants had notice that the cotton was ready for shipment. Whether the inspector delivered the certificate on the evening of the 17th or waited until the morning of the 18th would make no difference, for it was his duty to deliver this certificate to defendants, and neither plaintiffs nor the compress company had anything further to do in order to start the cotton in transit. The petition alleged that the cotton was delivered to defendants, and that they received and accepted the same. No motion was filed to require plaintiffs to set out the name of the agent with whom plaintiffs dealt. Had defendants desired, they might have required that this information be furnished, and, not having done so, plaintiffs were entitled to prove under the general allegation of delivery in the petition, that the cotton had been delivered to defendants in any lawful manner. A corporation must of necessity act through agents and under the state of the pleadings it was competent to prove delivery and notice to defendants as was done.

The judgment is affirmed.

OWEN, RAINEY, HARRISON, PITCHFORD, and JOHNSON, JJ., concur.

(76 Okl. 220)

SMITH et al. v. BRALEY et al. (No. 9441.)

(Supreme Court of Oklahoma. July 15, 1919.
Rehearing Denied Oct. 21, 1919.)

(Syllabus by the Court.)

1. ORIGINAL RECORDS OF DEEDS OR CERTIFIED COPIES ADMISSIBLE IN EVIDENCE.

Deeds duly recorded may be received in evidence by the introduction of the original records, or by copies duly certified by the officer having the legal custody of such records under his official seal, if he have one, with the same effect as the originals, when the originals are not in the possession or under the control of the party desiring to use the same.

2. JUDGMENT §704, 713(2)—MATTERS NOT ACTUALLY LITIGATED AND ADJUDICATED BETWEEN COPLAINTIFFS NOT RES JUDICATA.

In an action in ejectment, a former judgment of a court of competent jurisdiction, be-

tween the same parties and involving the same subject-matter, is conclusive as to the respective parties and those in privity with them, not only as to every matter involved in the former case, but as to every matter germane to the issues, which could, or might have been, litigated and determined therein, whether the same was pleaded or not; but such judgment does not have the effect of settling conflicting or hostile claims between coplaintiffs or codefendants, unless such claims were brought into issue and were actually litigated and adjudicated.

3. JUDGMENT §682(1)—WHEN RES JUDICATA AS TO SUBSEQUENT PURCHASER.

Where plaintiff sues to quiet title to certain lands, and the defendants in the action plead title from plaintiff's grantor, and judgment is rendered against the plaintiff and in favor of the defendants, a purchaser from plaintiff subsequent to the judgment cannot successfully claim compensation for improvements thereafter placed upon the premises in an action in the nature of ejectment by the said defendants to recover possession of the premises.

4. INDIANS §15(1)—DEED OF RESTRICTED INDIAN NOT AFFECTING HIS RIGHT TO EXECUTE OTHER CONVEYANCES.

Section 2280, R. L. 1910, does not apply when one has gone into possession under a deed executed by an Indian while restricted. It has been held in a number of cases by this court that this statute does not apply to a conveyance by a restricted Indian, and where a purchaser goes into possession under such a conveyance, the possession of such grantee, by virtue of the void conveyance, does not affect the right of the restricted Indian to execute other conveyances.

5. CHAMPERTY AND MAINTENANCE §7(3)—CONVEYANCE BY ONE TENANT IN COMMON TO HIS COTENANT OF LAND HELD ADVERSELY.

A conveyance by one tenant in common to his cotenant of his undivided interest in land held adversely is not champertous.

(Additional Syllabus by Editorial Staff.)

6. EVIDENCE §181—AS TO RECORDS OF OFFICE OF COUNTY CLERK IN DISCRETION OF TRIAL COURT.

In suit for possession of land and to quiet title, wherein plaintiffs and other witnesses were heard as to the whereabouts of a deed in order to lay the predicate for the introduction of the records, permission to plaintiffs to introduce records of county clerk's office was not an abuse of trial court's discretion, in view of Rev. Laws 1910, §§ 1170, 5099, and 5115.

7. DEEDS §120—RIGHTS ACQUIRED FROM GRANTEE UNDER VOID DEED.

Where a grantee's deed was void, he could convey no rights thereunder to others.

Error from District Court, Atoka County; J. H. Linebaugh, Judge.

Action for possession and to quiet title by B. B. Braley and E. T. Clymer against C. E. Smith, J. H. Gernert, and Clarence J. Crockett, in which, on the court's order, Willie Tumbler was made a party defendant.

Judgment for plaintiffs on a directed verdict. Motion by defendants Smith, Gernert, and Tumbler for a new trial denied, and they bring error. Affirmed as to defendant Crockett, reversed as to the other defendants, and remanded for further proceedings.

M. C. Haile and J. H. Gernert, both of Atoka, for plaintiffs in error.

J. G. Ralls, of Atoka, for defendants in error.

PITCHFORD, J. This action was commenced by the defendants in error, B. B. Braley and E. T. Clymer, in the district court of Atoka county, Okl., on the 27th day of April, 1915, for the possession of certain lands in said county, and to quiet the title thereto against the plaintiffs in error C. E. Smith and James H. Gernert. For convenience we will refer to the parties as they appeared in the court below. Plaintiffs deraign title from one Willie Tumbler, the original allottee of the land. They allege that on the 14th day of December, 1906, the said Willie Tumbler, after removal of restrictions, executed and delivered his warranty deed to said land to J. W. McClendon, J. O. Kuyrkendall, B. B. Braley, and E. T. Clymer; that thereafter on the 1st day of December, 1910, the said McClendon and Kuyrkendall conveyed their interests in said lands to the plaintiffs. There was a further allegation in the petition that Jas. H. Gernert and Clarence J. Crockett claimed some rights in said lands adverse to the plaintiffs, through deeds executed by Willie Tumbler and wife on the 19th day of December, 1916, to U. J. Burrows, and also a deed from U. J. Burrows to said Jas. H. Gernert, and other conveyances from Tumbler to Crockett.

Answers were filed by the several defendants, in which it was alleged that the rights of the plaintiffs had been adjudicated in the case of Burrows v. McClendon and others in case No. 124, in the district court of Atoka county, Okl., in which judgment was rendered on the 27th day of September, 1909; that the issues and parties in case No. 124 were identical with the issues in this case, and that the plaintiffs herein were claiming the same interest as claimed by the defendant in case No. 124; that by reason of said judgment the plaintiffs were barred from maintaining this action. It was further alleged in the answer that the said Jas. H. Gernert purchased said lands on the 24th day of November, 1906, and went into possession of the same for the said Burrows, and had been in possession ever since; that, if the plaintiffs ever had a deed from the said Tumbler, the same was secured by false and fraudulent representation; that no consideration was ever paid for the same, and, further, that the purported deed held by the plaintiffs from McClendon and Kuyrkendall was champertous and void, for the reason

that the same was taken while plaintiffs' grantors were out of possession and had not received the rents and profits arising from said land within a year prior to the date of the said deed.

On the 26th day of January, 1916, the court entered an order making the said Willie Tumbler party defendant in the instant action, and on March 17th thereafter the said Tumbler filed his answer, denying the allegation of plaintiffs' petition, and that he ever at any time executed a deed to plaintiffs or their grantors; that, if they did hold a deed from him to said land, the same was procured through false and fraudulent representations, and was without consideration; and prayed that his title to the lands be cleared. There were other pleadings filed by the respective parties, to which it is not necessary to refer. The case came on for trial on the 8th day of February, 1917, and resulted in the court instructing the jury to return a verdict for the plaintiffs. Thereafter, in due time, the defendants Smith and Gernert, and Tumbler, filed motion for a new trial. We will treat the assignments of error in the following order:

First. That the court erred in permitting plaintiffs to introduce the records of the office of the county clerk of Atoka county.

Second. That the court erred in permitting the introduction of incompetent, irrelevant, and immaterial testimony, and in refusing to permit defendants to introduce competent and material testimony.

Third. That the court erred in holding that the defendant Willie Tumbler was barred from making defense in the action.

Fourth. That the court erred in holding that the judgment in No. 124 was res adjudicata as to the defendants, and in refusing to hold that said judgment was res adjudicata as to plaintiffs.

Fifth. That the court erred in sustaining plaintiffs' motion to direct a verdict for the plaintiffs.

Sixth. That the court erred in refusing to allow the defendant Gernert to show the value of the improvements upon the land in controversy.

[1, 6] Did the court commit error in permitting the introduction of the records of the office of the county clerk? In order to lay the predicate for the introduction of the records, the testimony of several witnesses was heard as to the whereabouts of the deed. Among these witnesses were the plaintiffs. Evidently the court was satisfied with the showing made, and admitted the records. This was a matter largely within the discretion of the court, and, if we find that this discretion has not been abused, the judgment of the court thereon will not be disturbed. We are of the opinion that a sufficient showing was made to sustain the action of the court.

Section 5099, R. L. 1910, provides:

"Copies of all papers authorized or required by law to be filed or recorded in any public office, or of any record required by law to be made or kept in any such office, duly certified by the officer having the legal custody of such paper or record, under his official seal, if he have one, may be received in evidence with the same effect as the original when such original is not in the possession or under the control of the party desiring to use the same."

We find that this section was adopted from the Kansas statute, and in the case of *Bergman v. Bullitt et al.*, 43 Kan. 709, 23 Pac. 938, it is said:

"The plaintiffs below relied on a title derived from the general government through various meane conveyances to H. M. Bullitt, deceased, and to support their action they offered in evidence duly certified copies of the United States patent and other conveyances in the chain of title. These were certified to be correct copies of the originals that were recorded in the office of the register of deeds. It is contended that there was error in the admission of the copies, for the reason that sufficient proof had not been offered of the loss or destruction of the originals to warrant the admission of secondary evidence of such instruments. These, being copies of instruments authorized to be recorded in a public office, and which were recorded in the office of the register of deeds, were admissible in evidence upon proof that the original instruments were not in the possession and control of the party desiring to use the same. Proof that the originals were lost or destroyed was not essential to the admission of the copies."

It was clearly shown by the evidence that neither of the plaintiffs had possession or control of the original instruments, and the proof of their execution was not only admitted by the defendant Gernert, but was established by the evidence.

Section 1170, R. L. 1910, provides:

"All instruments affecting real estate, and executed and acknowledged in substantial compliance herewith, shall be received in evidence without further proof of their execution; and in all cases where copies or other instruments might lawfully be used in evidence, copies of the same duly certified from the records by the register of deeds may be received in evidence. * * *

Section 5115, R. L. 1910, provides:

"The books and records required by law to be kept by any county judge, county clerk, county treasurer, register of deeds, clerk of the district court, justice of the peace, police judge or other public officers, may be received in evidence in any court; and when any such record is of a paper, document, or instrument authorized to be recorded, and the original thereof is not in the possession or under the control of the party desiring to use the same, such record shall have the same effect as the original; but no public officer herein named or other custodian of public records, shall be compelled to attend any court, officer or tribunal sitting more than one mile from his office with any record or records be-

longing to his office or in his custody as such officer."

The defendants next contend that there had been an adjudication of the validity of the deed executed by Willie Tumbler and wife to McClendon and others, and also that there had been an adjudication of the validity of the deed executed by Willie Tumbler and wife to U. J. Burrows; that the parties are the same; that the subject-matter of that suit was the same as this, and therefore the adjudication of the court in that case is binding in this proceeding. The judgment of the court in case No. 124, among other things, recites:

"The court finds that the plaintiff acquired no title to the land in controversy by reason of a warranty deed for the reason that the said warranty deed was executed at a time when under the law the grantors, Willie Tumbler and his wife, were not permitted to transfer said land. It is therefore ordered and decreed by the court that the plaintiff take nothing by his suit, and that the defendants have and recover of and from the plaintiffs all their costs herein laid out and expended, for all of which let execution issue."

[7] There seems to be no question as to what was decided by the court. It was there held that U. J. Burrows, under whom the defendant Jas. H. Gernert derails title, had no title; that his deed was absolutely void. His deed being void, he could convey no rights thereunder to the defendants. In *Scott v. Wise-Autry Stock Co.*, 58 Okl. 504, 156 Pac. 340, the rule is stated as follows:

"While it is true that the plaintiffs in said action, Wise et al., conveyed this property to the corporation formed by them after the institution of their suit, and before the rendition of the judgment in said action, we are of the opinion that, inasmuch as the corporation purchased this property from the plaintiffs in said action after the institution of the said suit and during the pendency thereof, it is bound by the judgment rendered therein against its grantor and acquired no greater rights than they had in said property."

In *Baker v. Leavitt et al.*, 54 Okl. 70, 153 Pac. 1099, it is said:

"The rule is well settled in this state that a final judgment of a court of competent jurisdiction is conclusive between the parties and their privies, in a subsequent action involving the same subject-matter, not only as to all matters actually litigated and determined in the former action, but as to all matters germane to issues which could or might have been litigated and determined therein."

While in case No. 124 the defendants, who are plaintiffs in the instant case, asked for affirmative relief—that is, that they be adjudged to be the owners of the land—the court failed to pass upon this point. The plaintiff in that case relied upon the deed from Willie Tumbler and wife, which the

court held to be void. The court made no finding, nor was it necessary, in so far as the plaintiff there was concerned, to adjudicate the rights of the codefendants as between themselves; the plaintiff being in no manner interested or affected. As the record stands, there was a final adjudication as to the title of Burrows. There being no appeal from that judgment, the same became final.

[2, 3] It is clearly shown by the record that the issues, parties, and subject-matter in case No. 124 were identical with the issues, parties, and subject-matter in this case, except as to Smith and Crockett. This being true, the adjudication in No. 124 would be a bar to all matters and issues which were pleaded and proven, or might have been pleaded and proven, as between the plaintiffs and their privies and the defendants and their privies; but when the court found that the title of the plaintiff in that case was absolutely void, and that the plaintiff was not entitled to recover, and gave judgment for the defendants, without adjudicating the rights of the defendants as between themselves, none of their rights as between themselves were affected by the judgment. In the case of *Corrugated Culvert Co. v. Simpson Twp.*, 51 Okl. 178, 151 Pac. 854, the court said:

"A judgment or decree upon the merits is conclusive between the parties, and those in privity with them, and the facts thus established can never thereafter be contested between them, even upon a different cause of action; and where the subsequent action is upon the same cause of action, not only the facts thus adjudicated are concluded, but all the material facts which might have been presented as constituting the claim or defense are concluded between the same parties or their privies."

In *Alfrey v. Colbert et al.*, 44 Okl. 246, 144 Pac. 179, the court said:

"A judgment of a court of competent jurisdiction, delivered upon the merits of a cause, is final and conclusive between the parties in a subsequent action upon the same cause, not only as to all matters actually litigated and determined in the former action, but also as to every ground of recovery or defense which might have been presented and determined therein."

In *Prince v. Gosnell*, 47 Okl. 570, 149 Pac. 1162, it is said:

"In the absence of exceptional facts excusing a failure so to do, a party should plead all the material facts that constitute his claim or defense, and a failure to do so cannot be made the basis of another action."

Tumbler was a defendant in case No. 124, and while in that action he had filed an answer disclaiming any interest in the land now in controversy, claiming there that he had transferred all of his interest, right, and title to U. J. Burrows, yet, when the court declared the title of Burrows a nullity, then so

far as Burrows was concerned the title had never passed from Tumbler. While a judgment on the merits is final and conclusive as between the parties thereto and their privies, not only as to matters actually litigated, but also as to every ground of recovery or defense which might have been presented and determined therein germane to the issues therein, such judgment does not have the effect of settling matters between coplaintiffs or codefendants, unless their conflicting or hostile claims were brought into issue and were actually litigated and adjudicated. In *DeWatteville et al. v. Sims*, 44 Okl. 708, 146 Pac. 224, it is said:

"A judgment foreclosing a materialman's lien against a number of defendants, including a holder of a mortgage lien, who does not set up his mortgage in that action, will not preclude the latter from foreclosing his mortgage, as against his codefendants in the first foreclosure, who acquired no interest in the property under or by reason of such first foreclosure, and whose conflicting or hostile claims against said mortgage were not in issue nor litigated in the first foreclosure, and it was not error to reject the offer of such judgment by such former codefendants as *res adjudicata* in this subsequent action by the mortgagee to foreclose his mortgage against them."

In 23 Cyc. 1279, it is said:

"Although a judgment is conclusive upon all the parties to the action, so that no one can allege anything contrary to it, merely because his coplaintiff or codefendant is not joined with him in the second suit, yet the estoppel is raised only between those who were adverse parties in the former suit, so that the judgment therein settles nothing as to the relative rights or liabilities of the coplaintiffs or codefendants inter se, unless their conflicting or hostile claims were brought into issue by the cross-petitions or separate and adversary answers, and were thereupon actually litigated and adjudicated."

In 9 R. C. L. 928, it is said:

"Where the original parties in ejectment both claimed from the holder of the record title, but other persons claiming the land by adverse possession are added as defendants, a judgment for the defendants, while conclusive against the plaintiffs, is not conclusive as between those defendants claiming by the record title and those claiming by adverse possession."

The effect of the judgment in No. 124 was to preclude Burrows and his privies from afterwards claiming any rights by virtue of the deed from Tumbler to Burrows, or interposing said deed as a defense in the present action. The court, however, did not in any way pass upon the validity of the deed from Tumbler to these plaintiffs. The court was in error in holding that Tumbler was concluded by the judgment and estopped from seeking the cancellation of plaintiffs' deed, but as to Gernert and Smith, their title being acquired from Burrows after the judgment had been rendered, they, being privies

in contract with Burrows, are as completely concluded by that judgment as was their grantor. It would be a travesty upon the law to hold that Burrows, after being defeated in the action which he formerly brought against the plaintiffs in this case, wherein his title was declared void, could, by a subsequent conveyance, defeat and annul the effect of the judgment therein rendered. But here we are confronted with a more serious proposition. In case No. 124 Burrows was not suing for the possession of the land. He at the time claimed to be in possession. That action was brought for the purpose of clearing his title by the cancellation of deed from Tumbler to these plaintiffs. The judgment of the court declared the title of Burrows void, and gave the defendants judgment for costs. The question of possession was not therein litigated, nor did the judgment have the effect of giving these plaintiffs the possession. The sole question there decided was that Burrows had no title; in other words, by virtue of the judgment, no process could have been issued by the court placing defendants in No. 124 in possession of the premises; therefore plaintiffs in the case at bar, in order to gain possession, instituted the present action. In *McElroy v. Moose*, 51 Okl. 173, 151 Pac. 857, it is said:

"It is the right of possession between the parties in an action of ejectment that is tried, and this right of possession is the title that is to be adjudged in the trial."

The plaintiffs must recover upon the strength of their own title. If the deed relied upon by them from Tumbler is shown to have been obtained by fraud and without consideration, and judgment rendered in favor of Tumbler canceling the deed, then plaintiffs would have no right to the possession of the land, and they could not complain of any disposition Tumbler might thereafter make of the premises. That would be a matter entirely between him and his codefendants.

In this action the plaintiffs seek possession of the lands, and ask that their title be quieted as against Smith, Gernert, and Crockett. The title relied on by plaintiffs is that granted by the deed from Tumbler to the plaintiffs. There is no allegation in the petition that Tumbler is claiming any interest in the lands adverse to the plaintiffs. He was not made a party in this cause by any action on the part of plaintiffs. Nor is there anything in the record indicating that he was made a party on his own motion. We are to conclude that he was made a party on motion of the defendants, as it is seen in the answer of Gernert the attack is made on the deed from Tumbler to the plaintiffs, in alleging that the same was obtained by fraud and was made without consideration. We find, however, that Tumbler was made a party by order of the court. Plaintiffs filed a motion

to vacate this order, which was overruled. No doubt the object sought in having Tumbler made a party was to enable the defendants to defeat the claim of the plaintiffs for possession. This purpose is obvious, for the only object disclosed by the answer of Tumbler is to attach the deed to these plaintiffs. The petition alleges the deed from Tumbler to Crockett; the answer of Gernert alleges a deed from Tumbler to Burrows, executed on the 19th of December, 1906; and nowhere in the answer filed by Tumbler is there any denial or attack upon these deeds, nor does he seek possession of the land. When he was offered as a witness in the case, and the court sustained an objection to his testifying, he was permitted to state to the court in the absence of the jury that:

"If he was permitted, he would testify that he never at any time executed to Dr. McClen-don, J. O. Kuyrkendall, E. T. Clymer, or B. B. Braley a warranty deed dated the 14th of December, 1906, or at any other time, to the lands in controversy in this case; that, if they ever had any such purported deed, it was obtained through fraud and misrepresentation, and no consideration was paid this defendant for any deed to said land; * * * that said defendant claimed no interest in said land, but had conveyed the same, as he understood, to one U. J. Burrows, on the 23d day of November, 1906; that he never intended to convey said lands to said J. W. McClen-don, J. O. Kuyrkendall, B. B. Braley, and E. T. Clymer."

Defendants further contend that the court committed error in admitting the several deeds from Tumbler to Crockett, from Tumbler to Harris, from Harris to Crockett, from Harris to Tumbler, from Crockett to Meninger and Ellis, and from Meninger and Ellis to Crockett. While this evidence might have been irrelevant and immaterial, we are unable to see wherein the defendants could have been injured thereby. The most that can be said of this evidence is that it goes to prove that Tumbler was lacking in the power to say no and held himself in readiness to execute a deed to any one applying.

[4] The defendants next contend that the deeds taken by the plaintiff were void, same being champertous. We have seen that the deed from Tumbler to Burrows was declared absolutely void by the court in case No. 124, the deed having been executed while the grantor was a restricted Indian; therefore this deed gave Burrows no right to the possession of the lands therein conveyed. In *Groom v. Dyer* (decided by this court Feb. 25, 1919, not yet officially reported) 179 Pac. 12, the court said:

"Section 2260, R. L. 1910, does not apply when one has gone into possession under a deed executed by an Indian while restricted. It has been held in a number of cases by this court that this statute does not apply to a conveyance by a restricted Indian, and where a purchaser goes into possession under such a conveyance, the possession of such grantee by virtue of the

void conveyance does not affect the right of the restricted Indian to execute other conveyances."

In *Thompson v. Riddle*, 171 Pac. 831, it was said:

"To hold that the champerty statute is applicable and rendered conveyances void made to others than the one in adverse possession would leave the Indian, his restrictions on alienation being removed, only the alternative of selling his lands to the person in adverse possession or bring an action to dispossess such person. This would be giving force and effect to these attempted conveyances and transactions, which the law denounces as absolute nullities."

The case of *Goodwin v. Mullen*, 48 Okl. 689, 150 Pac. 680, seems to hold to a contrary rule. This latter decision was based upon the former opinion of this court in *Miller v. Fryer*, 35 Okl. 145, 128 Pac. 713. The case of *Murrow Indian Orphans' Home v. McCleendon* (decided by this court June 6, 1917) 166 Pac. 1101, expressly overruled the holding in *Miller v. Fryer*, supra, and *Ruby v. Nunn*, 37 Okl. 389, 132 Pac. 128. Nor is the contention of the defendants tenable on the proposition that the deed from McCleendon and Kuyrkendall to plaintiffs was champertous.

Chapter 11, §§ 2, 8, of the General Statutes of Kentucky, provides:

"All sales or conveyances, including those made under execution, of any lands, or the pretended right or title to the same, of which any other person, at the time of such sale, contract or conveyance, has adverse possession, shall be null and void. * * * Neither party to any contract made in violation of the provisions of this chapter shall have any right of action or suit thereon."

The Court of Appeals of that state, in the case of *Russell et al. v. Doyle et al.*, 84 Ky. 386, 1 S. W. 604, construing the foregoing statute, says:

"The reason for its enactment with us is to prevent litigation, and the purchase of doubtful claims by strangers to them. If the owner is not disposed to attempt the enforcement of a doubtful claim, public policy requires that he should not be allowed to transfer it to another party, and thus encourage strife and litigation. It has therefore been deemed beneficial to the public interest to prohibit it, and time has manifested that it works no injury to the honest man, while it may, and in fact does, often interfere with the interests of keen-sighted speculators, and prevent a practice of purchasing doubtful titles. This, then, being clearly the object of the statute, does it apply to a transfer by one tenant in common or co-owner, of his undivided interest, to his cotenant? In such a case no stranger to the title is introduced, but one who is already interested, and who may sue for the property, merely increases his interest. Here the reason for the rule fails, and hence it fails. The champerty law was intended to apply to the purchase by a stranger of property adversely held, as this would be productive of litigation, and should not receive a strained con-

struction, and one reaching beyond the reason for its enactment, in a country where the alienation of estates is favored."

[5] There was no error in refusing the request of the defendant Gernert for an entry upon the Journal of the court asking for the value of the improvements placed upon the land in controversy, and that the same be appraised or tried to a jury. In the answer filed by the defendant Gernert, there was no claim for improvements, and, if compensation for improvements had been demanded, the evidence abundantly shows he would not be entitled to make the claim therefor. Section 4935, R. L. 1910; *Wolcott v. Smith*, 33 Okl. 249, 124 Pac. 970.

The judgment of the lower court is therefore affirmed as to defendant Crockett, and reversed as to the other defendants, and remanded for further proceedings not inconsistent with this opinion.

OWEN, C. J., and SHARP, McNEILL, and HIGGINS, JJ., concur.

(76 Okl. 188)

MUSKOGEE TIMES-DEMOCRAT v.
BOARD OF COM'RS OF MUSKOGEE
COUNTY. (No. 106356.)

(Supreme Court of Oklahoma. Oct. 14, 1919.)

(Syllabus by the Court.)

1. NEWSPAPERS §5(2) — GENERAL STATUTE AS TO COMPENSATION FOR PUBLISHING TAX LIST NOT REPEALED BY SPECIAL STATUTE.

Section 3258, Rev. Laws 1910, in referring to the fees for the publication of lists of land on which taxes are delinquent, is a general statute, while section 7397, in so far as it refers to the cost of publication, is a special statute referring only to the publishing of notices of the sale of lands for delinquent taxes provided for in said section; and the former section of the statute is not repealed by the latter. Overruling *Stillwater Advance Printing & Publishing Co. v. Board of County Commissioners of Payne County*, 29 Okl. 859, 119 Pac. 1002.

2. STATUTES §225½ — SPECIAL PROVISIONS CONFLICTING WITH GENERAL LAW.

Where there are two provisions of the statutes, one of which is special and particular and clearly includes the matter in controversy, and where the special statute covering the subject prescribes different rules and procedure from those in the general statute, it will be held that the special statute applies to the subject-matter, and that the general statute does not apply.

3. TAXATION §686 — CERTIFICATE OF PURCHASE TO COUNTY ON FAILURE OF BIDS.

When the lands as provided for in section 7397, R. L. 1910, have been offered for sale for delinquent taxes, and no one bids the amount due thereon for taxes, penalty, and costs and the same is bid off in the name of the county and a

certificate of purchase issued to said county, the effect of the certificate is to maintain in status quo the county's lien on said lands for taxes and assessments, and as long as the certificate is held by the county the taxes and assessments due on said lands are still unsatisfied and unpaid and remain so, unless the county assigns said certificate, or until the lands have been bid in by the county at a resale or redeemed by the owner, and until said time said lands are termed "delinquent lands."

4. NEWSPAPERS — (2) — COUNTY LIABILITY FOR NOTICES FOR RESALE OF DELINQUENT LANDS.

The amount of liability of the county for publishing notice for resale of lands, as provided for in sections 7409-7411, is controlled by section 3258, Revised Laws of 1910.

Error from District Court, Muskogee County; Benjamin B. Wheeler, Judge.

Proceeding by the Muskogee Times-Democrat, begun by the filing with the Board of County Commissioners of Muskogee County of its claim for a certain amount for publishing notices of tax resales of Muskogee County. From an order of the Board of County Commissioners disallowing the claim in part, the Muskogee Times-Democrat appealed to the district court, and from judgment there allowing the claim in a certain sum and disallowing the remainder thereof it brings error. Affirmed.

J. C. Stone, Chas. A. Moon, and Francis Stewart, all of Muskogee, for plaintiff in error.

R. E. Jackson, Asst. Co. Atty., and W. W. Cotton, Co. Atty., both of Muskogee, for defendant in error.

McNEILL, J. This proceeding was commenced by the Muskogee Times-Democrat filing with the board of county commissioners of Muskogee county its claim for \$6,075, for publication of notices of tax resales in Muskogee county. The publication consisted of 2,700 nonpareil squares, for which the paper made a charge of 75 cents per square for the first insertion, and 50 cents per square for subsequent insertion. The board of county commissioners disallowed the claim in part, and from the order disallowing the claim the Muskogee Times-Democrat appealed to the district court. On trial of the case in the district court, the court allowed the claim in the sum of \$787.80 and disallowed the remaining part of the same.

The facts were not disputed. The publication consisted of 10,248 separate items. Counting the separate descriptions of lots in the publication, the total number of lots involved were 7,878, which referred to the general tax, penalty, and cost of each lot for each year. It is admitted that the remaining 2,370 items referred to the sewerage tax

and pavement tax, each with the penalty and cost. The court awarded judgment for the 7,878 items, each item covering a town lot at 10 cents per lot, and disallowed the sewerage and pavement items, since they should have been included in the general tax items. From said judgment, the Muskogee Times-Democrat has appealed.

[1, 2] It is argued on appeal by plaintiff in error: First, admitting that the resale of lands as provided in sections 7409, 7410, and 7411, R. L. 1910, is the advertising of delinquent lands, there is no statute controlling the amount to be paid for the publication of the notice of said delinquent lands. There being no contract, the cost for publishing said notices is controlled by that portion of section 3258, Revised Laws 1910, which provides for payment of the publication at so much per inch. Second, it is argued that the publishing of the resale list as provided in sections 7409, 7410, and 7411, is not a publication of delinquent lists of land.

We will consider the questions in the order they are briefed.

First. Admitting the publication of the resale notice is the publication of lists of delinquent lands. It is admitted that section 7411 does not specify the amount the county shall pay for such publication. We then look to section 3258, Revised Laws 1910, which is a general statute and provides as follows:

"For publishing lists of lands upon which taxes are delinquent, each description, twenty cents. For publishing lists of town lots on which taxes are delinquent each description, ten cents."

It is suggested that this portion of the statute has been repealed by section 7397, Rev. Laws 1910, and was so held by this court in the case of Stillwater Advance Printing & Publishing Co. v. Board of County Commissioners of Payne County, 29 Okl. 859, 119 Pac. 1002. This is true, but from an examination of that case we think the premises adopted by the court in arriving at its conclusion were erroneous.

The court in the opinion in that case stated that section 3060, Wilson's Revised & Ann. Statutes, which statute is the same as section 3258, Rev. Laws 1910, was repealed by section 6021, Wilson's Revised Statute, which is the same as section 7397, Revised Laws 1910. The opinion in that case states that section 3060 of Wilson's Revised Statute became effective September 25, 1890, and that section 6021 became effective in March, 1895; but as to section 6021 becoming effective in March, 1895, the court was in error. This no doubt occurred by reason of the statement in the opinion in the case of Allen-Rixes v. Board of County Commissioners of Cleveland County, 12 Okl. 603, 73 Pac. 286,

that the section which is 6021 of Wilson's Revised Laws became effective in March, 1895. But from an examination of the statute, or that portion of the same which is material, we find it became effective in December, 1890, at the time of the adoption of the 1890 Code. It is true that it was amended in 1895, but only as to the date when said publication notice should be made.

But looking to the history of the two statutes, we find that the portion of section 3258 which is as follows:

"For publishing lists of lands upon which taxes are delinquent, each description, twenty cents. For publishing lists of town lots on which taxes are delinquent, each description, ten cents"

—was section 2919, St. 1890, section 2901, St. 1893, and section 3060 of Revised Laws of 1903; section 7397 of Revised Laws of 1910, or the following portion thereof, to wit:

"The county treasurer shall charge and collect in addition to the taxes, interest and penalty the sum of twenty-five cents on each tract of real property * * * and ten cents on each town lot advertised for sale, which sum shall be paid into the county treasury and the county shall pay the cost of the publication, but in no case shall the county be liable for more than the amount charged to the delinquent lands for advertising"

—was a portion of section 6206, St. 1890, section 5651, St. 1893, and section 6021 of Revised Laws of 1903.

When the court in the case of Stillwater Advance Printing & Publishing Co. v. Board of County Commissioners of Payne County, 29 Okl. 859, 119 Pac. 1002, adopted the theory that this portion of section 6021, Revised Laws of 1903, was not adopted until 1895, it was in error, while it would have made no difference in the result in that case, as the publication notice in that case was governed by said section 6021.

The opinion should have stated that section 3060, Wilson's Laws 1903, referred generally to publication of notice for sale of lands for delinquent taxes, while section 6021, Wilson's Laws of 1903, referred only to publications designated in that section, therefore section 3060 was a general statute and 6021 a special statute, and as the publication in that particular case was the publication designated in section 6021 it would follow that the publication was controlled by the special statute, section 6021, and not by the general statute, section 3060.

The rule of construction of the statutes, where one is a special statute and the other a general statute, covering the same subject-matter, was stated by this court in the case of Gardner v. School District No. 87, Kay County, 34 Okl. 716, 126 Pac. 1018:

"Where there are two provisions of the statutes, one of which is special and particular and

clearly includes the matter in controversy, and where the special statute covering the subject prescribes different rules and procedure from those in the general statute, it will be held that the special statute applies to the subject-matter, and that the general statute does not apply."

We therefore refuse to follow the former opinion in that respect, and the same will be overruled in so far as it is in conflict with this opinion.

Section 3258 and section 7397, as adopted in the Revised Laws of 1910, are both in full force and effect. Section 3258 is a general statute and section 7397 is a special statute, applying only to publication referred to in that section and has no application to the publication involved herein. In the publication of the notice of resale of delinquent lands as provided for in section 7411, the cost of publication is controlled by section 3258.

The second contention of the plaintiff in error is that the resale of lands as provided in sections 7409, 7410, and 7411, is not the advertising of lands upon which taxes are delinquent, nor are such lands classified as delinquent lands. The lands advertised for resale as provided for in section 7409, 7410, and 7411, are those lands which have once been offered for sale as provided in section 7397, for failure to pay the taxes. It is provided by section 7406 that the county treasurer in the sale of delinquent lands controlled by section 7397, in case no other bidder offers the amount due for taxes, penalties, and interest, is authorized to bid off all or any real estate offered for sale in the name of the county, and a certificate of purchase shall be issued to the county. Said section of the statutes provides that the county acquires all the rights, both legal and equitable, that any other purchaser acquires by reason of such purchase. While it is true said section of the statute contains the above provision, it will be noticed that the rights of the county are very different from that acquired by an individual when receiving the tax certificate. If an individual purchases at the delinquent tax sale, a certificate is issued to him. He pays the amount of taxes due thereon. The statute then provides that, if the same is not redeemed by the owner within two years, the purchaser may, after giving 60 days' notice to the owner of the land and the person in possession to redeem, and if he fails to redeem said land, acquire a tax deed to the same. When an individual purchases at the delinquent tax sale, provided for in section 7397, R. L. 1910, the taxes are paid by him, and the land no longer is delinquent, nor are the taxes unpaid. In cases where the county is required to bid the same in, when no one else offers to pay the amount of the taxes due and penalties and costs, a certificate is issued to the county. The county does not pay the

taxes due thereon to the county treasurer, nor does the county, township, or school district or subdivision of the county receive their proportionate share of the taxes. The certificate is simply held by the county, with the right to assign the certificate to any one who will pay the amount of taxes, penalty, and costs due thereon, and subject to the land being redeemed by the landowner. If the county is unable to assign the certificate to any one for two years, or if the landowner fails to redeem the same within said time, the law then provides that the county, upon proceeding as provided in sections 7409, 7410, and 7411, shall readvertise the property and sell the same to the highest bidder for cash, provided his bid equals the amount of taxes, penalty, and cost due on said land, and, if no one makes such a bid, then the county may become the purchaser thereof. So it can be seen that the right acquired by the county and an individual are very different. The purchaser of a certificate may proceed and obtain a title through his purchase; this the county cannot do.

We have been unable to find any case exactly in point upon this particular question, and none has been cited to us by either side, and, since all of the states have different statutes and different procedure, it is therefore hard to find a case very analogous to the one at bar. The Supreme Court of Minnesota, in the case of *Chauncey v. Wass*, 35 Minn. 1, 14, 30 N. W. 826, on page 830, in defining "delinquent tax," used the following language:

"To constitute a legally delinquent tax on land three things are necessary: First, that the land is subject to taxation; second, that the tax authorized by law has been levied on it in the manner provided by law; third, that the tax remains unpaid after the time appointed by him for its payment."

The Supreme Court of Nebraska in a case where the county had bid in the lands at a delinquent sale and had received a certificate therefor, in the case of *Lancaster County v. Trimble et al.*, 34 Neb. 752, 52 N. W. 711, held:

"Taxes are levied by and are due the county, either for itself or as trustee for various corporations, such as the state, cities, villages, and school districts. Where a county purchases the lands for delinquent taxes, it is unnecessary, therefore, for it to pay the treasurer the amount of such delinquent taxes."

The Supreme Court of New Jersey, in the case of *Maginnis v. Rutherford*, 73 N. J. Law, 287, 63 Atl. 16, quoted from the case of *In re Report of Commissioners of Adjustment of the City of Elizabeth*, 49 N. J. Law, 488, 10 Atl. 363, as follows:

"By the city charter the certificate of sale does not transfer or divest the title. The certificate, by section 84, after it is recorded, constitutes simply a continuance of the original lien. * * * A certificate of sale made to the city in effect maintains its lien for taxes and assessments in statu quo. Everything is in fieri until a declaration of sale, duly executed and recorded, divests the title of the owner. Until that is accomplished, the taxes and assessments are still unsatisfied and unpaid, and as such are subject to adjustment under this act."

[3] We think the rule adopted by the Supreme Court of New Jersey is the sound rule, and that, under the statutes of this state, a certificate of sale made to a county in effect maintains its liens for taxes and assessments and holds the same in statu quo, and that the taxes and assessments are still unsatisfied and unpaid until the certificate of a sale is assigned by the county to a purchaser, and the county receives the money therefor, or until a resale has occurred and the county has purchased at a resale and has become the owner of the land; that so long as the county holds the certificate of purchase, the taxes are still unsatisfied and unpaid and the lands delinquent.

The plaintiff in error cites and relies upon the case of *Wilson v. Wood*, 10 Okl. 279, 61 Pac. 1045; but this was a case where an individual had purchased the tax certificate and the money was paid into the county treasurer, and under those condition the court held that the land was not delinquent for the reason that the taxes had been paid. The purchaser of a certificate had a lien upon the land, as to which, after two years from the date of the certificate, by giving notice to the owner of the land and the party in possession, if he failed to redeem the same, the purchaser could receive a tax deed therefor. But in the case at bar the taxes had not been paid by any one. The certificate of purchase was held by the county, and in so far as the taxes are concerned they were simply held in statu quo, and the certificate could not ripen into title so long as it was held by the county until the lands were readvertised by the county and sold, and if no one offer to bid the amount due for taxes, penalty, and costs, the county could purchase the same and become the owner thereof.

[4] We therefore conclude that the advertisement of lands, as provided for in sections 7409, 7410, and 7411, is the advertisement of list of lands upon which taxes are delinquent, and the charge for the publication is controlled by section 3258, R. L. 1910.

For the reasons stated, the judgment of the district court is affirmed.

OWEN, C. J., and RAINEY, JOHNSON, and HIGGINS, JJ., concur.

(78 Okl. 184)

BENN et al. v. TROBERT. (No. 8482.)

(Supreme Court of Oklahoma. Oct. 14, 1919.)

*(Syllabus by the Court.)***1. JURY §13(5)—RIGHT TO JURY TRIAL NOT APPLICABLE TO ISSUES OF FACT IN EQUITY.**

The constitutional guaranty that "the right of trial by jury shall be and remain inviolate" has no reference to the trial of issues of fact in equity cases.

2. ACTION §25(2)—CHARACTER OF ACTION DETERMINABLE BY PRAYER FOR RELIEF.

The character of an action is to be determined by the nature of the issues made by the pleadings and the rights and remedies of the parties, and not alone by the form in which the action is brought, or by the prayer for relief, which, in this respect, forms no material part of the pleading.

3. MORTGAGES §422 — ON SEVERAL MORTGAGES SECURING SAME DEBT, VENUE IN ANY COUNTY WHERE LAND LIES.

Where several mortgages are made to different parcels of land to secure one and the same debt, they constitute one mortgage, and their unity is determined by the debt secured, and an action may be maintained in any county in which any part of the land is situated which is covered by any one of the several mortgages.

4. APPEAL AND ERROR §1009(4)—JUDGMENT IN EQUITY CONCLUSIVE UNLESS CLEARLY AGAINST WEIGHT OF EVIDENCE.

In equitable actions the judgment of the trial court will not be set aside, unless it is clearly against the weight of the evidence.

5. APPEAL AND ERROR §1050(2)—MORTGAGES §383—FORECLOSURE IN ANOTHER STATE AFTER JUDGMENT FOR AMOUNT OF DEBT.

Where husband and wife, on August 15, 1910, while residents of the state of Colorado, joined in the execution of certain promissory notes and mortgages upon the land of the wife situated in this state, and after default in the payment of the notes the same are merged into judgments in the courts of Colorado in favor of the payee in said notes on the 18th and 18th days of April, 1912, and thereafter, on August 23, 1913, the said payee filed a suit to foreclose his mortgage lien upon said land in the district court in this state against the makers of said notes and mortgages, but did not seek a personal judgment in such foreclosure proceedings for his debt, but merely to condemn the land to sale for the payment thereof, *held*: (a) That the plaintiff may maintain his foreclosure action without suing upon his foreign judgment and that subdivision 4 of section 4657, R. L. 1910, providing that a suit upon a foreign judgment must be brought within one year, is not available as a defense. (b) That the fact that verbal testimony was admitted, upon the trial of said foreclosure suit, tending to prove that the defendants were divorced in the state of Colorado on September 19, 1912, constituted harmless error.

6. MORTGAGES §463—EVIDENCE SUSTAINING JUDGMENT OF FORECLOSURE.

Record examined, and *held*, that the judgment of the court is not against the clear weight of the evidence.

7. EFFECT OF HARMLESS ERROR.

No judgment shall be set aside or new trial granted by any appellate court of this state in any case, civil or criminal, on the grounds of misdirection of the jury, or the improper admission or rejection of evidence, or as to error in any matter of pleading or procedure, unless, in the opinion of the court to which application is made, after an examination of the entire record, it appears that the error complained of has probably resulted in a miscarriage of justice, or constitutes a substantial violation of a constitutional or statutory right.

Error from District Court, Seminole County; Tom D. McKeown, Judge.

Suit by W. R. Trobert against Peter Benn and Margaret R. Benn to foreclose real estate mortgages, brought after foreign judgments on defaulted notes, with amended petition making Lucy Barkus, A. H. Cotrell, Sookie Baker, and others additional parties defendant, and with default or disclaimer by most of such parties, with answer and cross-petition by defendant Margaret R. Benn, and answer to petition by A. H. Cotrell and Sookie Baker. Judgment for plaintiff, motion for new trial overruled, and defendants Peter Benn and others bring error. Affirmed.

Davis & Patterson, of Wewoka, for plaintiffs in error.

Mark Goode, of Shawnee, and T. S. Cobb, of Wewoka, for defendant in error.

JOHNSON, J. This is an appeal from the district court of Seminole county. On August 23, 1913, W. R. Trobert, as plaintiff, filed his suit in the district court of Seminole county, Okl., against Peter Benn and Margaret R. Benn, to foreclose two certain real estate mortgages on separate and distinct parcels of land, one of the mortgages describing certain lands in Seminole county, Okl., and the other one describing lands in Pottawatomie county, Okl., alleging that the mortgages were made to secure the payment of one note for \$5,500, dated August 15, 1910, due August 15, 1912, one note for \$100, dated August 15, 1910, payable June 15, 1912, and one note for \$100, dated August 15, 1910, due July 15, 1912; that on the \$5,500 note a judgment was given in favor of the plaintiff and against the defendants in the district court of the city and county of Denver, in the state of Colorado, for the sum of \$6,093.33 and costs, on the 18th day of April, 1912; that on the two promissory notes, of \$100 each, a judgment was duly made and given in favor of the plaintiff and against the

defendants in Denver, Colo., on the 16th day of April, 1912, and no part of the same has been paid.

Thereafter, on the 12th day of December, 1913, plaintiff filed his amended petition, making Lucy Barkus, James Hurd, G. N. Fulton, A. Lackery, Gibson Payne, Lizzie Davis, Sookie Baker (née Barkus), A. B. Baker, and A. H. Cotrell additional parties defendant. He alleged the same cause of action against Peter Benn and Margaret R. Benn, and alleged that the additional parties defendant were asserting some adverse claim to the lands and sought to quiet title as against them. Lucy Barkus, James Hurd, G. N. Fulton, A. Lackery, Gibson Payne, Lizzie Davis, Sookie Baker, and A. B. Baker either disclaimed or defaulted.

On January 26, 1914, Peter Benn and Margaret R. Benn demurred to plaintiff's petition, for the reason that it does not state facts sufficient to constitute a cause of action, and because there is misjoinder of causes of action. This demurrer was overruled, and the defendants excepted. On the 27th day of April, 1914, Margaret R. Benn filed her verified answer and cross-petition to plaintiff's petition. Her answer was a general denial, and a further allegation of fraud in the procurement of the mortgages. As a cross-petitioner she alleges that she is the owner of all the land described in plaintiffs' petition, except one of the tracts, to wit, the west half of the northeast quarter of section 36, township 7 N., range 7 E., in Seminole county, Okl.; that she is in the peaceable possession of the land, and that W. R. Trobert is claiming an adverse interest by reason of the mortgages he claims on the same; and she seeks to cancel the mortgages and quiet her title.

On the 23d day of September, 1915, A. H. Cotrell and Sookie Barkus Baker filed their answer to plaintiff's petition, which was a general denial, and allegation that Sookie Barkus sold the west half of the southeast quarter, and the south half of the southwest quarter of the northeast quarter of section 36, township 7 N., range 7 N., a part of the land in controversy, to A. H. Cotrell, after she had procured a judgment of the district court of Seminole county, Okl., quieting the title to the same in her, and further pleaded the statute of limitation as to the judgment of plaintiff procured in Denver, Colo.

An order of the court first had, on the 23d day of September, 1915, Margaret R. Benn filed an amendment to her amended answer, which pleaded the statute of limitations. To the answers of the defendants the plaintiff filed replies, being general and specific denials.

Thereafter, on the 25th day of September, 1915, the cause proceeded to trial on the amended petition of plaintiff, and on the

amended answer of Margaret R. Benn, and the amendment to her answer, and the answer of A. R. Cotrell and Sookie Barkus Baker.

After the evidence was introduced, the court made his findings of fact, which are as follows:

The court finds that the only issue to be determined in this cause between the plaintiff and defendants is the question or the issue as to the statute of limitation, as pleaded by the defendants.

The court finds that the defendant Margaret R. Benn was in Oklahoma City, Oklahoma, during the early spring of 1912, and remained in Oklahoma City from time to time until the 3d day of September, 1912, when she filed a petition in the district court of Denver county, city of Denver, state of Colorado, and on the 19th day of September, 1912, in the county court of the county of Denver, city of Denver, state of Colorado, suing for divorce from Peter Benn, her husband, and upon such petition was divorced in said state, and the court concludes as a matter of law that she is estopped to deny her residence to be in any state other than the state of Colorado from that date.

The court concludes and finds that the judgments sued on in this case were rendered on the dates set out in 1912, and the court concludes as a matter of law that they were filed—that the petition in this action was filed within one year from the rendition of said aforesaid judgments; that the judgments are unsatisfied and that the mortgages introduced in evidence were to secure the indebtedness on the judgments which are still unsatisfied and are subsisting and valid judgments; and it is the judgment of the court that the plaintiff recover the amounts sued for and foreclosure for the amounts sued for in the petition.

To all of which findings of the court the defendant Margaret R. Benn excepts.

The defendants Sookie Barkus Baker and A. R. Cotrell request that the court make separate findings of fact and conclusions of law as to the west half of the southeast quarter and the south half of the southwest quarter of the southeast quarter of section 36, township 7 N., range 7 E., being a part of the land involved in this litigation.

The court finds that in an action in the district court of Seminole county, Oklahoma, wherein Sookie Barkus was plaintiff and Margaret R. Benn et al. were defendants, a judgment was rendered, cancelling the conveyances from Sookie Barkus to Margaret R. Benn, defendant; that the plaintiff in this action, W. R. Trobert, was made a party to that action, and no proper service was had; and that on or about the — day of —, 19—, in the district court of Seminole county, Oklahoma, said judgment was set aside as void and held for naught as to the plaintiff, W. R. Trobert, in this case alone, and set aside as to him alone. The judgment is valid and subsisting as to the other defendants, and will not be disturbed, but ordered by the court that so far as practicable that all the lands be sold prior to the tract of the Sookie Barkus land and Jackson Barkus land, or the land in controversy between Sookie Barkus and Margaret R. Benn,

because you can get the money of the other, let them have this piece of land that Mr. Cotrell and all of them claim.

To all of which findings of fact and conclusions of law the defendants excepted.

On the 25th day of September, 1915, the defendants filed their motion for a new trial, which, omitting the formal part, was as follows:

(1) Because the court erred in overruling the motion of the defendants to make the petition of plaintiff more definite and certain.

(2) Because the court erred in overruling the demurrer of the defendants to plaintiff's petition.

(3) Because the court erred in overruling the motion of the defendant Margaret R. Benn to continue the said cause.

(4) Because the court erred in passing said cause from 9 o'clock until 1 o'clock on September 25, 1915, after the plaintiff had announced ready and the case proceeded to trial.

(5) Because the court erred in overruling the second petition of the defendants for a continuance and an application for a jury in said cause.

(6) Because the court erred in not sustaining the demurrer of the defendants to plaintiff's evidence, for the reason that in the petition the plaintiff sued on certain notes and a foreclosure of an alleged mortgage securing the same, that there was no evidence in said cause in any way identifying the judgments introduced in evidence with the notes sued on, and the pleadings did not justify the introduction of the judgments in support thereof, and the same showed on their face that they were foreign judgments, and had been rendered more than one year prior to the institution of the suit now on trial.

(7) Because the court erred in admitting incompetent evidence over the objection and exceptions of the defendants in said cause.

(8) Because the court erred in refusing to admit competent evidence of the defendants in support of their defense.

(9) Because the court erred in refusing, over the objection of the defendants Sookie Barkus and A. H. Cotrell, to permit them to defend as to the lands claimed by them in this action.

(10) Because the court erred in his findings of fact and conclusions of law in finding that Margaret R. Benn procured a divorce in Denver, Colo., on or about the 25th day of December, 1912, and for that reason she was estopped from denying that her residence was in Colorado at that time.

(11) That the findings of fact by the court in said cause are contrary to the evidence introduced on the trial of said cause and are contrary to the law; that the conclusions of law in said trial are contrary to the evidence and are contrary to the law; that the judgment rendered in said cause by said court is contrary to the evidence and are contrary to the law

—which was overruled on the 17th day of January, 1916, and the defendants excepted and prayed an appeal to this court, and were granted time to make and serve case-

made. In due time, to wit, on July 12, 1916, they commenced this action in this court to reverse the case by filing their petition in error with case-made attached, and assigned error as follows:

(1) Said court erred in overruling the motion of defendants in error for a new trial.

(2) Said court erred in overruling the motion of plaintiffs in error, defendants below, to make the petition of defendant in error, plaintiff below, more certain and definite.

(3) Said court erred in overruling the demurrer of plaintiffs in error, defendants below, to petition of defendant in error, plaintiff below.

(4) Said court erred in not sustaining the demurrer of plaintiff in error to the evidence of defendant in error.

(5) The court erred in its conclusions of law to the effect that Margaret R. Benn was estopped by reason of the fact that she had secured a divorce in Denver, Colo., to deny that she was a resident of that state at that time.

(6) Because the court erred in its findings of fact.

(7) Because the court erred in admitting over the objection of plaintiffs in error, defendants below, incompetent evidence, to wit, the judgments introduced in evidence to sustain defendant in error's claim, and parol evidence to the effect that Margaret R. Benn secured a divorce in Denver, Colo.

(8) Because the court erred in refusing to admit competent evidence on the part of the plaintiffs in error.

(9) Because the court erred in overruling the motion of plaintiff in error for a continuance in said cause.

(10) Because the court erred in refusing the application of plaintiffs in error for a jury.

(11) Because the court erred in all of his findings of fact and conclusions of law, and erred in rendering judgment for defendant in error on the evidence introduced.

(12) Because the court erred in refusing to permit plaintiff in error to introduce evidence in support of their motion for a continuance.

[3] Plaintiffs in error's third assignment of error is:

"Said court erred in overruling the demurrer of plaintiffs in error, defendants below, to petition of defendant in error, plaintiff below."

For they say that plaintiff sues on two mortgages, one describing land in Seminole county, Okla., and the other in Pottawatomie county. We think there is no merit in this contention. It is true, as contended by the plaintiffs in error in their brief, that the plaintiff sues upon two mortgages, one covering lands in Pottawatomie county and the other covering lands in Seminole county; but, as alleged in plaintiff's petition, these mortgages were both given to secure the same indebtedness as evidenced by the same notes—that is, each was to secure all the notes originally given, and when these were merged in judgments they still continued to stand as security for the debt. The debt is the principal thing, and the mortgages given

to secure the debt are regarded as a mere incident thereof. This we think is the general rule, and was announced by this court in the case of *Clark et al. v. Grant*, 28 Okl. 398, 109 Pac. 234, 28 L. R. A. (N. S.) 519, Ann. Cas. 1912B, 505. We think the plaintiff had the right under the law to bring his action for a foreclosure of these mortgages in either Seminole or Pottawatomie county, as provided in Revised Laws of 1910, § 4672, which, in so far as the same is applicable, is as follows:

"If real property, the subject of an action, be an entire tract, and situated in two or more counties, or if it consists of separate tracts, situated in two or more counties, the action may be brought in any county in which any tract, or part thereof, is situated. * * *

The same is the rule as announced by *Jones on Mortgages*, § 352, as follows:

"Where several mortgages are made to different parcels of land to secure one and the same debt, they constitute one mortgage, and their unity is determined by the debt secured, and an action may be maintained in any county on which any part of the land is situated which is secured by any one of the several mortgages."

This rule is announced in the cases of *Commercial National Bank v. Johnson*, 16 Wash. 536, 48 Pac. 267, *Lomax v. Smith*, 50 Iowa, 223, and *Stevens v. Ferry et al.* (C. C.) 48 Fed. 7.

[1, 2] We will next consider the plaintiffs in error's tenth assignment of error, which is:

"Because the court erred in refusing the application of plaintiffs in error for a jury."

We think there is no merit in this contention, for the reason that the plaintiff's action was not one for the recovery of a judgment for money, nor for the recovery or possession of specific real or personal property, but was a suit for the foreclosure of a mortgage lien upon real estate, and was therefore an action purely of equitable cognizance, and in such cases neither party is entitled to a jury trial as a matter of right, and the trial court did not err in denying a jury trial. This court has frequently held that—

"The constitutional guaranty that 'the right of trial by jury shall be and remain inviolate' has no reference to the trial of issues of fact in equity cases." *Mathews et al. v. Sniggs et al.*, 182 Pac. 703, not yet officially reported; *Anderson v. Muhr*, 36 Okl. 184, 128 Pac. 296; *Brown v. Massey*, 19 Okl. 482, 92 Pac. 246; *Maas v. Dunmyer*, 21 Okl. 434, 96 Pac. 591; *Childs v. Cook*, 174 Pac. 274.

The plaintiffs in error's ninth assignment of error is:

"Because the court erred in overruling the motion of plaintiff in error for a continuance in said cause."

The record discloses that when the case was called for trial the defendants filed their motion for a continuance, which was overruled by the court, and the plaintiffs in error complain of the action of the trial court and in their brief say that:

"They alleged the docket was set only for the purpose of settling issues; that no cases were to be tried except by agreement; that Tom D. McKeown, judge of the district court, was not present on the first day; that George C. Crump presided and ordered the cases set for trial over the objections of the defendant; that the case was a jury case, and had at a former time been ordered placed on the jury docket. This court has uniformly held that a motion for continuance is within the discretion of the trial judge, and his action will not be disturbed unless it is made to appear there has been an abuse. We admit this overruling of the motion of Mrs. Benn would hardly be considered by the court. We insist, however, that the general motion by all the defendants states facts that should have entitled them to a continuance in any court."

We fail to see anything in the allegations to indicate that the trial court in any way abused his discretion in overruling the application for a continuance, and we feel that the contention of the plaintiffs in error in this respect is without merit. *McCann v. McCann*, 24 Okl. 264, 103 Pac. 694; *R. L. 1910, § 5044*; *Martin v. Hubbard*, 32 Okl. 2, 121 Pac. 620; *N. S. Sherman Machine & Iron Works v. R. D. Cole Mfg. Co.*, 51 Okl. 353, 151 Pac. 1181.

[4-6] The plaintiffs in error's fourth, fifth, and sixth assignments of error will be considered together, and are as follows:

(4) Said court erred in not sustaining the demurrer of plaintiff in error to the evidence of defendant in error.

(5) The court erred in its conclusions of law to the effect that Margaret R. Benn was estopped by the reason of the fact that she had secured a divorce in Denver, Colorado, to deny that she was a resident of that state at that time.

(6) Because the court erred in its findings of fact.

The fourth assignment of error, that the court erred in not sustaining the demurrer of plaintiff in error to the evidence of the defendant in error, is not well taken, because the essential allegations in the plaintiff's petition were that the notes secured by the mortgages sought to be foreclosed herein had been merged into judgments in the courts of the state of Colorado on the 16th and 18th days of April, 1912, and that no part of said judgments had been paid, except the sum of \$40, and that the mortgages sought to be foreclosed had been duly executed and delivered by the defendants Peter and Margaret R. Benn, and duly recorded in the records of Pottawatomie and Seminole counties, and that the conditions of said mortgage

had been broken, and that the sum for which judgment was rendered was due and unpaid, and these allegations were fully sustained by the evidence of the plaintiff, which evidence consisted of certified copies of the judgments, which were certified to as required by law, and said mortgages, and the testimony of the plaintiff that such judgments were unpaid; hence we say that there was no error in overruling the defendants' demurrer to the evidence of the plaintiff. The plaintiff did not sue upon the judgments, but only to foreclose his mortgages, and hence subdivision 4 of section 4657, Rev. L. 1910, providing that a suit upon a foreign judgment must be brought within one year, has no application, and was not available as a defense herein, and the trial court committed no error in reaching such conclusion, although the reasons that he gave therefor in his findings were erroneous. *Echols v. Reeburgh*, 161 Pac. 1065, construing R. L. 1910, § 5128, and chapter 175, S. L. 1915; *Tracey v. Crepin*, 40 Okl. 297, 138 Pac. 142; *Brocker v. Stalard*, 34 Okl. 612, 126 Pac. 781; *McClung v. Cullison*, 15 Okl. 402, 82 Pac. 499; 27 Cyc. §§ 1593 (c) (d), 1597 (VII), 1599 (c); *Jones et al. v. Lapham*, 15 Kan. 540; *Ency. Pl. & Pr.* 128.

We think that all the court's findings and conclusions in reference to the residence of the defendant Margaret R. Benn, and the fact that she had been divorced from her former husband, were wholly immaterial. The fact that she might have been divorced subsequent to the execution of the notes and mortgages did not release her from liability thereon, and the fact that the notes had been merged into judgments in favor of the plaintiff in the courts of the state of Colorado and were valid and subsisting was conclusive upon her, and such judgments were not subject to collateral attack, and, this being a case of purely equitable cognizance, it is our duty to weigh the evidence, and unless the judgment of the trial court is clearly against the weight of same it must be sustained. *Schock v. Fish*, 45 Okl. 12, 144 Pac. 584; *Crump v. Lanham*, 168 Pac. 43.

[7] The conclusion here reached likewise disposes of plaintiffs in error's sixth, seventh, and eleventh assignments of error, which attack the court's findings of fact and conclusions of law; and the plaintiff's eighth and twelfth assignments or error go to the question of the court's refusal to admit evidence over the objections of plaintiffs in error, and refusal to permit plaintiffs in error to introduce certain evidence, come clearly within the provisions of Revised Laws 1910, § 6005, which provides:

"No judgment shall be set aside or new trial granted by any appellate court of this state in any case, civil or criminal, on the ground of misdirection of the jury or the improper

admission or rejection of evidence, or as to errors in any matter of pleading or procedure, unless, in the opinion of the court to which application is made, after an examination of the entire record, it appears that the error complained of has probably resulted in a miscarriage of justice, or constitutes a substantial violation of a constitutional or statutory right."

We have carefully examined the entire record, and in consideration of the same cannot say that the judgment of the trial court is clearly against the weight of the evidence, or that any error complained of has probably resulted in a miscarriage of justice, or constituted a substantial violation of any constitutional or statutory right of the plaintiffs in error, and the judgment is therefore affirmed.

(16 Okl. Cr. 639)

TINGLEY v. STATE. (No. A-3102).*

(Criminal Court of Appeals of Oklahoma. Oct. 25, 1919.)

(Syllabus by the Court.)

1. CRIMINAL LAW §684—EVIDENCE IN REBUTTAL IN DISCRETION OF TRIAL COURT.

It is discretionary with the trial court, in furtherance of justice, to permit evidence in rebuttal which would have been competent evidence in chief.

2. ERROR IN ADMISSION OF EVIDENCE NOT CAUSE FOR REVERSAL.

This court will not reverse a judgment of conviction on the ground of the improper admission of evidence unless it appears, after an examination of the entire record, that in the opinion of the court the error complained of has resulted in a miscarriage of justice, or constitutes a substantial violation of a constitutional or statutory right.

3. WITNESSES §52(7), 188(1)—HUSBAND INCOMPETENT TO TESTIFY AS TO COMMUNICATIONS OF WIFE.

Neither the husband nor wife is a competent witness against the other, except in a criminal prosecution for a crime committed one against the other. In this prosecution, the defendant was not charged with the commission of a crime against his wife; he was therefore incompetent as a witness to disclose communications made by his wife to him.

(Additional Syllabus by Editorial Staff.)

4. CRIMINAL LAW §684—ADMISSIBILITY OF EVIDENCE IN REBUTTAL.

In trial for homicide the admission of state's evidence in rebuttal, after defendant had rested, without offering any evidence as to his general character, that before and until homicide defendant was frequently seen with a lewd woman, and at her room and had paid her bills, in view of an instruction limiting its effect to his motive in killing deceased to prevent him from assisting defendant's wife

in her proceeding for a divorce was not error, in view of Rev. Laws 1910, § 5370, subd. 4.

Appeal from District Court, Caddo County; Will Linn, Judge.

Jake Tingley was convicted of manslaughter in the first degree, his punishment fixed at seven years' imprisonment in the state penitentiary, and he appeals. Affirmed.

This is an appeal from the district court of Caddo county, wherein the defendant, Jake Tingley, was convicted of manslaughter in the first degree, and sentenced to serve a term of seven years' imprisonment in the state penitentiary for the killing of one W. H. Overholser.

The killing occurred in the city of Anadarko, Caddo county, on the evening of the 21st day of August, 1916. The defendant had been a resident of Caddo county for a number of years, conducted a pawnshop in the city of Anadarko, and lived about one-half mile east of the city. At the time of the commission of the homicide, he was a married man, having a wife and several small children.

The deceased, W. H. Overholser, was a resident of Wichita, Kan., an attorney at law, and at the time of the homicide was visiting the family of Mr. G. W. Milne, who resided near the town of Verden, Okl., some distance east of where the defendant lived.

The defendant and the deceased had known each other only for a day or two prior to the killing. The killing was the outgrowth of domestic troubles between the defendant and his wife, and it appears that Mrs. Tingley just prior to the killing had consulted with the deceased, Overholser, with a view to obtaining a divorce from the defendant, the custody of their children, and a division of property. The defendant had accumulated considerable property, some \$40,000 or \$50,000, at the time of the commission of this alleged crime.

It is unnecessary to go into a detailed statement of all the facts and circumstances surrounding this offense. The record is voluminous, and it would consume considerable space to state fully all the facts detailed in evidence.

The defenses interposed were self-defense and insanity. According to the evidence on the part of the state, the defendant was proven guilty of a deliberate, willful, and premeditated murder; while according to his own testimony on the issue of self-defense there is some slight evidence of a doubtful character which tends to show, if believed, that the killing was in defense of his person. The recollection of the defendant, however, of just what occurred immediately preceding and immediately subsequent to the killing is very hazy, necessarily so because of his defense of temporary insanity which he claims was brought about by misconduct between his

wife and the deceased, and also between his wife and one Ed Caesar, immediately preceding the killing as to Overholser, and for some time prior thereto as to the said Ed Caesar.

The testimony relative to the temporary insanity of the defendant is composed largely of evidence from the defendant as a witness in his own behalf, in which he detailed certain alleged misconduct on the part of his wife with the said Ed Caesar, and also certain reports that were brought to him that his wife was seen in the company of a man in an automobile some two or three hours before the killing, which man the defendant believed to be the deceased, Overholser, and this alleged misconduct, together with the fact that his wife had left his home a night or two before the killing and had not returned thereto, and the constant outcry of the children for their mother, so dethroned his reason as to render him temporarily insane and not criminally responsible for the commission of the act. This testimony was supplemented by that of an alienist, who expressed his opinion, based upon a long hypothetical question detailing the defendant's theory of the case, that the defendant was insane at the time of the commission of the act. There was also some testimony on the question of the defendant's insanity by laymen. In rebuttal, the state was permitted to prove that the defendant had been consorting with a woman of lewd character in the city of Anadarko; that he had been a frequent visitor to the apartments of such woman, and had paid her living expenses, and was frequently seen in her company; and that the defendant had been told a short time before the commission of the homicide that his wife was acquainted with all these facts and was consulting the deceased with reference to obtaining a divorce from him on that ground, and that she had gone with the deceased to the city of Anadarko a short time before the killing took place.

The deceased was killed about 8:30 p. m. on one of the main streets in the city of Anadarko, in front of the residence of W. F. Milne, where the deceased and his wife were stopping temporarily. The deceased was in an automobile at the time he was shot; defendant firing some seven or eight shots from a pistol or pistols, several from a short distance and the last two after defendant had mounted deceased's automobile, the fatal shot entering from the rear and below the shoulder.

Bristow & McFadyen, of Anadarko, and Pruett, Sniggs & Patterson, of Oklahoma City, for plaintiff in error.

S. P. Freeling, Atty. Gen., and R. McMillan, Asst. Atty. Gen. (A. J. Morris, of Anadarko, of counsel), for the State.

MATSON, J. (after stating the facts as above). [1, 4] It is contended that the de-

defendant was prejudiced by the admission of certain incompetent and irrelevant evidence on the part of the state, over the objection and exception of the defendant, in rebuttal. After the defendant had rested his case, the state in rebuttal, over objection and exception, introduced witnesses, who testified that the defendant, for some time prior to the commission of the homicide and up until the time of its commission, had been frequently seen in the company of one Nell Martin, an immoral woman; that defendant paid her meat bills, was seen at her room in the daytime and nighttime, and stated that it was none of anybody's business what he and the said Nell Martin did.

It is contended that this evidence was incompetent and irrelevant as tending to show that the defendant was guilty of a separate and distinct offense from that charged in the information; that it tended to show that he was a man of immoral character; and that its admission, especially in rebuttal, was clearly prejudicial to the defendant's substantial rights, in view of the fact that the defendant did not introduce any evidence whatever as to his general reputation for peace and quietude, and his reputation for any other trait of character was not an issue in the case. Authority is cited in the brief of counsel for defendant tending in some degree to support the contentions made.

The question of the competency of evidence in any particular criminal case, at any particular stage of the proceedings in that case, depends upon the issues as joined in the trial. In this case, it was the contention of the state that the killing was a deliberate murder, and that the defendant's motive was to prevent the deceased from assisting defendant's wife in her proceedings for a divorce and alimony, the custody of their children, and a division of their property, in which proceedings the defendant's adulterous acts with the said Nell Martin would necessarily be disclosed, thereby leading and resulting in a criminal prosecution against the defendant for such felony. The truth of the cause that moved the defendant to kill the deceased was clearly an issue in the case, especially if a conviction of the crime of murder was to be had.

Also it is contended on the part of the state that the defendant, having testified that he believed the deceased and his (defendant's) wife were intimate with each other, that the deceased had invaded his home, and partly by reason of such conduct his reason was temporarily dethroned, the state had a right to show, to rebut any presumption of insanity arising from such belief, that the real purpose of the defendant in killing the deceased was to prevent deceased from assisting defendant's wife in making disclosure of defendant's relations with Nell Martin, a woman of immoral character, and that defendant, by reason of his said relations with

the said Nell Martin, had failed to keep his own life pure, and did not have that high regard for the sanctity of the home which would tend to dethrone the reason of a pure man and cause him to commit an act of homicide, otherwise inexplicable except on the ground of temporary insanity. Authority is cited in the brief on behalf of the state tending to support the contention that under the issues presented in this trial that such evidence was competent in rebuttal.

In connection with this evidence, the court gave the following instruction:

"The court further instructs the jury that there has been permitted to be introduced in evidence in this case testimony of certain witnesses with reference to the association, conduct and relation existing between the defendant and a certain woman prior to the time of the alleged homicide, and in this connection you are instructed that this evidence was admitted for one purpose and one only and should be considered by you only for such purpose; that is, in determining a probable motive, if any, for the commission of the offense for which the defendant is charged, should you find beyond a reasonable doubt the defendant was sane at the time and was not acting in his necessary self-defense."

The fourth subdivision of section 5870, Revised Laws 1910, provides:

"The parties may then, respectively, offer rebutting testimony only, unless the court for good reason, in furtherance of justice, or to correct an evident oversight, permit them to offer evidence upon their original case."

After having provided that the state must in the first instance offer evidence in support of the indictment or information, and then that the defendant or his counsel may offer evidence in support of his defense, the Legislature has seen fit to lodge with the trial court a large discretion as to the admission of other evidence than that strictly in rebuttal, providing in the fourth subdivision, above quoted, that the court "for good reason, in the furtherance of justice, or to correct an evident oversight, may permit either party to offer evidence upon their original case." *Dickinson v. State*, 8 Okl. Cr. 151, 104 Pac. 923; *Shires v. State*, 2 Okl. Cr. 89, 99 Pac. 1100; *Cochran v. United States*, 14 Okl. 109, 76 Pac. 672; *Harvey v. Territory*, 11 Okl. 156, 65 Pac. 837.

The question here presented then is: Did the trial court abuse its discretion in permitting the state to introduce this evidence in rebuttal? In view of instruction No. 15, above quoted, and in view of the further fact that the defendant was only convicted of the crime of manslaughter, we fail to see where in there was any prejudicial injury done him, even if it be admitted that this evidence was not strictly rebuttal, a question which is not necessary to a proper decision of the controversy.

The evidence was certainly admissible in chief to show motive, and to indicate that the killing was with a premeditated design to effect death, and therefore murder. But the defendant was only convicted of manslaughter, a killing which does not involve the question of premeditation or deliberation. How then can it be said that the defendant was prejudiced by evidence, although admitted in rebuttal, which tended to establish a premeditated design for the killing? Can it be said that there was an abuse of discretion in the admission of this evidence in rebuttal which resulted to the substantial prejudice of the defendant? Clearly not.

[2] Before this court is authorized to reverse a judgment of conviction on the ground of the improper admission of evidence, "it must appear, after an examination of the entire record, that in the opinion of the court the error complained of has probably resulted in a miscarriage of justice, or constitutes a substantial violation of a constitutional or statutory right." Section 6005, Revised Laws 1910. To reverse this judgment of conviction upon the ground here contended for would constitute a clear miscarriage of justice, resulting, perhaps in the failure to punish one who, from the evidence in the record, is at least guilty of the crime for which he was convicted.

[3] It is also contended that the court erred in excluding from the consideration of the jury evidence of the defendant as to statements made to him by his wife relative to her relations with the deceased and with one Ed Caesar. It is claimed that this evidence was competent to show the condition of the defendant's mind at the time he took deceased's life.

It is not the contention of the state that the evidence offered was incompetent, nor was the same excluded upon the ground that it was incompetent. The court excluded the evidence upon the ground that the defendant, as a witness, was incompetent to testify to communications made to him by his wife. Section 5882, Revised Laws 1910, provides:

"Except as otherwise provided in this and the following chapter, the rules of evidence in civil cases are applicable also in criminal cases: Provided, however, that neither husband nor wife shall in any case be a witness against the other except in a criminal prosecution for a crime committed one against the other, but they may in all criminal cases be witnesses for each other, and shall be subject to cross-examination as other witnesses, and shall in no event on a criminal trial be permitted to disclose communications made by one to the other except on a trial of an offense committed by one against the other."

Construing the above section, this court has held that a husband or wife is a competent witness against the other in cases

where one is charged with the commission of a crime against the other.

In this case, the defendant was charged with the murder of one W. H. Overholser, clearly not a crime against his wife, or one necessarily involving the marital relation. The wife was not charged with any crime at all, and was on trial for no offense. She would not have been a competent witness in this trial against her husband as to any communications made by him concerning his relations with Nell Martin. It is obvious that under the provisions of the foregoing statute he was incompetent also to testify to these alleged communications between him and his wife, and this though the issue of insanity was presented. The foregoing statute is not open to the construction contended for, even under the liberal interpretation heretofore given same by this court.

We have carefully examined the entire record in this case, and the conclusion is reached that the defendant was exceedingly fortunate in having been found guilty only of the crime of manslaughter, with a punishment of seven years' imprisonment in the state penitentiary.

Finding no error in the record that resulted in the deprivation of any substantial right to the defendant, the judgment is affirmed.

DOYLE, P. J., and ARMSTRONG, J., concur.

(16 Okl. Cr. 717)

KINCHELOE v. STATE. (No. A-3289.)

(Criminal Court of Appeals of Oklahoma. Oct. 29, 1919.)

(Syllabus by Editorial Staff.)

CRIMINAL LAW §1070—CAUSE ABATES ON DEATH OF APPELLANT.

As the purpose of a criminal action is to punish the defendant in person, the action must necessarily abate upon his death pending the appeal.

Appeal from District Court, Carter County; W. F. Freeman, Judge.

J. F. Kincheloe was convicted of forgery, and he appeals. Proceedings abated.

A. Eddleman and J. C. Thompson, both of Ardmore, for plaintiff in error.

W. C. Hall, Asst. Atty. Gen., for the State.

PER CURIAM. Plaintiff in error, J. F. Kincheloe, was convicted of forgery, and his punishment fixed at 18 months in the penitentiary. From the judgment rendered on the verdict on the 20th day of September, 1917, an appeal was perfected.

The Attorney General has filed a motion that the proceedings abate by reason of the death of the plaintiff in error. Attached to

said motion is the affidavit of the sheriff of Carter county, which, omitting caption and jurat, is as follows:

"I, Buck Garrett, sheriff of Carter county, Oklahoma, being first duly sworn, upon oath depose and say that I knew J. F. Kincheloe during his lifetime, and I was present when he was convicted in the district court of Carter county, Oklahoma, and I know the said J. F. Kincheloe to have died at Little Rock, Arkansas, while in the service of the United States at Camp Pike, Arkansas"

—which affidavit was duly subscribed and sworn to on the 27th day of October, 1919.

In a criminal action, the purpose of the proceedings being to punish the defendant in person, the action must necessarily abate upon his death.

It is therefore adjudged and ordered that all the proceedings in this prosecution be abated by reason of the death of the plaintiff in error. The district court of Carter county is directed to enter its appropriate order to that effect.

(16 Okl. Cr. 471)

WILSON v. STATE. (No. A-3098.)

(Criminal Court of Appeals of Oklahoma. Nov. 1, 1919.)

(Syllabus by the Court.)

CRIMINAL LAW §97(1), 108(1)—JURISDICTION ON REMARRIAGE WITHIN SIX MONTHS FROM DIVORCE.

The penal provisions of section 4971, Revised Laws 1910, are directed solely against the remarriage of either party to a divorce proceeding to any other person within six months immediately subsequent to the rendition of the decree of divorce. *Held*, the jurisdiction of a prosecution under such statute is in the county where the second marriage takes place; and *held*, further, where one of the parties to such decree, within the prohibited period of six months, marries another person without the state, and subsequently returns and cohabits with such person in this state, the subsequent cohabitation not being of the gist of the offense defined by said statute, there is no jurisdiction to prosecute thereunder in this state.

Appeal from District Court, Cotton County; Cham Jones, Judge.

W. E. Wilson was convicted of the crime of bigamy, and sentenced to serve a term of one year's imprisonment in the State penitentiary, and he appeals. Reversed and remanded.

A. H. Japp, of Walters, and J. F. Thomas, of Lawton, for plaintiff in error.

S. P. Freeling, Atty. Gen., and R. McMillan, Asst. Atty. Gen., for the State.

MATSON, J. This is an appeal from the district court of Cotton county, wherein the

defendant was informed against and convicted of the crime of bigamy, and sentenced to serve a term of one year's imprisonment in the State penitentiary. From this judgment of conviction, he has appealed to this court, and asks that the judgment be reversed on the ground that the court erred in overruling the demurrer to the information.

The information, omitting the caption, is as follows:

"I, Fren Hansen, county attorney of the county of Cotton and state of Oklahoma, duly authorized and empowered by law to inform of offenses committed and triable within said county and state, in the name and by the authority of the state of Oklahoma, come now here and give the court to understand and be informed that at and within said county and state, and while W. E. Wilson and Barbara Wilson were legally wedded and were husband and wife, and after living together for several years in Cotton county, state of Oklahoma, and holding themselves out in said county as husband and wife, that in a certain civil action wherein the said Barbara Wilson was plaintiff and W. E. Wilson was defendant, then pending in the district court of said county and state, and whereof the said court had jurisdiction, a judgment and decree was rendered and made and dated as of the 4th day of September, 1916, whereby the said Barbara Wilson was granted a divorce from the said W. E. Wilson, the above-named defendant, and that thereafter, to wit, on the 11th day of November, 1916, and within six months from and after the said rendition and making of said judgment and decree, the said W. E. Wilson and the said Barbara Wilson then being still living, and said judgment and decree of divorcement so rendered, made, and dated as aforesaid not being absolute or in effect, knowingly, willfully, unlawfully, and feloniously married and entered into a marriage relationship with another woman than the said Barbara Wilson, namely Alphretta Hewett, a resident of Oklahoma, said marriage being entered into within the state of Texas, and that thereafter, to wit, at all times from and after the 20th day of November, 1916, to the present time, he has knowingly, willfully, unlawfully, and feloniously lived and cohabited with the said Alphretta Hewett as his wife at and within the county of Cotton and state of Oklahoma, contrary to the form of the statute in such case made and provided."

The specific ground of demurrer was that the information did not state facts sufficient to constitute an offense against the laws of the state. The statute upon which this information is based (section 4971, Revised Laws 1910) in part provides:

"It shall be unlawful in any event for either party in such divorce case to marry any other person within six months from the date of the decree of divorcement. * * * Any person marrying contrary to the provisions of this section shall be deemed guilty of bigamy, and such marriage shall be absolutely void."

Section 4972, Revised Laws 1910, provides:

"Every person convicted of bigamy, as such offense is defined in the foregoing section, shall be punished by imprisonment in the penitentiary for a term of not less than one year nor more than three years."

It is the contention of counsel for the defendant that the above special statutory enactment is directed specifically against the remarriage of parties to divorce actions to any other person within the period of six months from the date of the decree of divorce, and not against a subsequent cohabitation of the parties in this state; that, in the absence of some such specific provision in the statute to the contrary, the inhibition is against a remarriage within the jurisdiction of the state; that said statute cannot be given an extraterritorial effect. The state contends to the contrary.

This court is impelled to the conclusion that the contention of counsel for the defendant is correct. It is clear, from a reading of the foregoing statute, that it is directed solely against the remarriage of either party to the divorce proceeding to another person within six months immediately subsequent to the rendition of the decree. There is no specific provision in the statute against the marriage of either party to another person elsewhere than in the state, nor is there any provision against the marriage of either of the parties to another person outside of the state and the subsequent cohabitation of the parties in this state. Some states have enacted statutes defining it to be bigamy for a married person to marry any other person during the life of the former husband or wife, whether the second marriage shall take place in such state or elsewhere, and the party so marrying and returning to such state may be punished in any county where he shall be apprehended. Other states have made punishable the mere act of illegal cohabitation in such state with the second spouse, the gist of the offense in either event being the second marriage and subsequent illegal cohabitation. 3 R. C. L. 796, § 1; *State v. Stewart*, 194 Mo. 345, 92 S. W. 878, 112 Am. St. Rep. 529, 5 Ann. Cas. 963, and cases cited in note thereto. Such statutes have been uniformly held to be valid and constitutional enactments.

But it is apparent that the statute before us contains no such provisions as are contained in the statutes of Missouri, Tennessee, and other states. In the absence of such provisions, it has been uniformly held that the jurisdiction of the offense is in the state where the second marriage is solemnized. 3 R. C. L. 797, § 3, and cases cited under note 4; also cases cited in note, 5 Ann. Cas. 968. In the case of *State v. Ray*, 151 N. C. 710, 66 S. E. 204, 134 Am. St. Rep. 1005, 19 Ann. Cas. 566, the Supreme Court of North Carolina held:

"The North Carolina statute (Revisal, 1905, § 3361) making it a crime for a person having a lawful husband or wife living to marry a second time, whether the second marriage is in 'North Carolina or elsewhere,' is unconstitutional in so far as it relates to second marriages outside the state."

A further provision contained in the statute before us, "such marriage shall be absolutely void," indicates the legislative intent to deal only with remarriages consummated within the state. Such a construction renders the statute clearly constitutional, and gives force and effect in this state to marriages consummated in other states valid under their laws.

Our statute is directed solely against the second marriage. The subsequent cohabitation in this state is no part of the offense. It is the opinion of this court that the statute can be given no extraterritorial effect, and that until the Legislature has seen fit to broaden its terms, as has been done in the states heretofore indicated, it cannot be held that the information in this case stated the offense of bigamy as defined by said statute, and of which the defendant was convicted, when it is alleged therein that the remarriage took place in another state.

For the reasons stated, the judgment is reversed, and the cause remanded, with instructions that the prosecution be dismissed.

DOYLE, P. J., and ARMSTRONG, J., concur.

(87 Colo. 225)

CITY AND COUNTY OF DENVER v.
MOUNTAIN STATES TELEPHONE &
TELEGRAPH CO. et al. (No. 9443.)

(Supreme Court of Colorado. July 7, 1919.
On Application for Rehearing,
Oct. 6, 1919.)

1. MUNICIPAL CORPORATIONS ⇨57—POWERS OF MUNICIPALITY.

The city and county of Denver, under Const. art. 20, even before amendment thereto of 1912, had all the powers which the Legislature in the absence of article 20 could have conferred upon the municipality. (Per White, Teller, Denison, and Allen, JJ.)

2. CONSTITUTIONAL LAW ⇨12—CONSTITUTIONS WILL BE BROADLY CONSTRUED.

Constitutions will not be given a narrow and technical construction, and will be construed as a frame of government or fundamental law and not as a mere statute. (Per White, J.)

3. MUNICIPAL CORPORATIONS ⇨57—POWERS DEFINED.

Powers of municipal corporations are either governmental, legislative, or public, or proprietary, commercial, and quasi public. (Per White, J.)

4. CORPORATIONS §394—PEOPLE HAVE POWER TO REGULATE PUBLIC UTILITIES.

The whole of the people, as the sovereign, have the ever-existing, inherent, and inalienable power to regulate the business of every public utility operating within the limitations of the state, and to make and to remake, as changed conditions may require, a maximum schedule of rates to be charged for the service rendered by such utility. (Per White, J.)

5. CORPORATIONS §394—MANNER OF REGULATION OF PUBLIC UTILITIES BY THE PEOPLE.

The people of the state may regulate business of public utilities through any agency created by them for such purpose, and are not required to do so through an agency created by Legislature. (Per White and Teller, JJ.)

6. CONSTITUTIONAL LAW §81—POLICE POWER MAY BE EXERCISED BY AGENCY CREATED BY CONSTITUTION.

The police power is not above the Constitution, but is bounded by its provisions and may be exercised by any agency which the Constitution creates for that purpose. (Per White, J.)

7. TELEGRAPHS AND TELEPHONES §33(1)—REGULATION OF TELEPHONE RATES A MUNICIPAL FUNCTION.

Under Const. art. 20, the city and county of Denver has the power to regulate telephone rates to be charged for local service within its territorial limits; such regulation being a municipal function.

8. MUNICIPAL CORPORATIONS §59—REGULATION OF RATES OF PUBLIC UTILITIES WITHIN IMPLIED POWERS OF MUNICIPALITY.

The police power to regulate rates to be charged by public utilities may be invested in a municipality without use of express language, it being sufficient if such power necessarily arises from or is fairly implied in, or is incidental to, the powers expressly granted or is essential to the declared objects and purposes of municipality. (Per White, J.)

9. TELEGRAPHS AND TELEPHONES §33(1)—POWER OF DENVER UNDER CHARTER TO REGULATE TELEPHONE RATES.

In view of City and County of Denver Charter, § 280, reserving to the people the regulation of rates of public utilities, the Home Rule Amendment of 1912 to Const. art. 20 (see Laws 1913, p. 669), ratifying, affirming, and validating the charter and "each and every provision thereof," held to expressly give the city and county of Denver the right to regulate telephone rates to be charged for local service. (Per White, Teller, Denison, and Allen, JJ.)

10. TELEGRAPHS AND TELEPHONES §33(1)—PUBLIC UTILITIES COMMISSION WITHOUT JURISDICTION TO REGULATE TELEPHONE RATES IN DENVER.

Public Utilities Commission has no jurisdiction under Public Utilities Act to regulate rates to be charged by telephone company in its local service within city and county of Denver; the city and county having power to regulate such rates under Const. art. 20.

11. COURTS §97(1)—DECISIONS OF SUPREME COURT OF UNITED STATES AS TO VIOLATION OF UNITED STATES CONSTITUTION CONTROLLING.

Decisions of United States Supreme Court on questions involving violation of federal Constitution will be followed by the state Supreme Court in actions involving such questions. (Per Denison, Allen, and Burke, JJ.)

12. PUBLIC SERVICE COMMISSIONS §33—PRESUMPTION FAVORING VALIDITY OF ORDER REGULATING RATES.

Courts must assume that the Public Utilities Commission and cities having power to regulate rates will do their duty and fix rates that are fair and reasonable so as not to violate Const. art. 15, § 8. (Per Burke, J.)

Garrigues, C. J., and Scott and Bailey, JJ., dissenting.

En Banc.

Writ of Review to the Public Utilities Commission.

Proceedings before the Public Utilities Commission for fixing of rates to be charged by the Mountain States Telephone & Telegraph Company. The City and County of Denver objected to the jurisdiction of the Commission with reference to rates to be charged for local service in City and County of Denver, and upon entering of order fixing rates therein petitions for writ of review. Order reversed.

James A. Marsh, Thos. H. Gibson, and Norton Montgomery, all of Denver, for City and County of Denver.

Leroy J. Williams, of Central City, and Grant E. Halderman and A. P. Anderson, both of Denver, for Public Utilities Commission.

Milton Smith, Charles R. Brock, and W. H. Ferguson, all of Denver (Elmer Brock and Floyd F. Walpole, both of Denver, of counsel), for Mountain States Telephone & Telegraph Co.

John A. Rush, E. W. Hurlbut, and Albert L. Vogl, all of Denver, Charles M. Rose, of Pueblo, M. H. Aylesworth, of Salt Lake City, Utah, Gerald Hughes and Clayton C. Dorsey, both of Denver, Push L. Holland, of Colorado Springs, and Lee & Shaw, of Ft. Collins, amici curiæ.

WHITE, J. The sole question involved herein is whether the Public Utilities Commission has jurisdiction to regulate the rates to be charged by the Mountain States Telephone & Telegraph Company in its local service within the city and county of Denver. The case does not involve the constitutionality of the Public Utilities Act (Laws 1913, p. 464), but only whether the act is applicable within the aforesaid municipality. The city and county of Denver came into existence by virtue of article 20 of the Colorado Constitution, and that article, as amended at the gen-

eral election of 1912, measures its powers. (See Laws 1913, p. 669.)

Prior to the aforesaid amendment, we held that the stinted grant of power in section 1 of article 20 was not the only power invested in the municipality, as the purpose of the article was to enlarge the powers beyond those usually granted by the Legislature, and to bestow upon the people of the municipality "every power possessed by the Legislature in the making of a charter for Denver." *Denver v. Hallett*, 34 Colo. 393, 359, 83 Pac. 1066, 1608. And subsequently, in *Londoner v. Denver*, 52 Colo. 15, 22, 23, 119 Pac. 156, 158, 159, referring to the *Denver-Hallett Case*, we further declared:

"By that decision we determined that the powers enumerated in section 1 of article 20 of the Constitution do not constitute a limitation of the powers conferred on the municipality; and, moreover, the article conferred upon such people (of the city and county of Denver) 'every power possessed by the Legislature in the making of a charter for Denver.'"

[1] In fact those decisions and other declarations of this court of like character made it clear that the power invested in the city and county of Denver by article 20 prior to its amendment, could be determined by ascertaining whether the Legislature, in the absence of article 20, could have conferred upon the municipality the power in question. *People v. Cassidy*, 50 Colo. 503, 117 Pac. 357; *Speer v. People*, 52 Colo. 325, 122 Pac. 768; *People v. Prevost*, 55 Colo. 199, 134 Pac. 129; *People ex rel. v. Perkins*, 56 Colo. 17, 137 Pac. 55, Ann. Cas. 1914D, 1154.

[2] Under the rule of constitutional interpretation those deductions were inevitable. "Narrow and technical reasoning is misplaced when it is brought to bear upon an instrument framed by the people themselves, for themselves, and designed as a chart upon which every man, learned and unlearned, may be able to trace the leading principles of government. A constitution is to be construed as a frame of government or fundamental law," and not as a mere statute. *Cooley on Const. Limitations* (7th Ed.) p. 93.

This judicial rule, which we applied in the interpretation of article 20, was in no sense abrogated by the amendment thereto, but rather enlarged and confirmed thereby. The amendment confirms in the people of the municipality the power set out in sections 1, 4, and 5 of the article, and invests them with "all other powers necessary, requisite or proper for the government and administration of its local and municipal matters," including the power "to amend, add to or replace the charter of said city or town, which shall be its organic law and extend to all its local and municipal matters." It then declares that—

"Such charter and the ordinances made pursuant thereto in such matters shall supersede

within the territorial limits and other jurisdiction of said city or town any law of the state in conflict therewith."

It then provides:

"The statutes of the state of Colorado, so far as applicable, shall continue to apply to such cities and towns, except in so far as superseded by the charters of such cities and towns or by ordinance passed pursuant to such charters."

And further declares that—

"All provisions of the charters of the city and county of Denver, * * * which provisions are not in conflict with this article, and all elections and electoral votes heretofore had under and pursuant thereto, are hereby ratified, affirmed and validated as of their date."

At and prior to the time of the adoption of this amendment, the charter of the city and county of Denver contained the following:

"Sec. 280. All power to regulate the charges for service by public utility corporations is hereby reserved to the people, to be exercised by them in the manner herein provided for initiating an ordinance."

Prior to the adoption of article 20, all ordinary legislative power of the people was vested in the General Assembly. The General Assembly, however, was only a creature of the Constitution, and therefore an agent of all the people. By that article the sovereign created another agency, to wit, the city and county of Denver, and vested in it some of the power previously residing in the first agency. It invested the second agency with the exclusive power "in the making, altering, revising or amending" charters for the city and county of Denver, and by the constitutional amendment in 1912 invested it with "all other power necessary, requisite or proper for the government and administration of its local and municipal matters." These two agencies are creatures of the same sovereign people, and the source of their authority is the same. Neither agency has either supreme or inherent power, for that power resides only in all the people, upon whose will all government is founded. Bill of Rights, §§ 1, 2, art. 2. Each agency may exercise the power which the sovereign has invested in it, but only to the extent and in the manner and form prescribed. We must not be confused by the use of the word "state" when the mere machinery of government is meant.

[3-6] The sovereign in Colorado—the people thereof—has surrendered nothing, bartered nothing away, or in any sense abdicated. The powers with which municipal corporations are endowed, whether created directly by the sovereign through constitutional grant or by the General Assembly through legislative enactment, are divided into two main classes, so that municipal corporations act in two distinct capacities. One is governmental, legislative, or public; the other is

proprietary, commercial, and, in this sense, quasi private. Pong on Public Utilities, § 2. This is equally true, however, of the General Assembly. The granting of the right by the city to a public service corporation to use the streets of the municipality, or the granting by the General Assembly to such a corporation the right to use the highways of the state, is the exertion of the proprietary power of the sovereign. The regulation, however, of the business of such public service corporation, whether performed by the Legislature or the municipality, is an exertion of the governmental power of the sovereign. Indeed, the governmental regulation of a business, whatever its character, is always the exertion of the police power, and therefore lawmaking. In the exercise of this power no agent can exhaust it and no vested right may be acquired therein. Such governmental power is inherent in the sovereign and may be exerted, withdrawn, and re-exerted according to the judgment, whim, or caprice of the sovereign. The ever-existing, inherent, and inalienable power resides in the sovereign, to wit, the whole people of Colorado, to regulate the business of every public utility operating within the limitations of the state and to make and to remake, as changed conditions may require, a maximum schedule of rates to be charged for the service rendered by such utility. It does not follow, however, that this function can only be discharged through an agency created by the Legislature. It may be performed through other agencies which the sovereign has also created, and invested with power in the premises. The police power "is not above the Constitution, but is bounded by its provisions." *People v. Gillson*, 109 N. Y. 389, 400, 17 N. E. 343, 346 (4 Am. St. Rep. 465). It may be exercised by any agency which the Constitution creates for that purpose.

Moreover, the regulation of rates to be charged by public utilities has long been recognized as a proper municipal function. *McQuillin on Munic. Corp.* § 34; *Dillon on Munic. Corp.* (5th Ed.) § 1325; *Wyman on Public Service Corp.* § 1410.

In the case of *Home Telephone Co. v. Los Angeles*, 155 Fed. 554, affirmed Id., 211 U. S. 265, 271, 29 Sup. Ct. 50, 51 (53 L. Ed. 176), it is said:

"The power to fix, subject to constitutional limits, the charges of such a business as the furnishing to the public of telephone service, is among the powers of government, is legislative in its character, continuing in its nature, and capable of being vested in a municipal corporation."

[7] These authorities demonstrate conclusively that, prior to the adoption of article 20, the General Assembly of the state of Colorado could have invested the city and county of Denver with the governmental power to regulate the rates to be charged by

public utilities for local service within its territorial limits. It therefore has such power under the repeated decisions of this court hereinbefore cited.

But apart from this, article 20 invests the city and county of Denver with exclusive power to make, alter, revise, or amend its charter, and the amendment invests it "with all other power necessary, requisite or proper for the government and administration of its local and municipal matters." Could language be stronger? Clearly this is an express grant of full and complete power of local self-government. It necessarily includes the power, whether of eminent domain, taxation, or police, necessary to modern, progressive, and efficient local self-government. Indeed, the growth of cities has been the productive force broadening and extending the police power. It is indispensable to self-government in all our municipalities. In fact, it is the very soul and spirit thereof. It is inconceivable that the health, education, and welfare of a great city could be properly safeguarded, extended, and protected without telephones, street railroads, and other like public utilities. Cities have produced new social, industrial, commercial, safety, and health conditions, and the problems of government resulting from them. Clearly, then, the regulation of the instrumentalities essential to deal with such problems is peculiar to such communities, and therefore a local or municipal matter. Indeed, those residing outside the city limits are only incidentally, if at all, interested in, or concerned with, the rate a public service corporation receives for its service within such municipality. If the rate therein be fixed by the city, it must be a reasonable rate. This is equally true if the rate be imposed by a central body. We are unable to perceive the force of the point that respondents seek to make that a distinction exists between utilities which operate only within a charter city and those which operate within and without. The only distinction apparent is that the former only performs one duty—it serves a local community; the latter serves the same community and renders an additional service. In either event, the service rendered among the inhabitants of the city is a local matter. This is clearly pointed out by the federal courts in *Home Telephone & Telegraph Co. v. City of Los Angeles*, *supra*, in the following language:

"Nor is there anything contrary to these views in * * * the Constitution, for the simple reason that the regulation of the charges of a public service corporation within the limits of a city is a 'municipal affair.' The streets of a city are public highways, in which the people of the whole state are interested, yet the opening and widening of streets are 'municipal affairs.' * * * The regulation of telephone rates in a city would seem to be more clearly a matter of local concern than the control of streets."

Mauff v. People, 52 Colo. 562, 123 Pac. 101, does not conflict with the doctrine just quoted from the California case. On the contrary, it is in perfect harmony therewith. In the **Mauff Case** we held that elections are public in character, of governmental and state-wide importance rather than of local interest, and therefore must be under the control and regulation of the Constitution and general laws, and that the city and county of Denver, under article 20, prior to the amendment in 1912, had no authority to legislate upon or otherwise control its municipal elections. Such holding was inevitable because of the provisions of section 11, art. 7, of the Constitution, which required the General Assembly to pass laws to secure the purity of elections, and as this constitutional duty was imposed upon the General Assembly, and not upon municipalities, and the right to vote came from the sovereign and can only be fully protected and enforced by the same authority, elections were not purely local or municipal matters.

[8] The contention of respondents that the police power to regulate the rates to be charged by public utilities may not be invested in a municipality, unless the intention so to do is contained in express language, is untenable. There is a marked distinction between the investment or delegation of such power, and the delegation or investment of the authority to surrender by contract such power of government. In the latter specific authority for that purpose is required. The authorities cited in support of the contention clearly disclose the distinction, which is fundamental. The police power is lodged in the people of the state. It is one of the highest attributes of sovereignty. The exercise of this power is essential to the good order and general welfare of organized society. It is continuing in its nature, and, if it can be bargained away at all, it can only be by words of positive grant, or something which is in law equivalent. The investment or delegation to a subordinate agency to exercise the police power differs materially from the investment or delegation of authority to suspend or bargain that power away. The case of **Denver, etc., Ry. Co. v. Englewood**, 62 Colo. 229, 161 Pac. 151, involved an attempted exercise of the latter power. In the one instance the power remains to be exercised either by the agency in whom it is invested or recalled and exercised by the sovereign. In the other instance the power is gone, and may not be reclaimed during the life of the contract. The police power to control public utilities need not be granted or invested in a subordinate agency in express words. It is sufficient if it necessarily arises from, or is fairly implied in, or is incidental to, the powers expressly granted, or is essential to the declared objects and purposes for which the agency was created. **Denver v. Hallett**, *supra*.

[9] However, were the law otherwise, the Constitution has expressly authorized the people of the municipality to regulate the charges for service by public utilities operating therein. Prior to the adoption in 1912 of the amendment to article 20 of the Constitution, the city and county of Denver had attempted, at least, to exercise the power of regulating public utilities. Section 290, *supra*, of its charter, had been enacted, and such charter with that section therein was on file in the office of the Secretary of State. The constitutional amendment expressly approved, "ratified, affirmed and validated" such charter and each and every provision thereof "not in conflict with" article 20. It further declared that such charter and the ordinances made pursuant thereto in local and municipal matters shall supersede, within the territorial limits of the municipality, any law of the state in conflict therewith. This provision of the charter was in substantial effect written into the Constitution. It was adopted by reference, for there is nothing in the charter provision in question which is in any wise in conflict with the article. We cannot assume that the constitutional ratification, affirmation, and validation of the various charter provisions had reference only to the municipal election at which they were adopted. The language of the Constitution is otherwise. It not only ratifies such elections, but expressly designates the charter provisions themselves and ratifies and validates them. Each word embodied in the Constitution must be given its meaning, and courts should not construe away that which the sovereign has embodied in its fundamental law. With the wisdom of the measure we have no concern. That question belongs solely to the people in their sovereign capacity.

The constitutional article in question is different from the so-called "home rule" provisions in the Constitutions of other states. Therefore authorities from other states aid but little in ascertaining the intent and purpose of the article in question. It has no counterpart in the Constitutions of other states. In other states the power to make a charter for "home rule" cities is subject to the Constitution and laws of the state. With us the only constitutional provision that may affect the charter is article 20, and legislative acts in conflict with the charter provisions enacted in pursuance of article 20 have no force and effect within the municipality.

[10] We are clearly of the opinion that the Public Utilities Commission had no jurisdiction in the premises, and its order, therefore, is reversed and held for naught.

Judgment reversed.

BURKE, DENISON, and TELLER, JJ., specially concurring.

GARRIGUES, C. J., and SCOTT and BAILEY, JJ., dissenting.

TELLER, J. (concurring). For the respondent it is argued that the rate-making power can be conferred only by express grant, and that said article contains no such grant; that, moreover, such powers as are therein granted relate only to local and municipal matters; and that the regulation of rates is not a local matter.

It is not to be denied that cases may be found in which it is held that the grant must be express; but those cases involve the question of the power of a municipality to contract away some portion of the police power.

Cases from three states are cited in which constitutional grants are under consideration; but, inasmuch as the constitutional provisions there under consideration are quite different from article 20, those cases are not in point.

It is also true that there are in some cases dicta to the effect that the regulation of telephone rates is not a local matter, but nowhere have we been given a valid reason for that opinion.

If the constitutional provision under consideration vests this power in the petitioner, it is not material whether or not the act of 1913 (Laws 1913, p. 464), which created the commission and prescribed its duties, is in conflict with said article; but, if the statute recognizes that the jurisdiction of the commission is limited by said article, it makes the conclusion we have reached the more satisfactory.

Section 15 of the law, after requiring the filing of schedules with the commission, provides that—

"The rates, tolls, rentals and charges shown on such schedules when filed by a public utility as to which the commission acquires the power by this act to fix any rates, tolls, rentals, or charges, shall not within any portion of the territory as to which the commission acquires as to such public utility such power, exceed the rates, tolls, rentals or charges in effect on the tenth day of October, nineteen hundred and twelve."

This clearly indicates that there was "territory" within the state in which the commission would have no jurisdiction. And the only territory to which this language can conceivably apply is that of the home rule cities.

It has been suggested that the limitation was to prevent interference with interstate commerce, but the control of that is not confined to any particular portion of the state.

The exception refers to "territory," and not to jurisdiction or power. That it was not necessary to exclude interstate commerce from this provision is conclusively shown by the fact that section 68 of the act provides that no part of the act, "except when specifically so stated," shall apply to foreign or interstate commerce. In other words, exclusion of interstate commerce is the rule, and inclusion only by special mention.

That the Legislature may delegate to a city the power to regulate telephone rates is distinctly held in *Home Telephone Co. v. Los Angeles*, 211 U. S. 265, 29 Sup. Ct. 50, 53 L. Ed. 176.

That being so, it is not to be doubted that such power may be conferred by the act of the people through the fundamental law.

I am of the opinion that article 20, as originally adopted, gave to the petitioner the right now in question, as a local matter.

In support of the contrary position, it is said that local telephone communication is carried on over the same lines as are used in state-wide business; that the separation of the property for taxation is exceedingly difficult; and that the local rates affect the ability of the company to carry on its business outside of the city. Conceding all of this, it does not make a case against the right of local regulation.

In *Simpson v. Shepard*, 230 U. S. 352, 33 Sup. Ct. 729, 57 L. Ed. 1511, 48 L. R. A. (N. S.) 1151, Ann. Cas. 1916A, 18, the court had under consideration the right of the Minnesota Railroad Commission to prescribe rates on business wholly within the state, but carried on over lines engaged in interstate commerce. It was there contended, among other things, that the local or intrastate rates were a burden on interstate commerce; that the parts of the carriers' business were so intermingled that they could not be separately regarded, etc. The court, however, upheld the right of the state to regulate rates on intrastate business.

If the regulation of rates on intrastate commerce, carried on over interstate railroads, is a local, as distinguished from a national, matter, it is difficult to see why telephone rates in Denver are not a local matter, though the same lines are used for both local and general purposes.

If it were necessary, therefore, the right claimed for the city might find a basis in article 20, as it was before amendment.

But, as I shall hereafter show, it is not necessary thus to base it.

Although this court had, in *Denver v. Hallett*, 34 Colo. 393, 83 Pac. 1066, held that the grant of powers under said article was not limited to those therein enumerated, but was intended "to bestow upon the people of Denver every power possessed by the Legislature in the making of a charter for Denver," it seems to have been thought necessary by the people to make the fact certain, and so they included in the amendment the following provision:

"It is the intention of this article to grant and confirm to the people of all municipalities coming within its provisions the full right of self-government in both local and municipal matters and the enumeration herein of certain powers shall not be construed to deny to such cities and towns, and to the people thereof, any right or power essential or proper to the full exercise of such right."

It not being denied that the Legislature, before article 20 was adopted, could have granted to the city the power now in question, it follows from the quotation from the last case cited that article 20 granted that power.

In that case the right of the city to build an auditorium was held to exist because the court found, on a review of the authorities, that the Legislature might have authorized it—a direct application of the argument above made.

This cause may be determined by reference to article 20, as amended in 1912; and by giving to the language therein used its plain meaning. No construction is required or permissible, for "it is not allowable to interpret what has no need of interpretation."

In *Mauff v. People*, 52 Colo. 562, 123 Pac. 101, it was held that the people of Denver in the conduct of a municipal election were subject to the general laws concerning elections; and it is common knowledge that the decision in that case was the moving cause of the framing and initiating of the amendment of 1912. That amendment, in terms, gave to the city the very power which this court had denied to it on the ground that it was not local—an assertion by the people of the right to confer upon a municipality a right which in common parlance is not local.

In *People v. Prevost*, 55 Colo. 199, 134 Pac. 129, it is said that, if the powers in the home rule amendment were not local before the amendment they are so now.

It is to be observed, too, that in the provision above quoted it is the announced intention to grant the "right of self-government in both local and municipal matters," showing that there might be local rights granted which were not municipal.

After enumerating certain powers granted, and following that with the provision above quoted, that the enumeration of powers should not be held to include all powers granted, a further provision was added, apparently, to prevent a denial of the right to exercise such powers as the home rule cities were by their charters exercising. The provision reads as follows:

"All provisions of the charters of the city and county of Denver and the cities of Pueblo, Colorado Springs and Grand Junction, as heretofore certified to and filed with the Secretary of State, and of the charter of any other city heretofore approved by a majority of those voting thereon and certified to and filed with the Secretary of State, which provisions are not in conflict with this article, and all elections and electoral votes heretofore had under and pursuant thereto, are hereby ratified, affirmed and validated as of their date."

The charter of the city and county of Denver was on file in the office of the Secretary of State when the amendment was adopted, and it included the following provision:

"All power to regulate the charges for service by public utility corporations is hereby reserved to the people, to be exercised by them in the manner herein provided for initiating an ordinance."

The claim of the city is that, the right to regulate rates being thus asserted in its charter, the right is effectually affirmed by the above-quoted provision of the amendment of 1912.

This claim is met in the briefs for respondent by the assertion that anything in the charter not expressly authorized by article 20, before it was amended, would be in conflict with said article, and hence not ratified.

If that be true—that is, if nothing could be made valid by the amendment which was not expressly authorized by the original article—why say anything about validation and ratification? The things that were expressly authorized required no ratification, and the use of that word was without reason. Ratification implies that some act has been done without authority in the agent, which the principal is willing to adopt as his own. Likewise "validate" involves the idea of making valid that which is for some reason not valid. Such provisions of the charters as were expressly authorized by article 20 were valid, and could not be "validated."

That there was no intent to limit the validation to acts authorized, either expressly or by implication, by the original article, is further shown by the fact that the sentence following that above discussed provides for the ratification of all elections theretofore had pursuant to said charter provisions. By the provision above quoted anything in the filed charters, not in conflict with *this article* is ratified. The reference can only be to the article of which the amendment of 1912 forms a part. How can the words "this article," in the amendment itself, refer to the original article 20? The only article in force when a question of conflict might arise under this provision was article 20, as amended. No one has pointed out anything in article 20 with which this charter provision is in conflict.

The simple, narrow question is: What powers have been granted by article 20, as it now is? Until some conflict between the charter provision above mentioned and article 20—the only article 20 there is at this time—be pointed out, there is no possible escape from the conclusion that the people intended to and did ratify and validate said provision, and that in consequence thereof the city has the right to regulate telephone rates.

DENISON, J. (specially concurring). I concur in the conclusion of the majority of the court, as announced in the former opinion handed down in this case, for the following reasons:

Under the twentieth amendment, Denver could assume, by charter, any power which, before the amendment, the Legislature could

grant. *Denver v. Hallett*, 34 Colo. 395, 397, et seq., 83 Pac. 1066.

The Legislature could grant the power to regulate telephone rates. *Home Tel. Co. v. Los Angeles*, 211 U. S. 271, 279, 29 Sup. Ct. 50, 53 L. Ed. 176.

Therefore Denver could assume, by charter, the power to regulate telephone rates.

By her charter of 1904, § 280, she did assume that power:

"All power to regulate the charges for service by public utility corporations is hereby reserved to the people, to be exercised by them in the manner herein provided for initiating an ordinance."

Therefore she has it.

Furthermore, in 1912, by the home rule amendment, the people expressly ratified Denver's charter, including the section above quoted.

It has been held by this court that the Legislature can grant, and therefore the city can assume, any power in matters of local concern, and that the Legislature can grant, and therefore the city can assume, no power, except in matters of local concern. It follows from these holdings that what is of local concern and what the Legislature can grant are one and the same.

[11] It seems to the writer that regulation of rates within the city is manifestly of local concern. However, the reason for the restriction of the city's powers to matters of local concern is that otherwise a state within a state would be created, and thus the Constitution of the United States would be violated. Some of the arguments against the decision are upon the ground that the regulation of rates within the city is not of local concern and the right to regulate them could not be granted by the Legislature. The whole force of this argument lies in the conclusion that the Constitution of the United States would be violated. Were it not for that Constitution, the people of this state, by constitutional amendment, might grant to the city or any part of the state full sovereignty or independence or anything short of it. The question, therefore, is one under the Constitution of the United States, and it is our duty to follow the decisions of the Supreme Court of the United States upon it; but that court has determined in the *Home Telephone Case* that the power to regulate rates can be granted to the city, and that necessarily determines that such power is of local concern and that such grant does not violate the Constitution of the United States. It is then our duty to hold likewise.

It has been argued that the home rule amendment ratified only what was "not in conflict with this article," and that the said provision of the charter was so in conflict because the article made no specific provision that that particular power might be assum-

ed; that is to say, the charter is in conflict with something the article does not contain. With what part does it conflict? I cannot assent to such reasoning.

It is a part of the history of the state that the people were disappointed, not to say more, at the restrictions put upon the powers of cities by this court's interpretations of article 20, and that the home rule amendment was the expression of that feeling. Upon points where this court has given the article a restricted interpretation, the home rule amendment reverses that interpretation. That they did not include regulation of rates must be because this court had not yet restricted the meaning of the article on that point. But they expressed, in general terms as broad as language permits, all powers which could be constitutionally granted under the previous decisions of this court.

I cannot agree with the proposition that the power to regulate rates is not expressly granted by such language. An express grant of all power is an express grant of every power, and the ratification of Charter, § 280, is an express grant; a discussion, therefore, of the question whether the power to regulate rates can be inferred or impliedly granted has no application to the question in hand.

I am authorized to state that Mr. Justice ALLEN concurs in this opinion.

BURKE, J. (concurring specially). I concur in the conclusion reached in the majority opinion. It is conceded in respondent's briefs that article 20 of our Constitution, including amended section 6, has conferred upon the city and county of Denver all powers which the Legislature could have conferred, i. e., power to legislate upon all subjects local and municipal; and, if the power to fix telephone rates by compulsion be one of local and municipal concern, it has been granted to the municipality. The sole contention is that this is not a local or municipal matter.

The latest definite declaration of the law on this subject by the highest authority in the country, and which still stands unreversed and unmodified, is *Home Telephone & Telegraph Co. v. City of Los Angeles*, decided by the Supreme Court of the United States November 30, 1908, 211 U. S. 265, 271, 29 Sup. Ct. 50, 51 (53 L. Ed. 176). Among other things it is there said:

"The power to fix, subject to constitutional limits, the charges of such a business as the furnishing to the public of telephone service, is among the powers of government, is legislative in its character, continuing in its nature, and capable of being vested in a municipal corporation."

If it is "capable of being vested in a municipal corporation," it is only so because it deals with a matter of purely local and municipal concern.

Quoting further (211 U. S. 273, 29 Sup. Ct. 52, 53 L. Ed. 176):

"It has been settled by this court that the state may authorize one of its municipal corporations to establish by an inviolable contract the rates to be charged by a public service corporation (or natural person) for a definite term, not grossly unreasonable in point of time, and that the effect of such a contract is to suspend, during the life of the contract, the governmental power of fixing and regulating the rates."

This authority holds that this power to contract for a definite rate for a specified time is a greater power than the power to fix rates by compulsion. The reason is apparent. A rate fixed by ordinance or statute is not fixed for a definite time because it may be changed or altered at any time by repeal or amendment of the legislation. The same is true even of a constitutional provision. But a rate fixed by contract is definite and certain as to time and may extend far beyond any such temporary limits. The right to confer the greater power necessarily implies the right to confer the lesser.

As to the further declaration therein that—

"But for the very reason that such a contract [fixing rates for a definite term] has the effect of extinguishing pro tanto an undoubted power of government, both its existence and the authority to make it must clearly and unmistakably appear, and all doubts must be resolved in favor of the continuance of the power"

it seems to me wholly inapplicable. Because here the authority, being derived from the Constitution, is unquestioned, and the existence, if the subject be one of local or municipal concern, is admitted.

Quoting again (211 U. S. 279, 29 Sup. Ct. 54, 53 L. Ed. 176):

"It is too late, however, after the many decisions of this court, which have either decided or recognized that the governing body of a city may be authorized to exercise the rate-making function, to ask for a reconsideration of that proposition."

The court is here speaking of an authorization by legislative enactment. If the governing body of a city may so be authorized by the Legislature, it is only because the subject is one of local and municipal concern. And if the municipality may be so authorized by the Legislature, it may, a fortiori, be so authorized by constitutional enactment.

The opinion in the Los Angeles Case was by Mr. Justice Moody, without dissent. It supersedes all previous state and federal decisions in conflict with it, and, in view of its positive statement that it is now too late to ask for a reconsideration of the proposition, it cannot be presumed that the highest court of the land will hereafter otherwise decide. It is absolutely binding upon this court.

I think it cannot be denied that the ques-

tion, upon reason, is a close one, nor that the great weight of authority, exclusive of the Home Telephone Case, is to the contrary. I myself, during the consideration of the matter, have been of a different opinion, but am led to this conclusion by what I believe to be the overwhelming force of that decision.

In the instant case the opinion was by a closely divided court, four justices concurring and three dissenting. It was handed down but a few minutes before a change occurred in the personnel of the court; two of the concurring justices retiring, and their places being taken by two newly elected. The opinion was written by one of the retiring justices. A majority of the members of the court who had heard argument and considered the case were against the conclusion. The motion for a rehearing could not be passed upon by the justices who had decided the cause. The question at issue was one of vast importance to the whole people of the state. Under such conditions, I think a motion for rehearing should be granted and the question determined upon a careful review of the whole case upon its merits, and that such was the proper procedure irrespective of the final determination of the court.

Furthermore, if the power to fix rates by compulsion exists in the city of Denver, it is by reason of the provisions of article 20 of the Constitution, including amended section 6 ratifying the city's charter. If it depends upon the amendment, such power is granted only to those cities which had their charters on file with the Secretary of State January 22, 1913, when the amendment became effective. It would therefore take another constitutional amendment to confer this power upon other home rule cities. It is contended that the inevitable result must be that home rule cities will fix the lowest rates which the courts will permit to stand as not confiscatory; that to balance this result the commission will fix, in all other cities and in the state at large, the highest rates which the courts will sanction as reasonable; that the citizens of the state at large will thus be obliged to bear so much of the burden of the support of such utilities as the favored cities will in this manner be able to transfer to them; because the courts cannot correct the evil, being powerless to fix rates, and having only jurisdiction to determine what rates are unreasonable and what are confiscatory; hence that section 8 of article 15 of the Constitution, providing that—

"The police power of the state shall never be abridged or so construed as to permit corporations to conduct their business in such manner as to infringe the equal rights of individuals or the general well-being of the state"

will be violated.

[12] This question was not discussed in the original opinion and seems not to have been

presented in the main case. It was a new question raised on the motion for a rehearing, which of itself justified the granting of that motion. On this subject I am of the opinion that, until it otherwise appears, the courts must assume that the cities concerned, as well as the commission, will do their duty, fixing rates that are fair and reasonable. If the people have granted this power to these home rule cities, no presumption that it will be improperly exercised can be indulged to defeat any exercise thereof. It may be that the plan will not work out to the satisfaction of the people of the state. If so, it is within their province to amend or repeal it whenever they see fit. "On their own heads, in their own hands, the sin and the saving lies."

SCOTT, J. (dissenting). The Public Utilities Commission of the State of Colorado, upon hearing, entered an order fixing rates for service to be charged by the Mountain States Telephone Company, within the state, including the city and county of Denver. The city objected to the jurisdiction of the commission in the premises, as relates to the city and county of Denver, claiming exclusive jurisdiction to fix such rates as applied to the city under article 20 of the Constitution and the amendment thereto. The city did not appeal to the Supreme Court from the findings and decision of the commission, as under the statute it was expressly authorized to do, but elected to permit such decision to become final, so that the merits of the case are not before us, and the controversy is now one of jurisdiction as between the city and the state.

Acting under section 46 of the Public Utilities Act, and upon stipulation of parties, the commission certified to this court the record, for a decision upon the question of jurisdiction alone.

The powers of the Public Utilities Commission, under the act of 1913, creating the commission and defining its powers and duties, were considered and determined by this court in *Denver & S. P. Ry. Co. v. Englewood*, 62 Colo. 229, 161 Pac. 151, reserving, however, a decision on the application of the rule in the case of a municipality organized and operating under article 20 of the Constitution, and this is the question now before us for decision. Therefore the rule announced in that case must be held to apply here, unless it shall be found that the Public Utilities Act of 1913 is inhibited by article 20 and the amendment thereto. The act declares:

"Sec. 14. The power and authority is hereby vested in the Public Utilities Commission of the State of Colorado, and it is hereby made its duty to adopt all necessary rates, charges, and regulations to govern and regulate all rates, charges and tariffs of every public utility of this state as herein defined, the power to correct

abuses, and prevent unjust discriminations and extortions in the rates, charges and tariffs of such public utilities of this state and to generally supervise and regulate every public utility in this state and to do all things, whether herein specifically designated, or in addition thereto, which are necessary or convenient in the exercise of such power, and to enforce the penalties provided in this act, through proper courts having jurisdiction."

1. In the *Englewood Case*, speaking of the powers thus conferred, we said:

"This act is very broad and seems to confer the absolute power to regulate, both as to rates and otherwise, all public utilities within the state."

And again:

"From the sections quoted, and from other provisions of the act, it fully appears that the Legislature intended to delegate to the Public Utilities Commission the administration, supervision, and regulation of all service rendered to the public throughout the state, including municipalities."

The first comprehensive general public utility law enacted in this country was the New York act of 1907 (Laws 1907, c. 429), and which furnishes the model for the many subsequent acts by the Legislatures of other states, including our own.

The New York act created two districts with two commissions and with identical powers. One of these districts consisted alone of the territory now embraced in the city of Greater New York, and therefore now embracing a single municipality.

The intention of the Legislature by that act to include municipalities with the operation of the law is too plain to permit question.

It has been uniformly so held as to every other similar act, where the question has been raised. It is obvious that the chief purpose of our act, as of all laws of that character by other states, was to generally regulate and fix rates for public utilities, such as water, gas, electric, telephone, and street car corporations, operating within municipalities; for the then existing railroad commission act quite fully provided for such regulation of railroads. The kind of utilities so intended to be regulated were to be found only in municipalities. To say that the Legislature intended to exclude municipalities from the operation of the law is to convict that body of either ignorance or willful intent to violate the fundamental law.

Article 20 is as much a part of the Constitution of the state as if it had been a part of the original instrument, and is of like force and sanctity.

Then to sustain the contention of the city, it is plain that we must hold the public utilities statute of 1913 to be in derogation of the Constitution, to the extent, at least, as

the act may apply to cities of two thousand population or more, and for such reason to be void.

2. It has been uniformly held since the case of *Ogden v. Saunders*, 12 Wheat. 214, 6 L. Ed. 606, that the presumption is that every statute is a constitutional enactment, and that this presumption is not overcome until the contrary appears beyond a reasonable doubt.

This doctrine has been repeatedly affirmed by this court. *Consumers' League v. C. & S. Ry. Co.*, 53 Colo. 54, 125 Pac. 577, Ann. Cas. 1914A, 1158, where our cases involving the subject up to that time are collated and cited.

The rule then by which we must be governed in this particular is that, when an act of the Legislature is attacked as in violation of the Constitution of the United States or of the state, we are required to uphold the legislation, unless its unconstitutionality appears beyond all reasonable doubt.

We are asked in this case to declare an act void, not such as affects merely the private or public rights or wrongs of persons, or the rights of property in a general way, but, on the contrary, a legislative act in which the state asserts the exercise of its inherent and sovereign power, as against the claim to such power upon the part of a municipality within its own borders.

3. There is another canon of construction which may not be overlooked in this case, and that is the deference and weight which the court must give to a practical contemporaneous legislative construction of a constitutional provision.

The amendment to article 20 of the Constitution, known as the "home rule" amendment, and upon which the city relies, was adopted at the November, 1912, election, being the same general election at which all the members of the Legislature, except a moiety of the Senate, were elected, and which Legislature enacted the Public Utility Act of 1913, now under consideration.

It may be noted that not one vote in either house of the assembly was cast against the bill upon its passage therein, so that the representatives of every city in the assembly, operating under, or which may operate under, article 20, voted for the statute. The legislative act then is clearly a contemporaneous construction, by the legislative branch of the state government, of the constitutional amendment now under consideration.

It is universally held that contemporaneous or practical construction of an ambiguous provision of a Constitution by the legislative or executive departments of the government is always important, and is frequently of controlling influence in determining its meaning. 12 C. J. 712.

And the rule seems likewise to be general that, if the meaning of the Constitution is doubtful, legislative construction will be given serious consideration by the courts, both as a matter of policy, and also because it may be presumed to represent the true intent of the instrument. A contemporaneous legislative exposition of a constitutional provision is entitled to great deference, as it may well be supposed to result from the same views of policy and modes of reasoning which prevailed among the framers of the instrument expounded. 12 C. J. 714.

This rule of construction of a constitutional provision has been accepted many times by this court. In *People ex rel. Livesay v. Wright*, 6 Colo. 92, where there was quoted with approval the following:

"As in regard to statutes, so in regard to Constitutions, contemporaneous and legislative expositions are frequently resorted to, to remove and explain ambiguities. * * * Great deference is due to a legislative exposition of a constitutional provision, and especially when it is made almost contemporaneously with such provision, and might be supposed to result from the same views of policy and modes of reasoning which prevailed among the framers of the instrument expounded.' *Sedgwick Stat. & Const. Law*, 412; *People v. Green*, 2 Wend. [N. Y.] 266, 274."

And in *Frost v. Pfeiffer*, 26 Colo. 338, 58 Pac. 147, the court said:

"Contemporaneous legislative construction of the fundamental law, while not controlling upon the courts, yet, in case of doubt or ambiguity, is entitled to great weight, as expressive of the views entertained by those of the meaning of that law whose mandates they are bound to observe. *Cooper Mfg. Co. v. Ferguson*, 113 U. S. 727 [5 Sup. Ct. 739, 28 L. Ed. 1137]; *People v. Le Fevre*, 21 Colo. 218 [40 Pac. 882]."

In *Denver v. Adams County*, 33 Colo. 1, 77 Pac. 858, it was said:

"While it is not conclusive with the courts, nevertheless a contemporaneous legislative construction of a statute or constitutional provision is persuasive."

In *Cooper Mfg. Co. v. Ferguson*, 113 U. S. 727, 5 Sup. Ct. 739, 28 L. Ed. 1137, it was held that as the clause in the Constitution and the act of the Legislature relate to the same subject, like statutes in *pari materia*, they are to be construed together; and that an act passed by the first Legislature that assembled after the adoption of the Constitution must be considered as a contemporary interpretation, entitled to much weight.

The court must take notice of the fact that the adoption of the "home rule" amendment to article 20 was of state-wide interest and the subject of much discussion while pending.

We cannot assume that the members of the Legislature elected at the same election were not therefore familiar with the intent

and purpose of this amendment to the organic law, nor that they had the intent to knowingly or willfully act in violation thereof. Therefore, in considering the question of the validity of the Public Utilities Act, we must bear in mind the two foregoing important and universally accepted canons of construction.

4. It is well to consider the nature and character of the power which the city claims in this case.

It is universally held that the power to fix maximum rates is a power resting exclusively in sovereignty. "Sovereignty" has been judicially defined as the supreme power which governs the body politic, or society which constitutes the state; a term used to express the extreme political authority of an independent state or nation; the aggregate of all civil and political power; the supreme, absolute, uncontrollable power by which a state is governed; that public authority which directs or orders what is to be done by each member associated, in relation to the end of the association. 36 Enc. 516.

Preliminary to the adoption of the federal Constitution, there was grave apprehension as to possible or probable conflict between the several co-ordinate branches of the government. The suggestion of Thomas Jefferson, in his "Notes on the State of Virginia," seems to have since been followed in every serious or crucial conflict between the powers of government. His statement, in which he likewise gave a further definition of sovereignty as then contemplated, is as follows:

"As the people are the only legitimate fountain of power, and it is from them that the constitutional charter, under which the several branches of government hold their power, is derived, it seems strictly consonant to the republican theory to resort to the same original authority not only when it may be necessary to enlarge, diminish, or new-model the powers of the government, but also whenever any one of the departments may commit encroachments on the chartered authorities of the others. The several departments being perfectly co-ordinate by the terms of their common commission, neither of them, it is evident, can pretend to an exclusive or superior right of setting the boundaries between their respective powers, and how are the encroachments of the strong to be prevented, or the wrongs of the weaker to be redressed, without an appeal to the people themselves, who as the grantors of the commission, can alone declare its true meaning, and enforce its observance."

This sound governmental truth has been made manifest by its frequent application in both state and nation. The several branches of the government are but the creatures of the sovereign power, and always subject to the exercise of the sovereign will. This is illustrated by the recent constitutional enactment in this state of the power of the initiative and referendum where theretofore

exclusive powers of the assembly were taken away and reserved to the people themselves, to initiate statutes and constitutional amendments, and also to veto statutes enacted by the assembly.

The argument by the city assumes that sovereign power is divisible, separable, and alienable, like bushels of grain, rather than as the life-saving air of government, indivisible, inseparable perpetuating the equilibrium in government and serving as a system of checks and balances as between, not only the co-ordinate branches of government, but all the agencies of government, as well.

5. It is to be observed that, in all governments of constitutional limitations, sovereign power manifests itself in three ways: By exercising the right of taxation, the right of eminent domain, and through its police power.

The exercise of sovereign right is of necessity the exercise of a right which the state alone, or some of its governmental agencies, possess, and before such right may be exercised by any such agency there must have been a delegation of such power in terms clear and unmistakable. This is not only the rule of this court, but it is universal with all courts. In the Englewood Case we quoted with approval the following:

"In *Freeport Water Co. v. Freeport*, supra [180 U. S. 587, 21 Sup. Ct. 493, 45 L. Ed. 679], it is said: 'This power of regulation is a power of government, continuing in its nature; and, if it can be bargained away at all, it can only be by words of positive grant, or something which is in law equivalent. If there is reasonable doubt, it must be resolved in favor of the existence of the power.' In the words of Chief Justice Marshall in *Providence Bank v. Billings*, 4 Pet. 514, 561, 7 L. Ed. 939, 955, 'Its abandonment ought not to be presumed in a case in which the deliberate purpose of the state to abandon it does not appear.'"

Upon this point it was said in *Interstate Commerce Com. v. Railway Co.*, 167 U. S. 479, 17 Sup. Ct. 896, 42 L. Ed. 243:

"The question debated is whether it vested in the commission the power and the duty to fix rates; and the fact that this is a debatable question, and has been most strenuously and earnestly debated, is very persuasive that it did not. The grant of such a power is never to be implied. The power itself is so vast and comprehensive, so largely affecting the rights of carrier and shipper, as well as indirectly all commercial transactions, the language by which the power is given had been so often used and was so familiar to the legislative mind and is capable of such definite and exact statement, that no just rule of construction would tolerate a grant of such power by mere implication."

Further citation of authority is not required. There are none to the contrary.

The power to regulate public utilities is based upon that branch of sovereignty desig-

nated as the police power of the state. The term "police power" has never as yet been accurately or satisfactorily defined. The difficulty is that it is from its very nature incapable of definition, because none can foresee the ever-changing conditions which may call for its exercise. But it is by all agreed that it is an attribute of sovereignty, inherent in the several states of the Union, subject only to the limitations of the federal Constitution, and that the very existence of government depends on it. It is as a well, inexhaustible, from which may be drawn from time to time the power necessary to protect or promote the public welfare.

It is a fixed principle of government that the state cannot barter away the right to the use of the police power, for the reason that the governmental power of self-protection cannot be contracted away.

This furnishes the reason for the rule announced in *Denver Co. v. Englewood*, supra, that the power of regulation of public utilities is a power of government, continuing in its nature; and, if it can be bargained away at all, it can only be by words of positive grant, or something which is in law equivalent, and that, if there is reasonable doubt, it must be resolved in favor of the existence of the power in the state.

While the state may delegate the exercise of this power to an agency, municipal or otherwise, yet there can be no alienation. That is to say, here the same authority that granted the power under article 20, acting through the same instrumentality, may recall this power in its entirety. We turn to article 20 and search in vain for words expressly granting the power to the city to regulate or fix rates to be charged by any public utility. Indeed, there is no language therein even suggestive of any such grant of power, nor is the subject referred to.

6. The city in its contention apparently relies upon the following provisions of section 6, article 20, as amended, as conferring the power claimed:

"(1) The people of each city or town in this state, having a population of two thousand inhabitants as determined by the last preceding census taken under the authority of the United States, the state of Colorado or said city or town, are hereby vested with, and they shall always have, power to make, amend, add to or replace the charter of said city or town, which shall be its organic law and extend to all its local and municipal matters.

"(2) Such charter and the ordinances made pursuant thereto in such matters shall supersede within the territorial limits and other jurisdiction of said city or town any law of the state in conflict therewith.

"(3) It is the intention of this article to grant and confirm to the people of all municipalities coming within its provisions the full right of self-government in both local and municipal matters and the enumeration herein of certain powers shall not be construed to deny to such

cities and towns, and to the people thereof, any right or power essential or proper to the full exercise of such right.

"(4) The statutes of the state of Colorado, so far as applicable, shall continue to apply to such cities and towns, except in so far as superseded by the charters of such cities and towns or by ordinance passed pursuant to such charters.

"(5) All provisions of the charter of the city and county of Denver and the cities of Pueblo, Colorado Springs and Grand Junction, as heretofore certified to and filed with the Secretary of State, and of the charter of any other city heretofore approved by a majority of those voting thereon and certified to and filed with the Secretary of State, which provisions are not in conflict with this article, and all elections and electoral votes heretofore had under and pursuant thereto, are hereby ratified, affirmed and validated as of their date."

It will appear that in this amendment there is no suggestion of a grant of power to fix rates to be charged by a public utility. What would be said of the powers of the Public Utility Commission, if its grants of power under the statute creating and controlling were so obscure or rather so invisible.

There are two universally accepted rules of construction by which the court must be governed in determining whether or not these provisions of the Constitution, or any one of them, may be held to confer upon the city the rate-regulating power over public utilities within the city. The first of these is that the provision or provisions of the Constitution must appear to as clearly express the power claimed to have been conferred on the city, and in language as free from ambiguity, as those provisions of the statute alleged to be in conflict with the organic law.

The second rule is that laid down by the Supreme Court of the United States in the case of *Milwaukee Ry. Co. v. Wisconsin Ry. Com.*, 238 U. S. 174, 35 Sup. Ct. 820, 59 L. Ed. 1254:

"The fixing of rates which may be charged by public service corporations, of the character here involved, is a legislative function of the state, and while the right to make contracts which shall prevent the state during a given period from exercising this important power has been recognized and approved by judicial decisions, it has been uniformly held in this court that the renunciation of a sovereign right of this character must be evidenced by terms so clear and unequivocal as to permit of no doubt as to their proper construction. This proposition has been so frequently declared by decisions of this court as to render unnecessary any reference to the many cases in which the doctrine has been affirmed. The principle involved was well stated by Mr. Justice Moody in *Home Telephone Co. v. Los Angeles*, 211 U. S. 265, 273 [29 Sup. Ct. 50, 52 (53 L. Ed. 176)]:

"The surrender, by contract, of a power of government, though in certain well-defined cases it may be made by legislative authority, is a very grave act, and the surrender itself, as well as the authority to make it, must be closely scrutinized. No other body than the supreme

legislature (in this case, the Legislature of the state) has the authority to make such a surrender, unless the authority is clearly delegated to it by the supreme legislature. The general powers of a municipality, or of any other political subdivision of the state are not sufficient. Specific authority for that purpose is required."

This language was spoken of grants by the Legislature as representative of the sovereign power of the state. If it shall apply in such case, then with what greater force should it be regarded when applied to constitutional grants of power.

It is plain that the specified class of cities were thus granted power to make or amend a charter, applicable and specifically limited to its "local and municipal matters," and the declared purpose was to grant to the municipalities, as such, the full right of self-government, "limited to local and municipal matters." The same power was granted to all other cities having a population of 2,000 or more. The people of the state could have had in mind municipal powers only, except as otherwise conferred by express grant.

Nowhere in the provisions quoted can there be found any express delegation of power to fix maximum rates to be charged by public service corporations, and by no intelligent interpretation can this language be construed to intend an implied power to do so.

Of all things to be sacredly avoided by the court is the possibility of error in a construction that may be the equal to rewriting the organic law to that extent, and thereby to unconsciously usurp the Constitution-making power of the people.

It may be noted further that in the home rule amendment, in addition to the general powers, upon which the city relies in this case, there is provided eight express grants of power. They relate, in brief, to: (a) The creation of municipal officers, terms, duties, etc.; (b) the creation of police courts, powers, duties, etc.; (c) the creation of municipal courts, etc.; (d) matters pertaining to municipal elections, etc.; (e) providing for municipal obligations, etc.; (f) providing for the consolidation and management of park and water districts; (g) providing for assessments of city property for municipal purposes, collection of such taxes, etc.; and (h) providing for the imposition and collection of fines for the violation of provisions of the city charter and ordinances.

Article 20 was enacted several years before this amendment and some of these powers had been questioned.

All of these express grants relate in a general way to local and municipal matters only, and it was clearly the purpose of the amendment to relieve such powers from doubt, and of the necessity for judicial interpretation. If such was the purpose, it is pertinent to ask why such care to specifically express and recite powers, in their nature

local and municipal, and omit entirely any express reference to a power, universally held to be general and sovereign in character, if such power was intended to be conferred. This fact alone is sufficient to create the doubt which must necessarily, under the rule of construction, control the court's action in this case.

Is it possible that any elector could have read these provisions of the purposed amendment, which are quoted here, and have concluded that it was the intent and purpose of it to confer upon these cities the exclusive power to fix compulsory rates to be charged by public service corporations, a municipal grant then certainly uncommon, if not unprecedented in any state in the Union?

7. It is urged that prior to the adoption of the home rule amendment there was inserted in the charter the following:

"All power to regulate the charges for service by public utility corporations is hereby reserved to the people, to be exercised by them in the manner herein provided for the initiation of an ordinance."

It is then argued that by the ratification provision, as to the four cities named therein, this charter provision became an express constitutional grant of power to the city to regulate such charges. But there is an express limitation upon the provisions of the charter so ratified, and they were strictly confined to "provisions not in conflict with this article." But if article 20 and the amendment thereto contained no express power to regulate charges for service by public utility corporations, then the provision of the charter relied on was in conflict with article 20, and for such reason void under the very terms of the amendment.

The ratification provision in the amendment expressly extended to such provisions of the charter only as were not in conflict with the original article 20, and hence in plain terms did not ratify such attempted reservation of power. That the city was without power to prescribe compulsory rates to be charged by public utilities, under article 20 before the amendment, and that therefore the declaration to that effect found in the charter, before the amendment, was in conflict with such article, and for such reason is void, is the crux of this controversy, and we believe our conclusion finds confident and irresistible support in the authorities to follow: If it was void, it could not be, and by the terms of the amendment itself was not ratified.

Municipalities have no express or implied powers, excepting only such as may be conferred by sovereignty. It would be a strange anomaly to say that a municipality can reserve to itself a power resting exclusively in sovereignty. Certainly it cannot be said that a municipality has inherent power. If so, then it is sovereign, and constitutes a govern-

ment within a government, an imperium in imperio. The ratification of the provisions of the charter and valid ordinances, not in conflict with the article, did not make them a part of the Constitution. It is true, this ratification being constitutional in character, such provisions as are valid are immune from legislative act, but they were still only valid provisions of a municipal charter, always subject to amendment or repeal by the people of the city.

If we suppose that the charter had contained a provision declaring all power to regulate the liquor traffic "is hereby reserved to the people to be exercised by them in the manner herein provided, for the initiation of an ordinance," and, so far as the people who voted upon the amendment knew, there may have been such a provision, what would be said of the validity of the then state wide anti-saloon law? It would have been the exercise of the same general and sovereign police power as in the case of the regulation of public utilities.

Could it have been said that such a provision was ratified by the amendment to article 20. And there is to be found in article 20 and the amendment no more explicit grant of power to regulate public utilities than to regulate the liquor traffic.

The illustration demonstrates the wisdom, necessity, and purpose of the limitation contained in the amendment, "not in conflict with this article." The people could know the provisions of the amendment. They could have no knowledge of the charter provisions, nor the ordinances under it.

The constitutional amendment can be said to have done no more than to validate such charter provisions as were clearly within the lawful powers of the municipality. It was plainly not intended to confer a new or different power, not theretofore expressly conferred, or necessarily implied by article 20; for, as said in the Sours Case, 31 Colo. 369, 74 Pac. 167, 102 Am. St. Rep. 34:

"Even by constitutional amendment, the people cannot set apart any portion of the state in such manner that that portion of the state shall be freed from the Constitution, or delegate the making of constitutional amendments concerning it to a charter convention, or give to such charter convention the power to prescribe the jurisdiction and duties of public officers with respect to state government as distinguished from municipal, or city, government."

8. The power to regulate and control all public utilities of the state by means of a commission for that purpose is not entirely new or untried. So far as we are able to discover, all such statutes include, within such exercise of authority, the regulation of public utilities within the cities of the state, whether the municipal powers rest upon constitutional or statutory grant.

These laws may now be said to be general, and to constitute a definite policy for the

regulation and control of all public utilities. They include, among the acts of regulation, the issuance of stocks and bonds, the question of necessity for construction or extension, and many other matters and things not contemplated by the earlier regulation statutes which were confined to railroads alone. Indeed, it may be said that the regulation of these public utilities operating chiefly in large centers of population is the paramount purpose. The enactment of similar statutes has followed in most of the states of the Union, and the state's general power to regulate all the public utilities, without distinction as to municipalities, has been asserted and exercised under all such statutes.

So far as we are advised, this power has never been questioned in most of the states by the cities, whether operating under constitutionally conferred charter power or otherwise. But the question has been raised in some of the states of the Union, and, in so far as we are advised, in all cases, determined adversely to the contention of the city in this case.

We will now proceed to cite and briefly consider some of these cases. The recently decided case of Cleveland Tel. Co. v. City of Cleveland, by the Supreme Court of Ohio, 98 Ohio St. 358, 121 N. E. 701, as in this case, involved only the question of jurisdiction to fix maximum rates for the telephone company within the city of Cleveland, as between the city and the Public Utilities Commission of the state.

The city enacted an ordinance fixing the maximum rates and brought the action to enjoin the commission from enforcing other and different rates fixed by that body. The city claimed under a constitutional provision granting home rule as here, and it was held that the public utilities statute creating the commission and conferring authority upon it to regulate public utilities, and to fix the rates that such utilities may charge for commodity furnished or service rendered, gave exclusive powers to the commission.

It was contended in that case, as in this, that the authority conferred by the Constitution upon municipalities to exercise all powers of local self-government, necessarily included, as an incident thereto, police power in the broader sense of that term, and authorized the fixing of rates that may be charged by public utilities within the city.

It appears that, under the home rule amendment to the Constitution of Ohio, municipalities were given quite as broad and general powers for self-government as are to be found in the Constitution of this state. It was said in that case:

"The exercise of local police power is of vital importance to large centers of population. If police powers may be divided along the lines suggested, it is of far more importance to municipalities that they should have authority to exercise local police power untrammelled by the

general laws of the state, than that they should have absolute right to exercise the police powers included in the broader definition suggested by counsel. Yet section 3, art. 18, of the Constitution, does limit and restrict municipalities to the exercise of local police power in conformity with the general laws of the state.

"* * * If [municipalities] were independent sovereignties, there might be some force in the contention that they possess inherent police powers incident to sovereignty, especially if the Constitution imposed no limitations upon the exercise of that power, but even the most ardent supporters of independent sovereignty in the constitutional convention were obliged to abandon that idea. 2 Constitutional Debates, p. 1456, column 2. That question, however, is fully settled in the case of *Billings v. Cleveland Ry. Co.*, 92 Ohio St. 478, 485, 111 N. E. 155, 157, in this language:

"There is no imperium in imperio, except in the sense that by the approval of the state the city exercises part of the sovereign power under the limitations imposed."

"While in this state, in order to meet the needs of urban districts, local police powers have uniformly been delegated to local authorities to be exercised in conformity with general laws, nevertheless, police power is an attribute of sovereignty, and the exercise of that power largely in the discretion of the sovereign state. * * *

"It is hardly within the range of possibility, much less probability, that the people of this state intended to vest in the many municipalities of Ohio discretion to exercise unlimited and unrestricted police power."

In the case of *Traverse City v. Railroad Com.*, 202 Mich. 575, 168 N. W. 481, the precise question of jurisdiction as between the state commission and the constitutionally chartered city likewise involved the regulation of rates to be charged by a telephone company.

The authorities were quite generally reviewed, and the court said:

"Neither the Railroad Commission nor the municipality had any rate-making power, except that which the Legislature might delegate to them to exercise as state agencies. There is no doubt that it is competent for the Legislature to delegate its control over and power to regulate charges of common carriers operating within the state to a board or commission created for that purpose and within the range of legitimate municipal purposes to municipalities, but when such power is delegated to a municipal corporation by its charter it must be done in express terms. *Jacksonville v. Bell Tel. Co.*, 57 Fla. 374, 49 South. 509; *St. Louis v. Bell Tel. Co.*, 96 Mo. 623, 10 S. W. 197, 2 L. R. A. 278, 9 Am. St. Rep. 370. No power is given *Traverse City* by its charter in express terms to fix rates to be charged by telephone companies operating within its borders, nor is such authority inferable from the conferred power to regulate and control the use of its streets by telegraph, telephone, and other companies referred to."

The case of *City of Portland v. Public Service Com.*, 89 Or. 325, 173 Pac. 1178, has

peculiar likeness to the case at bar, and is determined upon the question of jurisdiction alone.

The constitutional power in that case granted to municipalities in the matter of their charters and ordinances was limited to "local, special and municipal" legislation, while in the Colorado Constitution this power is limited to "matters local and municipal," omitting the word "special." So that in effect the power granted in this respect is the same; that is to say, the power extends, in the absence of an express grant, to matters municipal only.

In that case the court said:

"That the regulation of rates is a prerogative of the state as to carriers operating wholly within its borders is taught in *Simpson v. Shepard*, 230 U. S. 352, 33 Sup. Ct. 729, 57 L. Ed. 1511, 48 L. R. A. (N. S.) 1151, Ann. Cas. 1916A, 18. * * *

"The case of the plaintiff is not aided by the subsequent amendments to the charter, whereby the effort was to invest the municipality with substantially all the authority over public utilities operating within the city that was conferred upon the commission.

"There are two reasons for this. One is that, although the city by these changes in its organic law asserted the right to regulate rates, it has not exercised the right. Another is that the scope of the initiative and referendum power vested in the legal voters of municipalities is confined to 'local, special and municipal legislation.' Article 4, § 1a, State Constitution. This section explains and limits the language of section 2 of article 11 of the same instrument, authorizing the legal voters of cities and towns 'to enact and amend their municipal charter, subject to the Constitution and criminal laws of the state of Oregon,' with the result that the city is debarred from assuming on its own initiative a power which is peculiarly a prerogative of the state itself. Regulation of rates is such a power. It affects the general public, and not merely the inhabitants of any single city, and never could have been exercised by the plaintiff, unless delegated to it by the state. The constitutional provisions for 'local, special and municipal legislation' by the initiative were never intended as permission to cities and towns to arrogate to themselves powers otherwise primarily resident in the state. All authority whatever possessed by cities and towns emanated from the state. They cannot further invade its original sovereign prerogative, unless the attempt is referable to 'local, special and municipal legislation.' The state, operating through its legislative assembly, or directly by its people, exercising the initiative, is still paramount in the matter of making laws. It can delegate authority to its subordinate governmental agencies, and it can revoke it."

State ex rel. v. Telephone Co., 189 Mo. 83, 88 S. W. 41, involved the precise question now under consideration. In that case the city was operating under specific constitutional authority to frame its own charter as follows:

"Any city having a population of more than one hundred thousand inhabitants may form a charter for its own government, consistent with and subject to the Constitution and laws of this state."

The charter framed under this constitutional provision and certain additional statutory provisions contained a provision in substance as follows:

"The city shall have power by ordinance: * * * To regulate the prices to be charged by telephone, telegraph, gas and electric light companies, and to compel them and all persons and corporations using, controlling or managing electric wires for any purpose whatever to put and keep their wires under ground and to regulate the manner of doing the same."

The court held that this ordinance, in so far as it related to the compulsory maximum rate-making power, was void as against the asserted power of the state in that respect. It was there said:

"A charter framed under that clause of the Constitution within the limits therein contemplated has the force and effect equal to one granted by an act of the Legislature.

"But it is not every power that may be essayed to be conferred on the city by such a charter that is of the same force and effect as if it were conferred by an act of the General Assembly, because the Constitution does not confer on the city the right, in framing its charter, to assume all the powers that the state may exercise within the city limits, but only powers incident to its municipality, yet the Legislature may, if it should see fit, confer on the city powers not necessary or incident to the city government. There are governmental powers the just exercise of which is essential to the happiness and well-being of the people of a particular city, yet which are not of a character essentially appertaining to the city government. Such powers the state may reserve to be exercised by itself, or it may delegate them to the city, but until so delegated they are reserved. The words in the Constitution, 'may frame a charter for its own government,' mean may frame a charter for the government of itself as a city, including all that is necessary or incident to the government of the municipality, but not all the power that the state has for the protection of the rights and regulation of the duties of the inhabitants in the city, as between themselves. Nor does the Constitution confer unlimited power on the city to regulate by its charter all matters that are strictly local, for there are many matters local to the city, requiring governmental regulation, which are foreign to the scope of municipal government."

Mr. Justice Marshall, in a specially concurring opinion in that case, declared:

"I am thoroughly persuaded that it never was within the contemplation of the framers of our system of government, or of our Constitution, that any city, whether organized under the general laws of this state, or under the provisions of the Constitution which allow cities to frame their own charter, to confer upon cities anything more than a police power, and a strictly municipal power. And that the power to enact

all laws of civil conduct, and to prescribe all civil remedies among citizens, in short, to enact laws as distinguished from municipal regulations, is expressly reserved to the Legislature of this state, and cannot be delegated by it."

Perhaps the most exhaustive and convincing opinion of any of those dealing with the subject now under consideration, is that of *City of Woodburn v. Public Service Com.*, 82 Or. 114, 161 Pac. 391, L. R. A. 1917C, 98, Ann. Cas. 1917E, 996. The city of Woodburn was operating under a home rule provision of the Constitution of the state of Oregon, which conferred the power upon municipalities:

"To grant franchises in, through and upon the streets of the city for public uses and public benefits;" and "to regulate and control or prohibit the placing of poles for electric lights or other purposes, and the suspension of electric and other wires along on cross-streets of said city, and to require any or all already placed or suspended, either in limited districts or throughout the entire city, to be removed, or to be placed in such manner as it may designate beneath the surface of the streets or sidewalks."

The city granted a franchise to the telephone company, one section of which fixed the maximum rates to be charged for telephone service. Upon application and hearing, the Public Service Commission fixed a schedule of rates higher than that fixed by the franchise. The Public Service Act was passed after the franchise was granted and thus arose the question of jurisdiction as between the city and the state.

The Constitution of Oregon also denied the right of the Legislature to amend or repeal any city charter in the following language:

"Corporations may be formed under general laws, but shall not be created by the legislative assembly by special laws. The legislative assembly shall not enact, amend, or repeal any charter or act of incorporation for any municipality, city, or town. The legal voters of every city and town are hereby granted power to enact and amend their municipal charter, subject to the Constitution and criminal laws of the state of Oregon."

It was said:

"While the Constitution grants to a city the right to enact and amend its charter and simultaneously prohibits the legislative assembly from enacting, amending, or repealing any charter for any city, nevertheless, neither the grant nor the prohibition includes any subjects except those 'that are purely local and municipal in character' (*Kalich v. Knapp*, 73 Or. 558, 142 Pac. 594, 145 Pac. 22, Ann. Cas. 1916E, 1051), or, as is stated in *Branch v. Albee*, 71 Or. 188, 205, 142 Pac. 598, the authority of the cities is not extended 'over subjects that are not properly municipal and germane to the purposes for which municipal corporations are formed.' We use the word 'municipal' as signifying what belongs to a city.

"In *Coleman v. La Grande*, 73 Or. 521, 525, 144 Pac. 463, 470, this court ruled that—

"By granting and reserving to the people of municipalities the power to enact and amend their charters and adopt local or special laws, the state has not surrendered her sovereignty to the municipalities. Within their boundaries cities are clothed with power to regulate matters purely local. However, a city is not constituted as a sovereignty as regards all matters of legislation, but is still to a certain extent a mere agency of the state of which it is a part. Beyond such municipal boundaries and in matters of general concern not pertaining solely to local municipal affairs, cities are amenable to the general laws of the state, which do not infringe upon the right of cities to local self-government. This is so whether such laws are enacted by the Legislature or by the people of the state at large."

"The right to regulate rates is a matter of general concern, and does not pertain solely to local municipal affairs. *Portland Ry., Light & Power Co. v. City of Portland* (D. C.) 210 Fed. 667."

It was further said:

"The state guards its right to regulate rates so vigilantly that specific authority is necessary to compel a surrender of this element of sovereignty, and in the language of the Supreme Court of the United States:

"The general powers of a municipality or of any other political subdivision of the state are not sufficient." *Home Telephone Co. v. Los Angeles*, 211 U. S. 265, 53 L. Ed. 176, 29 Sup. Ct. 50; *Milwaukee Elec. Ry. v. Wisconsin R. R. Co.*, 238 U. S. 174, 59 L. Ed. 1254, 35 Sup. Ct. 820.

"The power to regulate rates does not appertain to the government of a city; it is not municipal in character, nor is it even an incident to a grant of authority to enact or amend a charter for a city or town. *State ex rel. Webster v. Superior Court*, 67 Wash. 37, 120 Pac. 861, Ann. Cas. 1913D, 78, L. R. A. 1915C, 287."

It will be noted that the Constitution in that state uses the term "local and municipal," the precise limitation placed upon the powers and municipalities found in our own Constitution.

No case has been cited in the briefs, and we have no knowledge of any decision by a court of last resort, state or federal, expressing a contrary view to that of the cases here reviewed and cited.

To the same effect and of the same import as the foregoing cases may be cited: *Milwaukee Elec. Co. v. R. R. Co.*, 238 U. S. 174, 35 Sup. Ct. 820, 59 L. Ed. 1254; *Freeport Water Co. v. Freeport*, 180 U. S. 587, 21 Sup. Ct. 493, 45 L. Ed. 679; *Salt Lake City v. Utah Light & Traction Co.* (Utah) 173 Pac. 556; *Idaho Power & Light Co. v. Bloomquist*, 26 Idaho, 222, 141 Pac. 1083, Ann. Cas. 1916E, 282; *Light & Power Co. v. Portland* (D. C.) 210 Fed. 672; *Benwood v. Public Service Com.*, 75 W. Va. 127, 83 S. E. 295, L. R. A. 1915C, 261; *Webster v. Superior Court*, 67 Wash. 37, 120 Pac. 861, L. R. A. 1915C, 287, Ann. Cas. 1913D, 78;

Wolverton v. Telephone Co., 58 Colo. 58, 142 Pac. 165, Ann. Cas. 1916C, 776; *City of St. Louis v. Public Service Com.* (Mo.) 207 S. W. 799; *Public Service Com. v. City of Helena*, 52 Mont. 527, 159 Pac. 24; *Yuma Gas, Light & Water Co. v. City of Yuma* (Ariz.) 178 Pac. 26.

9. Counsel strenuously contend that the cases here cited are not authority in this case by reason of alleged distinction between the language of our Constitution and the wording of constitutional limitation of charter powers in those states. It is said that in some of these states the words are, "not in conflict with the Constitution and laws of this state." In others, "not in conflict with the Constitution and criminal laws of this state." While in the Colorado Constitution the limitation is as to "local and municipal matters."

This is a distinction without a difference. These limitations all have the same meaning in effect, and that is to limit the powers under the charter to matters municipal in character as distinguished from general or sovereign powers.

In none of the decisions we have reviewed, nor in any of the cases cited therein, is there any intimation that rate and service regulations of public utilities are matters of local or municipal concern. But, on the contrary, it is stated in all of them that this power is governmental, and is vested in the state in its sovereign capacity, which completely negatives the idea that it is merely local.

These authorities are in harmony with the true spirit of the "home rule" provision of the Colorado Constitution. The clear intention of the amendment undoubtedly was to confer upon the cities, coming within the class created by the amendment, the power and authority to exercise complete control over their local and municipal matters. This has been the universal conclusion reached in substance and in fact by the Colorado decisions.

10. Counsel for the city seem to regard the word "local" as having some peculiar significance, and in some manner enlarging upon the word "municipal." Why or how is not clear from the argument. If the word "local" can have any different meaning from the word "municipal" in this respect, it is to restrict rather than to enlarge, for it can mean no more than that the power is local to the municipality as distinguished from general, as applied to the state.

But, in a number of cases before this court construing article 20 and the amendment thereto, this contention has been expressly and uniformly repudiated.

Therefore to say that the charter powers of the city under the Constitution extends beyond its municipal affairs, except where otherwise expressly provided, is to overrule a line of cases of this court with express declarations to the contrary, and we are not re-

quired to rely upon the decisions from other courts for authority.

In the case of *People v. Sours*, 31 Colo. 369, 74 Pac. 167, 102 Am. St. Rep. 34, the contention was that article 20 was invalid for the reason that it was a grant of powers other than municipal in their nature; that is to say, it was a grant of powers general and sovereign in character and therefore in conflict with the federal Constitution. This is the precise contention of the city in the case at bar. The answer of the court to that contention, speaking through Mr. Justice Steele, was:

"If this amendment must be given that construction, it cannot be sustained. Even by constitutional amendment, the people cannot set apart any portion of the state in such manner that that portion of the state shall be freed from the Constitution, or delegate the making of constitutional amendments concerning it to a charter convention, or give to such charter convention the power to prescribe the jurisdiction and duties of public officers with respect to state government as distinguished from municipal, or city, government. * * * Under the Constitution of the United States, the state government must be preserved throughout the entire state; and it can be so preserved only by having within every political subdivision of the state, such officers as may be necessary to perform the duties assumed by the state government, under the general laws as they now exist or as they may hereafter exist.

"This distinction between the governmental duties of public officers and their municipal duties is fundamental, and therefore is not avoided or affected by the consolidation."

Finally, construing the purpose of the amendment, in its authorization to the city to adopt a charter and enact ordinances, as being limited to matters of local and municipal concern only, the court said:

"The amendment is to be considered as a whole, in view of its expressed purpose of securing to the people of Denver absolute freedom from legislative interference in matters of local concern; and, so considered and interpreted, we find nothing in it subversive of the state government, or repugnant to the Constitution of the United States."

This doctrine has in no sense been modified or abridged, but has been repeatedly affirmed.

The precise claim to sovereign and general police power upon the part of the city was made in the case of *Keefe v. People*, 37 Colo. 317, 87 Pac. 791, 8 L. R. A. (N. S.) 131, as here. It was there contended that the state statute providing for an eight-hour law was not applicable to the city and county of Denver, because such power of regulation had been conferred upon the city by article 20. Speaking through Mr. Chief Justice Gabbert, it was held:

"But the municipality of Denver, though created by a constitutional amendment by a direct vote of the people, and having the power to frame its own charter, is just as much an

agency of the state for the purpose of government as if it was organized under a general law passed by the general assembly. The mode of its creation does not change the nature of its relation to the state. Like cities and towns organized under the general statutes, it is still a part of the state government. It is as much amenable to state control in all matters of a public, as distinguished from matters of a local, character, as are other municipalities. The state still has the supreme power to enact general laws declaring what shall be its public policy, and it can make them applicable to the city of Denver, as well as to all other cities of the state. This act, in effect, declares that it is the public policy of the state not to permit any officer or agent of the state, or its municipalities, or any contractor thereof, to employ any working man in the prosecution of public work for more than eight hours a day, and for a violation of the statute a penalty is provided. What the public policy of the state is rests with its legislative department. The work of building a sanitary sewer by a city, in a sense, is local, in that it affects, primarily, its own citizens; but it is directly connected with the public health, and is a matter of concern and great importance to the people of the entire state."

In the case of *Speer v. People*, 52 Colo. 325, 122 Pac. 768, speaking through Mr. Justice Musser, the court said:

"Section 5 of article 120 of the Constitution expressly provides that 'the citizens of the city and county of Denver shall have the exclusive power to amend their charter or to adopt a new charter, or to adopt any measure as herein provided.' The citizens of this municipality, so far as concerns their local municipal matters, have all the powers of a Legislature with respect to their charter. *Denver v. Hallett*, 34 Colo. 393 [83 Pac. 1066]; *Londoner v. City and County of Denver* [52 Colo. 15] 119 Pac. 156."

In the case of *Hilts v. Markey*, 52 Colo. 382, 122 Pac. 394, the city, under a like claim to the exercise of general and state police power as here, attempted to avoid a levy of tax under the state law, by reason of its powers under article 20. Speaking through Mr. Justice Bailey, the court quoted and approved the following from the *Cassiday* case:

"As matters now stand, there is nothing whatever in article 20 which gives to the people of the city and county of Denver power to legislate upon anything whatever, concerning matters solely of state and county governmental import, except merely the designation of certain agents to perform therein the acts and duties incident thereto."

"These excerpts from our own decisions serve to conclusively show that the people of the city and county of Denver have no power whatever to legislate in the slightest degree upon any matter solely affecting state and county affairs. Such has been the construction given article 20, and none other was possible if the article was to stand."

And further, after quoting from the *Sours* Case, the court said:

"It was this original construction of the purpose and intent of article 20, to the effect that the people of the city and county of Denver had power to legislate upon and regulate matters of local concern only, that made it possible for the court to uphold and validate it, and this construction has ever since been rigidly and vigilantly upheld and maintained."

It was said by the court in *People v. Prevost*, 55 Colo. 199, 134 Pac. 129, speaking through Mr. Chief Justice Musser, and considering article 20 and the home rule amendment:

"It has been determined again and again that the subject-matter of article 20 was home rule, or the right of self-government by Denver and other municipalities in the state relating to local and municipal matters. Section 6 of the article, as it stood before the home rule amendment, gave to cities of the first and second class in this state the power to adopt charters and to govern themselves in relation to their local and municipal matters."

In the case of *Mauff v. People*, 52 Colo. 562, 123 Pac. 101, speaking through Mr. Justice Bailey, it was said:

"The distinction between the subject-matter of this suit and the matters involved in *Denver v. Hallett*, 34 Colo. 393 [83 Pac. 1066], and *Londoner v. City* [52 Colo. 15] 119 Pac. 156, is that in the latter cases purely local matters were under consideration, while here the matter involved is one of public and general interest. That the people of the city and county of Denver cannot legislate through their charter upon the latter subject is settled by all of our decisions."

And again:

"Where the Constitution and general laws of the state have not been, either by direct provision or necessary implication, set aside, they are as much in force in the city and county of Denver as they are in other portions of the state. The purpose of article 20 was to give to the people of the city and county of Denver exclusive control in matters of local concern only. * * * If by article 20 it had been undertaken to free the people of the city and county of Denver from the state Constitution, from statute law, and from the authority of the General Assembly, respecting matters other than those purely of local concern, that article could not have been upheld."

And further:

"The contention is that the exclusive power having been given to the citizens of the city and county of Denver, by article 20, to amend their charter, or to adopt a new charter, or to adopt any measure as therein provided, the power is with the people to provide for the conduct and control of elections as they may see fit. By every decision of this court, from the *Sours Case*, supra, down to and including the case of *Hilts et al. v. Markey et al.*, decided February 21, 1912, which is the last expression upon this subject, it has been held that this power extends to nothing except matters of local concern."

It is contended that the *Hallett Case*, 34 Colo. 399, 83 Pac. 1068, tends to support the contention of the city here, in the holding that it was the intention of article 20 to confer upon the "people of Denver every power possessed by the Legislature in the making of a charter for Denver." This falls far short of a decision that the people of the state, when they adopted the amendment, invested Denver, or intended to invest it, with police powers which essentially belong to the people of the whole state.

The learned judge in that case could have had only in mind the question of the grant of municipal powers only by the Legislature.

The sole contention was that the building of an auditorium was not a municipal function within the meaning of article 20. It was not suggested that the building of an auditorium for the city of Denver was a state function, or that the whole people of the state could have any possible interest in it. It was simply concluded that the city might construct an auditorium for the convenience, comfort, and pleasure of the people of the city, as it is well recognized it may do in case of public parks and boulevards; in other words, that it was a municipal purpose.

This court has heretofore recognized that there might be provisions in the Denver charter in conflict with the constitutional amendment when it said:

"It may be that the people of the city and county of Denver have, in some particulars, by their charter provisions, exceeded the grant of power given them, and, if so, those matters are for correction in proper proceedings to that end." *People v. Cassidy*, 50 Colo. 503, 117 Pac. 357.

11. It is important in this connection to consider the effect and importance of the provision contained in the amendment to article 20, providing for the application of general laws within the cities operating thereunder. The provision is as follows:

"The statutes of the state of Colorado, so far as applicable, shall continue to apply to such cities and towns, except in so far as superseded by the charters of such cities and towns or by ordinance passed pursuant to such charters."

This language can have but one meaning, fixed and definite—that all statutes of a general nature shall have application within municipalities. It is the precise converse of the language of the grant to municipalities—of powers limited to local and municipal matters.

There is perfect harmony between the language of the grant and the language of the reservation of power. The sum of the two equals the total of the state's inherent power, in this respect.

If we are accurate in our observation, no other constitutional grant of municipal charter powers contains a similar, or any express,

reservation; hence in this instance the language of the reservation must be considered in an interpretation of the grant. It would seem to be consonant with the spirit and purpose of article 20, which purpose we have so often declared was to give to such cities all powers of local and municipal concern only, to assume that all laws general in their character were intended to be included within the reservation above quoted.

If, however, it be contended that some general laws were to be included and others not, then how may we differentiate between a statute plainly of a general character, and regulating public utilities, and one of the same character, otherwise involving the public peace, the public health, the public safety, or the public welfare generally.

In considering the many laws of this nature, can it be said that, because some of the people of the state are domiciled in cities, they are in any case freed from the common duties and obligations of citizens to the state, or that they are to be denied the equal protection of the laws.

By what rule is the court to determine which of these laws, of the character we are considering, are to be included in, or excluded from, this provision of the article, making state statutes universally applicable? Will we not in all such controversies be compelled by necessity to rely upon the rule that, if the exercise of a general police power of the state has been conferred upon municipalities, it must so appear by specific and unmistakable declaration of the intent to do so, to be found in the grant itself?

12. There is another all-compelling reason why the contention of the city cannot be sustained. It is insisted that, by the mere use of the term "local and municipal," it was intended the inherent police power of the state claimed, now rests within the municipality, and therefore the court should so construe it.

It is provided by section 8 of the Constitution, article 15, that—

"The right of eminent domain shall never be abridged, nor so construed as to prevent the General Assembly from taking the property and franchises of incorporated companies and subjecting them to public use, the same as the property of individuals; and the police power of the state shall never be abridged or so construed as to permit corporations to conduct their business in such manner as to infringe the equal rights of individuals or the general well-being of the state."

It cannot be said that this provision was repealed or in any wise affected by article 20 including the amendment to section 6 thereof. It is a bulwark too sacred to our liberties to permit of such a contention.

"The police power of the state shall never be abridged." This seems in itself imperative and controlling, but the framers of the instrument were vigilant and they added "or

so construed." Hence, both the Legislature and the courts were expressly prohibited from invading this reserved power, either by legislative act or by judicial construction.

The contention that each city operating under the amendment may regulate public utilities operating within its borders must apply to all alike. It follows that, if it applies to telephones, it likewise applies to railroads. In case of these utilities one company may operate in all municipalities and throughout the state.

It also follows that the one utility may be regulated by as many powers as there are cities of the specified class within the state, and by the commission as to all territory outside the cities. Each city may fix a different rate; the commission may fix a different rate from either city, for the same utility and for like service.

Can it be denied that such a scheme would not infringe the equal rights of citizens of the state, or the well-being of the state. It would not only permit the corporations to do this, but would compel them to do so, regardless of the necessary discrimination between citizens of the state as to rates to be charged and regulations to be observed. It would require the deficiency of income from one city to be supplied by overcharge in other cities, or by the body of the state, outside the cities; for the Constitution, as construed by the courts, guarantees the reasonable expense of operation, and a reasonable return on the investment in public utilities in the matter of fixing the rates to be charged. The logical result of such a plan is confusion, chaos, and injustice.

Construing a like provision of the Constitution, it was said by the Supreme Court of the state of Missouri:

By the language of section 8, art. 15, "the Legislature would be powerless to enact a valid law by the terms of which the right of the state in the exercise of its sovereign police power in the fixing of reasonable rates for public services could be limited or abridged." *State ex rel. City of Sedalia v. Public Service Com.*, 275 Mo. 201, 204 S. W. 497.

But while the Legislature is thus powerless, it is not powerless to enact a valid general and uniform law asserting the police power of the state, in the particulars just mentioned, since there is no prohibition against this in the Constitution. *Mauif v. People*, supra.

To adopt the contention of the city in this case would be to decide that the people of the state at large, by inference merely, there being no express grant, have abdicated every inherent police power of the state and surrendered it to home rule cities. It would not only be the announcement of a principle universally repudiated by all courts, but one, the tendency of which would be to destroy our whole scheme of constitutional government.

My view of the matter is that the people of the state have given to home rule cities the right of local self-government, with all the incidental powers, including full control and supervision of their local and municipal matters, but that, the regulation of public utilities not being a local or municipal matter, that power has been reserved by the state, and has been conferred exclusively upon the Public Utilities Commission.

In sum and in substance, the question here is: There is no language in article 20, nor in the amendment thereto, that expresses the intent upon the part of the state to grant the compulsory rate-making power of the state to the cities involved. We are asked to write such a grant of power into the Constitution by construction; that is to say, we must interpret the term, "local and municipal powers," to include and intend, "sovereign and general powers," as well. This I cannot do.

13. I recapitulate the points of law applicable to this case, each one abundantly supported by an undivided judicial opinion in this country, as follows: (1) The Public Utilities Act does, and was intended to, confer exclusive jurisdiction upon the Utilities Commission for the regulation of all public utilities in this state including those operating in all cities. (2) In order to sustain the contention of the city, we must hold the act void, in so far as it applies to all cities operating under article 20 of the Constitution. (3) In order to do this, we must find the act to be in conflict with that provision of that article of the Constitution beyond a reasonable doubt. (4) The universal rule of law is that practical contemporaneous construction by the legislative branch of the government is to be given great weight in our consideration of the question involved. (5) It is a rule of law affirmed by all courts that the power of compulsory rate regulation is a sovereign and general police power, inherent in sovereignty, as distinguished from municipal powers resting solely on the express grant of sovereignty. (6) It is a rule of law, affirmed by universal judicial opinion covering the whole period of government, that this sovereign power cannot be conferred except by language clear and unmistakable, and that such a grant of power, either to a municipality or otherwise, may never be inferred. (7) Repeated decisions of this court have declared in unmistakable language that the powers conferred by article 20 were limited to those of municipal concern only. (8) That therefore, by the express terms of article 20, and by the force of such decisions, any power assumed under the charter of the city, sovereign or general in its nature, as distinguished from a power local or municipal in character, is void as being in conflict with the grant, and for such reason was not and could not be ratified. (9) That the contention of the city is repugnant to a cardinal principle

in constitutional government, in that its effect is to deny a republican form of government.

We know of no respectable judicial authority, state or federal, considering the precise question, which expresses a contrary view to any one of the foregoing principles of the law.

14. The issue here involves a great public question. It is solely between the people of the state on the one hand, and the people of the city on the other. No particular public utility is involved. No question of merit affecting the rights or interests of any one public utility is to be or can be determined in this proceeding. The city has elected to renounce its right of review, by the Supreme Court, of the merits of the cause, decided by the commission in the case of the utility, wherein and out of which this certified question arose, by declining to appeal from the decision against it.

No great public question should be permitted by the court to remain obscure in the public mind.

It is a law enacted by the constitutional lawmaking power of the state we are considering. It is the public alone, both of the city and state, whose vital interests are directly affected, and this public has a right to understand the policy and principle of the law in question, in order that they may the better understand the construction which the court must place upon it.

Public utility regulation was the conception of the public mind. Its purpose was to curb, and, if possible, prevent injustice in the matter of public service, rendered by private interests, always loath to recognize the moral and legal rights of the community in such matters. All public regulation is therefore compulsory in character.

No court has yet ever held that such compulsory power rested in any subdivision of the state, except under specific grant by the state. But all courts have held, on the contrary, that such power is inherent in sovereignty.

The history of rate regulation is replete with failures to accomplish the purpose. The earlier attempts to regulate were by state statutes, and applied principally to railroads. These statutes fixed maximum rates to be charged. These were of necessity but the arbitrary declarations of the lawmaking power. They were without hearing or determination as to merit or the rights of the private or public interests involved.

Therefore such rate regulation was universally held by the courts to be subject to consideration and determination by them as to whether or not they were unreasonable or confiscatory in the particular instance. The federal courts thus assumed jurisdiction in such cases generally, and at least temporarily enjoined enforcement, in order to determine whether or not the rate so arbitrarily fixed was inhibited by that provision of the federal

Constitution which provides that no person shall be deprived of his life, liberty, or property, without due process of law.

This practice became substantially universal, and the advocates of public regulation despaired of the accomplishment of their purpose. Finally, there was evolved the plan, incorporated into the Texas railroad law, the Interstate Commerce Commission Law, and into all railroad and public utility laws. This was by the creation of a commission, with delegated legislative powers to establish rates to be charged, and other regulations to be observed by public utilities, upon full hearing of the facts in each case, and under the law controlling, with right of review by either party to the courts of last resort, either state or federal.

This seems to have overcome in a large degree the theretofore insurmountable objection to arbitrary regulation, by legislative acts.

That the sovereign state should create a duly empowered tribunal to hear and determine the merits of each controversy, and that such hearing and determination might be reviewed by the court of last resort in the state, was believed to satisfy the constitutional guaranty of due process of law. This now is the state of the Colorado law, and, whether effective or not, it seems to represent at this time the best thought of economists, public-spirited men, and legislative authority of the country on that subject. That this plan of public utility regulation has largely succeeded in the accomplishment of its purpose must be conceded. But that it has failed in many instances is equally apparent.

In the administration of this character of law, as in case of any other law, the Greek maxim, that no law is better or more efficient than those chosen to administer it, finds ample exemplification. It largely depends on the personnel of commissions, and of courts who administer and construe it, as to the degree of right and justice which is to obtain.

But if the contention of the city could be sustained under the law, and if the city by ordinance enacted by the city council, or by direct vote of the people, was to fix an arbitrary rate to be charged for service by any public utility, then clearly it would be subject to be enjoined in the federal courts, and the question of its reasonableness, or whether or not it is confiscatory, determined and finally, determined, by such courts.

It will thus appear that to sustain the contention of the city, even though the law so permitted, would be, as a matter of public policy, a step backward in the progress of rate regulation for 30 years.

This is illustrated by the case of *Denver Union Water Co. v. City and County of Denver*, U. S. Supreme Court, 246 U. S. 178, 38 Sup. Ct. 278, 62 L. Ed. 649, where, as late as 1915, the city adopted an ordinance fixing the rates to be charged by the water company,

and which rates were held to be unreasonable and confiscatory, and were accordingly perpetually enjoined. Can the city expect any other procedure in any other attempted regulation by the enactment of an ordinance? And this was a case in which the franchise of the company had expired.

Can it be said that the people of the state, including the cities, without some sort of expression, either in the Constitution or statutes, to that effect, intended or desired to return to that hopeless and helpless state in this regard. If so, it is within their power to write such an intent in plain language into their organic law. It is not within the province of a court to so write it for them.

GARRIGUES, C. J., and BAILEY, J., concur in the dissenting opinion.

On Application for Rehearing.

BAILEY, J. While fully concurring in the dissenting opinion of Mr. Justice SCOTT, there are additional reasons why I cannot agree to the opinions of the majority, and why a rehearing should be allowed.

It has been urged by the respondents, especially by the Telephone Company, that section 280 of the Charter of the City and County of Denver is invalid because in conflict with the due process and equal protection clause of the Fourteenth Amendment to the Constitution of the United States, and that to construe Article 20 of the State Constitution as amended so as to vest in the City and County of Denver the jurisdiction to regulate the business and rates of the respondent Telephone Company, thus depriving the Utilities Commission of that jurisdiction, is to bring the Article in question into conflict with the due process clause of the Fourteenth Amendment above mentioned.

These contentions seem, for the following reasons, to be well taken:

1. Section 280 of the Charter of the City and County of Denver reads as follows:

"All power to regulate the charges for services by public utility corporations, is hereby reserved to the people, to be exercised by them in the manner herein provided for initiating an ordinance." Municipal Code 1917, City and County of Denver, p. 146.

The manner of initiating an ordinance is prescribed by section 273 of said charter, which reads:

"Any proposed ordinance may be submitted to the council by petition therefor of qualified electors equal in number to at least five per cent. of the last preceding vote for mayor, and such proposed ordinance shall be passed without alteration by the council, and if vetoed by the mayor shall be passed over his veto, within thirty days after such petition is filed, or the council shall refer such proposed ordinance to the qualified electors at the next municipal election held not less than sixty days after such petition is filed. If such petition contain a re-

quest for a special election and is signed by qualified electors equal in number to at least fifteen per cent. of the last preceding vote for mayor, the ordinance thereby proposed shall be passed by the council without amendment or change, and if vetoed by the mayor, shall be passed over his veto, within thirty days after such petition is filed, or the council shall refer such proposed ordinance to the qualified electors at a special election which shall be called within thirty days, and held not less than sixty, nor more than ninety days after such petition is filed, unless a general or special election is held within said period of time, in which case such proposed ordinance shall be submitted to a vote at such election. The council shall cause such proposed ordinance to be published in some daily newspaper of general circulation once each week until such election is held. No ordinance adopted by vote of the people shall be repealed or amended by the council. Any provision of the charter in conflict herewith is hereby repealed." Municipal Code 1917, City and County of Denver, p. 142.

It is demonstrated that the method of rate regulation thus prescribed precludes the possibility of any hearing as the basis of regulation. No presumption may be indulged in favor of the initiated ordinance relied upon by petitioner, nor in favor of any other initiated ordinance enacted in pursuance of the section of the charter, because the court judicially knows that there could have been no hearing of, or consideration given to, the facts upon which rate regulation, to be valid, must always be based. Moreover, the charter provides a method by which telephone users may apply for a change in rates, but affords no method by which the Telephone Company may make such application. These sections of the charter manifestly deny the Telephone Company due process of law and the equal protection of the law, in violation of the Fourteenth Amendment. The majority opinions, in denying the jurisdiction of the Utilities Commission to regulate the rates of the respondent company, necessarily and inevitably enforce against the Telephone Company these invalid charter amendments.

2. Article 20 as amended is so construed by the majority opinions as to parcel out the Telephone Company, a state-wide utility, and its property, among as many independent cities as there are in the State of Colorado having a population of 2,000 inhabitants, with the power in each city to regulate the business and rates of the company within its own borders, but necessarily without relation to the effect of such regulation upon the general service in other parts of the State, and of course without relation to the effect of such regulation upon the entire business or property of the company within the State.

There is no support in our State Constitution for such construction, and such construction brings the Article into direct conflict with the due-process clause of the Constitu-

tion of the United States, and the enforcement of that construction, necessitated by the majority opinions, clearly denies to the Telephone Company due process of law.

The several opinions of the majority, so far as they relate to the particular matters herein discussed, although they do not present the same line of reasoning, have precisely the same effect, because they permit the city to arbitrarily fix rates for the Telephone Company, without the possibility of a hearing, and so plainly deny to it due process of law.

From each of these opinions, therefore, I must dissent, as well for the reasons so clearly and fully discussed by Mr. Justice SCOTT, as for the additional ones hereby suggested, and likewise from the ruling of the majority in denying a rehearing in the case.

I am authorized to state that Mr. Chief Justice GARRIGUES and Mr. Justice SCOTT concur in this dissent.

(32 Idaho, 458)

WROUGHT IRON RANGE CO. v. RICH.

(Supreme Court of Idaho. Oct. 9, 1919.)

1. SALES \S 450—CONTRACT ONE OF CONDITIONAL SALE, PROPERTY REMAINING IN SELLER UNTIL DELIVERY.

Each of 66 persons ordered a range from the manufacturer, and in payment for it gave a promissory note, in which was expressed the condition that it should be void only in case of refusal to make delivery. The transactions were conditional sales, and the ranges remained the property of the manufacturer until the deliveries were made.

2. COMMERCE \S 83—PROPERTY TAXABLE AFTER DELIVERY FROM ANOTHER STATE UNDER CONDITIONAL SALE CONTRACT.

Property which has been shipped from one state into another, has reached its destination, and has been unloaded from the car preparatory to being delivered pursuant to a conditional sale contract, is no longer in interstate commerce, but is a part of the mass of taxable property within the state of its destination.

Appeal from District Court, Bingham County; F. J. Cowen, Judge.

Action by the Wrought Iron Range Company against Heber C. C. Rich to recover a tax paid under protest. Judgment for defendant, and plaintiff appeals. Affirmed.

Hansbrough & Gagon, of Blackfoot, for appellant.

Roy L. Black, Atty. Gen., Alfred F. Stone, Asst. Atty. Gen., T. A. Walters, former Atty. Gen., J. P. Pope, Asst. Atty. Gen., and Ralph W. Adair, of Blackfoot, for respondent.

MORGAN, O. J. Appellant, a corporation engaged at St. Louis, Mo., in manufacturing ranges and in selling them throughout the

country, consigned to itself at Blackfoot, in Bingham county, a carload, consisting of 66 ranges and fixtures, which were not marked in any way whereby they might be severally described or distinguished one from another. Prior to making the shipment, an agent of appellant had taken orders from residents of Bingham county for each of the ranges and had taken promissory notes in payment therefor, each of which contained the following provision:

"This note is given for one 'Home Comfort' range No. —, which — this day purchased from said Wrought Iron Range Company, to be delivered at — premises within 60 days from this date. This note to be void only upon the condition that said Wrought Iron Range Company refuses to deliver the said 'Home Comfort' range as above specified, and for no other cause whatever."

When the car arrived at Blackfoot, appellant's agent unloaded the ranges and placed them in a warehouse, where they were set up preparatory to being delivered to those who had ordered them. Before delivery, respondent, who was assessor of Bingham county, levied an assessment upon the ranges for purposes of taxation. The tax was paid by appellant under protest, and this action was commenced to recover the amount so paid. Judgment was for defendant, and the case is here on appeal.

Appellant contends the assessment was illegal and void, first, because the ranges had been sold to divers persons in Bingham county, and at the date of assessment were not its property; second, because the property assessed was at the time in transit, and that the attempt to collect the tax was and is an interference with interstate commerce, and violative of the right of Congress to regulate commerce among the states.

[1] These contentions are not well founded in fact. The sales were not absolute; they were conditional. Appellant was not bound to make deliveries of the ranges, and the notes were to be void if deliveries were not made. Neither of the purchasers had been sold a specified piece of property, but the order of each of them could be filled by the delivery of any range in the carload lot. If appellant made deliveries, as specified in the notes, the sales would be complete, and the obligations to pay would be absolute. Until that was done the sales were incomplete, the obligations were conditional, and the ranges were the property of appellant.

[2] At the time the assessment was made the interstate shipment had been completed; the goods were no longer in interstate commerce, but had become a part of the mass of taxable property within the state of Idaho. *Parks Bros. & Co. v. Nez Perce County*, 18 Idaho, 298, 89 Pac. 949, 121 Am. St. Rep. 261, 12 Ann. Cas. 1113; *Woodruff v. Parhan*, 8

Wall. 123, 19 L. Ed. 382; *Brown v. Houston*, 114 U. S. 622, 5 Sup. Ct. 1091, 29 L. Ed. 257; *American Steel & Wire Co. v. Speed*, 192 U. S. 500, 24 Sup. Ct. 365, 48 L. Ed. 538.

The judgment is affirmed. Costs are awarded to respondent.

RICE and BUDGE, JJ., concur.

(108 Wash. 367)

TATUM v. MARSH MINES CONSOLIDATED.
ED. (No. 15204.)

(Supreme Court of Washington. Oct. 1, 1919.)

1. MASTER AND SERVANT ⇨179—INJURY TO EMPLOYE NOT CAUSED BY ACT OF MASTER.

Where a blacksmith and his helper agreed as to method by which they would work together in sharpening steel, injury to blacksmith while pursuing plan agreed upon, was not caused by an "act or omission of any person in the service or employment of the master or employer, done or made in obedience to the rules and regulations or by-laws of the master" within Employers' Liability Act Idaho, § 1, subd. 3, making employer liable for injury so caused.

2. STATUTES ⇨228—FUNCTION OF "PROVISO" IS TO RESTRAIN DECLARING PART OF ACT.

The function of a "proviso" attached to a statute is a restraint upon, an exception to, or a modification of, something which appears in the declaring part of the act.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Proviso.]

3. MASTER AND SERVANT ⇨220(5) — EMPLOYE ASSUMING RISK OF INCOMPETENT HELPER.

A blacksmith who continued in his employment assumed the risk incident to the recklessness and incompetency of his helper, though he had complained to employer, where he had not made known to employer that he was unwilling to continue in the employment if helper was not removed.

4. EVIDENCE ⇨80(2)—LAW OF OTHER STATE PRESUMABLY THAT OF STATE OF FORUM.

In employee's action in Washington for injuries received in Idaho, it will be assumed, in absence of evidence as to the law of Idaho, that the law of Idaho on assumption of risk is the same as the common law in the state of Washington.

Department 1.

Appeal from Superior Court, Spokane County; R. M. Webster, Judge.

Action by R. B. Tatum against the Marsh Mines Consolidated. Judgment for plaintiff, and defendant appeals. Reversed and remanded, with instructions.

Carl Ultes, Jr., of Spokane, for appellant.
Post, Russell & Higgins, of Spokane, for respondent.

MAIN, J. This action was instituted to recover damages for personal injuries claimed to have been caused by negligence chargeable to the defendant. The cause was tried to the court and a jury and resulted in a verdict in favor of the plaintiff. At the conclusion of plaintiff's case in chief, the defendant challenged the sufficiency thereof and requested the court to enter a judgment in its favor. This motion was overruled and was repeated at the end of all of the evidence with a like result. After the verdict was rendered, the defendant moved for judgment notwithstanding the verdict and in the alternative for a new trial. The motion for judgment notwithstanding the verdict was overruled. The motion for a new trial was overruled upon the condition that the plaintiff should elect to remit from the verdict the sum of \$2,500. The election being made, judgment was entered on the verdict for the reduced amount, from which judgment the defendant appeals.

The appellant is a corporation and, at the time of the injury for which recovery is sought in this action, was operating a mine near Burke in the state of Idaho. The respondent was employed as a blacksmith in connection with the operation of the mine. The work for which the respondent was employed was done in a blacksmith shop located near the mine. A part of the work which he was required to do was that of sharpening steel. In the blacksmith shop, working with the respondent, was one John Klodt, whose duties were those of a blacksmith's helper.

The steel to be sharpened consisted of bars of from five to seven feet in length. In the blacksmith shop was a furnace in which one end of the bars of steel was placed to be heated. There was a sharpening machine in the shop also. Klodt had been employed as a blacksmith's helper prior to the employment of the respondent. When the latter was employed, he and Klodt talked over the plan or method by which they would work together in heating and sharpening the steel. Under the arrangement mutually agreed upon between them, Klodt was to cause the steel to be placed in the furnace, and, when the end was sufficiently hot, to remove it therefrom, place the hot end in the die to be sharpened and the other end upon a trestle or tripod nearby. After it was sharpened by the respondent operating the machine, it would be removed by the respondent and placed one end upon the floor of the shop. Thereupon the helper would remove from the furnace another piece of steel, place it in the machine ready for sharpening, and would remove the one previously sharpened from where it had been placed by the respondent when taken out of the machine.

While working in this way, one of the pieces of steel which had been placed ready for sharpening dropped, or partly dropped,

to the floor, and while the respondent was in the act of stooping to pick it up and place it in proper position the helper brought another piece of hot steel from the furnace to be placed in the machine. As he conveyed it to the machine the hot end came in contact with the respondent's left eye, while he was in a stooping position looking after the fallen steel. This is the injury for which recovery is sought.

The action was tried upon the amended complaint, which will be referred to here as the complaint, the answer, containing affirmative defenses, and the reply. The complaint specifically alleged that the action was brought under an act of the Legislature of the state of Idaho relating to the liability of employers to employes (Laws 1909, p. 84).

The first question is whether the evidence in the case brings it within the provisions of that act. It is there provided, among other things, that—

"Section 1. Every employer of labor in or about a * * * mine * * * shall be liable to his employé or servant for a personal injury received by such servant or employé in the service or business of the master or employer within this state when such employé or servant was at the time of the injury in the exercise of due care and diligence in the following cases: * * * (3) When such injury was caused by reason of the act or omission of any person in the service or employment of the master or employer, done or made in obedience to the rules and regulations or by-laws of the master or employer, or in obedience to particular instructions given by any person delegated with the authority of the master or employer so to instruct."

[1] It is not claimed that the injury in this case was caused by any one acting in obedience to particular instructions given by any person with the authority of the employer. The other provisions of subdivision 3 make the employer liable when the injury was caused by reason of the act or omission of a person, done or made in obedience to the rules and regulations or by-laws of the master or employer. Under the facts of this case, the respondent and the helper, in the method adopted for sharpening the steel, were not doing so in obedience to any rules and regulations or by-laws of the employer.

[2] The evidence is clear, and not subject to controversy, that when the respondent first entered the employment he and the helper, who had previously been there, talked over together and agreed upon the method by which they would perform the work. It cannot be said that such an agreement between those parties comes within the provision of the statute relating to rules and regulations or by-laws promulgated by the employer. There is no merit in the contention that the proviso referred to enlarges the scope and meaning of the declaring part of the statute,

for two reasons: First, the function of a proviso attached to a statute is a restraint upon, an exception to, or a modification of something which appears in the declaring part of the act (*Tsutakawa v. Kumamoto*, 53 Wash. 231, 101 Pac. 869, 102 Pac. 766); and, second, the proviso of the statute relied upon does not purport to extend the scope of the class of persons that come within it, beyond those mentioned in subdivisions 1, 2, 3, and 4. The facts do not bring the case within the statute.

It is next contended that, even though the proof failed to show liability under the statute, the respondent had a right under the allegations of the complaint, and the proof in support thereof, to recover at common law. It is alleged in the complaint that Klodt, the helper, had defective eyesight; that he was incompetent and reckless; and that the accident was caused by reason of his incompetency, negligence, and carelessness. There was evidence as to incompetency and negligence. This evidence, even though disputed and though we might be of the opinion that the greater weight of evidence was against it, would be sufficient to sustain the verdict and judgment unless the respondent is charged with the assumption of such risk. The risk would be assumed by the respondent unless he has brought himself within the rule that where a complaint is made to the employer, by an employé, of the incompetency of another employé, making known his unwillingness to continue in the employment unless the dangerous situation is relieved, and assurance is received that such dangerous situation will be relieved, and that the employé relied upon the assurance and thereafter continued in the employment until the time of the accident, the doctrine of assumed risk does not apply. *Labatt, Master & Servant*, § 419; *Coulston v. Dover Lumber Co.*, 28 Idaho, 390, 154 Pac. 636; *Myhra v. Chicago, Milwaukee, etc., R. Co.*, 62 Wash. 1, 112 Pac. 939.

[3, 4] Respondent testified that on two occasions he complained to the master mechanic of the appellant and requested him to make a change in helpers; that Klodt, the helper, could not see good and was reckless. He further testified that the master mechanic said he would see what he could do about it. This testimony, even though denied by the master mechanic, must, for present purposes, be accepted as true. There was nothing in the evidence which would tend to show that the respondent had given the master mechanic to understand that he was unwilling to continue in the employment unless the cause of danger was removed. Neither is there anything from which it can be inferred that he relied upon any assurance given him by the master mechanic, and that he continued in

the employment for that reason. It must be held, treating the case as an action at common law, that the respondent assumed the risk. In determining this question, there being no proof as to what the law of Idaho upon the question is, it must be assumed that the law of that state is the same as the common law of this state, and that a state of facts existed which would permit us to apply such law.

The judgment will be reversed and remanded, with instructions to the superior court to dismiss the action.

MACKINTOSH and MITCHELL, JJ., concur.

HOLCOMB, C. J. I concur in the result herein upon the sole ground it was not shown in the case, as alleged in paragraph 7 of the amended complaint, that there was no workmen's compensation law in Idaho at the time of the injury, and we must presume the state of the law to be the same as in this state, and that a case was not made under the Idaho Employers' Liability Act.

(56 Mont. 250)

KANSIER v. CITY OF BILLINGS.
(No. 4031.)

(Supreme Court of Montana. Oct. 1, 1919.)

1. MUNICIPAL CORPORATIONS §791(1)—DEFECTS IN SIMILAR SIDEWALKS AND NOTICE OF DEFECT IN SIDEWALK IN QUESTION.

The fact that a city knew that certain sidewalks were improperly constructed, and therefore glassy and slippery, would not impute notice to the city that another similar walk, constructed by the same contractors, at the same time, and under the same conditions, was likewise defective.

2. MUNICIPAL CORPORATIONS §818(8) — INJURY FROM DEFECTIVE SIDEWALK, EVIDENCE OF ACCIDENTS ON SIMILAR WALKS INADMISSIBLE.

In an action against a city for injuries on sidewalk, caused by the alleged slippery and defective condition thereof, court did not err in sustaining an objection to evidence that walks similar to the one on which the accident had occurred, which had been constructed by the same contractors, at the same time, and under the same conditions, had been chipped on the surface by the city by reason of their slippery surface, where the offer of proof did not attempt to fix the time when the changes in the other walks were made; the purpose of the testimony being to show that the city had notice of the defective walk in question.

3. MUNICIPAL CORPORATIONS §818(9)—PURPOSE OF EVIDENCE OF OTHER ACCIDENTS ON SIDEWALK IN QUESTION.

In an action against a city for injury from slipping and falling on a sidewalk, where evi-

dence for plaintiff to the effect that other persons than plaintiff had slipped or fallen on the walk in question was admitted generally, it must be presumed that the jury considered the same in determining whether or not the walk in question was in fact dangerous in the respects alleged by plaintiff, and plaintiff cannot maintain that he introduced such evidence solely for the purpose of showing that the city had notice of the defective condition, and hence the city was entitled to offer testimony that the walk was not dangerous in the respects contended by plaintiff, by showing that numerous persons had used the walk without difficulty.

4. MUNICIPAL CORPORATIONS §818(1)—EVIDENCE AS TO USE BY OTHERS WITHOUT ACCIDENT OF SIDEWALK ADMISSIBLE TO SHOW SAFETY.

In an action by a pedestrian for injuries received by slipping and falling on a walk alleged to be defective, in that it had a slippery surface, city was entitled to introduce evidence that many persons had used the walk without difficulty and without slipping, for the purpose of showing that the walk was reasonably safe.

5. TRIAL §91—ANSWER TO QUESTION UNOBTAINED TO WILL NOT BE STRICKEN.

Court did not err in refusing to strike the answer of witness to a certain question, where the question itself was not objected to.

6. TRIAL §252(8) — INSTRUCTION WITHOUT EVIDENCE TO SUSTAIN IT REFUSED.

In an action for injuries occasioned by slipping on a sidewalk, refusal of instruction that city would be liable, although the elements contributed to the injury, was not error, where there was no evidence that the elements in any way contributed thereto.

7. TRIAL §194(16)—INSTRUCTION ON WEIGHT OF EVIDENCE REFUSED.

In an action against a city for injuries occasioned by falling on sidewalk, a requested instruction to the effect that the city by one of its aldermen had notice of the defect in the walk *held* properly refused, as being on the weight of the evidence.

8. TRIAL §194(3)—INSTRUCTION ON WEIGHT OF EVIDENCE REFUSED.

A requested instruction, "The positive testimony of one credible witness to a fact is entitled to more weight than the testimony of several witnesses equally credible, who testify negatively, or to collateral circumstances merely persuasive in their character, from which a negative may be inferred," was properly refused, as being on the weight of the evidence.

9. TRIAL §253(4) — INSTRUCTION NOT REQUIRING DEFECT OF SIDEWALK TO BE PROXIMATE CAUSE OF INJURY REFUSED.

In an action against a city for injuries occasioned by fall on defective walk, a requested instruction stating that plaintiff should recover if the work was defective, etc., was properly refused, where it did not embody the rule relating to proximate causes.

10. MUNICIPAL CORPORATIONS §791(2)—NOT LIABLE FOR INJURIES ON SIDEWALKS REASONABLY SAFE AT TIME.

A city is not liable for damages to a pedestrian slipping and falling on a sidewalk, where at the date of the accident and prior thereto the sidewalk was reasonably safe for public use and travel.

11. MUNICIPAL CORPORATIONS §822(2)—INSTRUCTION NOT DENYING TO PLAINTIFF PRESUMPTION THAT SIDEWALK WAS REASONABLY SAFE.

In an action against a city for injuries on sidewalk, an instruction, "You are instructed that if you believe from the evidence in this case that the particular sidewalk described in the complaint herein, and which it was alleged was improperly constructed, was at the date of the accident in question and prior thereto reasonably safe for public use and travel, then the plaintiff cannot recover," was not defective as denying the plaintiff the presumption that the walk was in a reasonably safe condition for travel.

12. TRIAL §255(2)—DUTY TO REQUEST INSTRUCTION ON POINT DESIRED.

If a party desires an instruction covering a certain point, it is his duty to tender one on the point embodying his ideas.

13. APPEAL AND ERROR §1064(1) — OBJECTION TO INSTRUCTION AS REPETITION DISREGARDED.

Where the only objection urged to an instruction is that it was repetition, such objection may be disregarded on appeal.

14. TRIAL §251(8)—INSTRUCTION NOT ERRONEOUS AS RAISING QUESTION OF CONTRIBUTORY NEGLIGENCE NOT IN ISSUE.

In an action against a city for injuries caused by fall on sidewalk, an instruction defining an accident and stating that plaintiff could not recover if the fall was accidental *held* not an attempt to raise the question of contributory negligence, which was not an issue in the case.

15. MUNICIPAL CORPORATIONS §822(5)—EVIDENCE SUFFICIENT TO SHOW NOTICE TO PLAINTIFF OF DEFECT IN SIDEWALK.

In an action for injuries occasioned by a fall on sidewalk, *held*, that there was sufficient testimony concerning notice to plaintiff of the defect in the walk to justify an instruction thereon.

16. TRIAL §252(8)—INSTRUCTION AS TO EFFECT OF ICE ON SIDEWALK IMPROPER, THERE BEING NO EVIDENCE OF ICE.

In an action against a city for injuries occasioned by a fall on the sidewalk, alleged defect being slippery surface of walk, an instruction that plaintiff could not recover if the fall was occasioned by slipping on pieces of ice or snow should have been omitted, where the evidence showed that there was no ice or snow at the place where the plaintiff fell.

17. APPEAL AND ERROR §1066—HARMLESS ERROR IN INSTRUCTION GIVEN.

In an action for injuries occasioned by a fall on sidewalk, alleged defect being slippery

surfacing of walk by contractor, plaintiff was not prejudiced by an instruction that no recovery could be had if the fall was occasioned by particles of snow or ice, although the evidence showed that there was no snow or ice at the place where plaintiff fell.

Appeal from District Court, Yellowstone County; Geo. W. Pierson, Judge.

Action by Dora Kansler against the City of Billings. Judgment for defendant, and plaintiff appeals. Affirmed.

Grinistad & Brown, of Billings, for appellant.

J. H. Johnston and Nichols & Wilson, all of Billings, for respondent.

HURLY, J. This action was brought for the recovery of damages alleged to have been sustained by the plaintiff by reason of falling on a sidewalk in the city of Billings in December, 1914.

The complaint alleges that the sidewalk at the place where the accident occurred was constructed and allowed to remain in an improper, dangerous, and defective condition, the result of improper and excessive troweling and working of the cement in the construction and finishing of the surface of the sidewalk, thereby making the same glassy, smooth, and slippery; that during said time accidents had frequently happened to persons walking thereon, and that such dangerous condition had existed for a period of over six years prior to the time of the accident in question; that during all of this time the defendant had notice, or in the exercise of ordinary caution should have known, of the said accidents and dangerous condition; and that wholly and by reason of the negligent, careless, and unlawful acts and omissions of the defendant, and without any fault or want of care on her part, and without any knowledge on her part of the dangerous and defective condition of said sidewalk, she was injured as alleged.

A trial to a jury was had, in which trial defendant prevailed, a new trial was denied, and the case appealed to this court from the order denying the motion for new trial, and from the judgment.

Plaintiff's testimony, so far as pertinent to the questions involved upon the appeals, is substantially as follows:

"There was snow on the sidewalk, and in places there was no snow at all. It was dry and glassy. It was like glass; it was so slick. On the place where I fell it was dry and glassy. There was no snow there. * * * I was wearing ordinary shoes and was walking along slow. There was some snow a few feet ahead of where I fell. * * * I had heard the walk was slick, and I never paid any attention to it. I went up and down this street about once a week. * * * I don't know what caused the smooth and slippery surface of the walk where I fell. I know it was more smooth and glassy than the sidewalk adjoining it. I

had lived where I now live for about six years, and have been over this walk at all seasons of the year—winter, summer, spring, and fall. I never fell or slipped before. I do not know that I ever observed that it was dangerous for travel by people on foot, but I knew it was a little slick from what I had heard, but I never paid much attention to it myself. My knowledge was wholly from what I had heard, and not from what I had noticed myself. I had no more difficulty in going over this sidewalk than the rest of the sidewalk in the same block, or any other sidewalk. I have noticed that the walk was slippery. I heard my neighbors and other people say the walk was dangerous. I did not discontinue using it. I never saw any one else fall on the sidewalk. * * * I am certain I did not fall on any particular portion of the walk which was covered by snow. The snow had nothing whatever to do with my falling on the sidewalk, or with the accident."

Other testimony was given by plaintiff's witnesses to the effect that the sidewalk in question was slippery, and that other people had slipped or fallen thereon on numerous occasions, and that it was slippery and smooth because defectively constructed, as alleged in the complaint. The plaintiff also offered to prove by the witness Burke:

"That walks similar to the one on which the accident occurred, and which had been constructed by the same contractors, at the same time, and under the same conditions, have been chipped on the surface by the city of Billings."

[1, 2] This testimony was offered for the sole purpose of showing notice to the city of the condition of the walk on which the accident occurred, and not to impute negligence to the defendant. Defendant objected to the offer, which objection was sustained, and appellant's assignment of error numbered 1 is based thereon. Assuming that the city may have had notice or knowledge that the other walks referred to in the offer of evidence were defective, we fail to see how this fact would impute notice to the city that the walk on which Mrs. Kansler was injured was likewise defective. Besides, the offer of proof does not attempt to fix the time when the changes in the other walks were made.

Among other things, numerous witnesses on the part of the defendant testified that they were familiar with the condition of the walk in question, had used it frequently for a number of years, had seen its use during that period, and had never had any difficulty in the use of the same, and had never observed others to have any difficulty. This testimony was received, in part, over the objection of the plaintiff, though as to some of the questions upon this subject timely objections were not made. Upon the rulings of the court in admitting this testimony, specifications of error numbered 2 to 27, inclusive, are based.

As to the questions involved in these specifications, the record discloses, as heretofore

stated, that plaintiff offered the evidence of witnesses to the effect that persons other than plaintiff had slipped or fallen on the walk in question. This evidence appears in the record without objection, and plaintiff contends it was admissible under the authority of *Leonard v. City of Butte*, 25 Mont. 410, 65 Pac. 425, *O'Flynn v. City of Butte*, 86 Mont. 493, 93 Pac. 643, and *Pullen v. City of Butte*, 45 Mont. 46, 121 Pac. 878, and as it was received by the court it is necessary to mention it but briefly.

[3, 4] Appellant asserts that the testimony offered by plaintiff was solely for the purpose of showing notice, and not for the purpose of showing negligence; but an examination of the record does not disclose that it was offered for this purpose only, nor did the plaintiff tender, nor the court give, an instruction limiting the effect of the evidence to that end only. It having been admitted generally, it must be presumed that the jury considered the same in determining whether or not the walk in question was in fact dangerous in the respects alleged by appellant.

The important fact for the jury to determine in the case was whether or not the walk was improperly constructed, rendering it dangerous for pedestrians. Unless plaintiff's claim was substantiated in this respect, she could not recover. From the testimony offered, the jury must have considered the same as bearing upon the defective condition of the walk. Defendant surely was entitled to offer testimony that the walk in question was not dangerous in the respects contended by plaintiff. Plaintiff, however, contends that the evidence offered by the city was not competent, and did not tend to disprove plaintiff's contentions. Numerous cases are cited by appellant as authority for the position that the testimony so received was not competent.

As a whole, the cases cited by appellant sustain the proposition that where, as in the case of an obstruction on a sidewalk raising the surface of the walk several inches higher than the surrounding walk (*Bauer v. Indianapolis*, 99 Ind. 56), where a party fell into an area opening into a public footway (*Temperance Hall Association v. Giles*, 33 N. J. Law, 280), where injury resulted from a circular hole, with an additional depression in the walk (*Marvin v. City of New Bedford*, 158 Mass. 464, 33 N. E. 605), where a sleigh was pushed off the road by a passing vehicle, by reason of the way not being wide enough for two to pass (*Kidder v. Dunstable*, 11 Gray [Mass.] 342), in a case where plaintiff was injured by a falling rock in a mine (*Burgess v. Davis*, 165 Mass. 71, 42 N. E. 501), or where a railroad employé was injured in moving cars upon a track which moved up and down when cars were moved over it, by reason of the track being laid in boggy ground (*Louisville R. Co. v. Kemper*, 153

Ind. 618, 53 N. E. 931), or where animals, being transported on a ferryboat, fell off and were injured, by reason of there being no barrier on the boat (*Lewis v. Smith*, 107 Mass. 334), or where, a bridge over a stream having been washed out, travelers were forced to drive through the stream and one was injured by driving into a hole therein (*Garske v. Town of Ridgeville*, 123 Wis. 503, 102 N. W. 22, 3 Ann. Cas. 747), or where a person in the dark fell down an elevator shaft (*Parker v. Portland Pub. Co.*, 69 Me. 175, 31 Am. Rep. 262), or where a brick from a cornice fell, injuring a workman (*Mayer v. Thompson*, 116 Ala. 634, 22 South. 859), or where a railway employé was injured by projecting bolts, because there was not room between the train and the projection to permit him to ride in safety (*Bryce v. Railway Co.*, 103 Iowa, 665, 72 N. W. 730), or where horses fell over an unprotected embankment (*Baltimore & R. Turnpike Road Co. v. State*, 71 Md. 573, 18 Atl. 884), evidence as to the use, maintenance, or existence of the cause of the injury for months, or even years, without injury to persons or animals was not competent on the part of the respective defendants.

Anderson v. Taft, 20 R. I. 362, 39 Atl. 191, and *Branch v. Libbey*, 78 Me. 321, 5 Atl. 71, 57 Am. Rep. 810, sustain in a general way, appellant's position; but neither contains a recital of sufficient facts to illustrate the principle involved. *McGrail v. Kalamazoo*, 94 Mich. 52, 53 N. W. 955, cited by appellant, we regard as not in point.

On the other hand, in *Birmingham U. Ry. Co. v. Alexander*, 93 Ala. 133, 9 South. 525, plaintiff was injured while driving a wagon on the tracks of the defendant at a public crossing; the injury being alleged to have been by reason of the tracks not having been properly ballasted and surfaced, nor level with the surface so as to permit unobstructed passage across the street. The trial court permitted testimony on the part of defendant that others had passed over this particular point and that they had found the same in such condition as not to hinder the free passage of vehicles. In passing upon the question involved, the Supreme Court said:

"It would * * * have been competent for the plaintiff to prove that other similar casualties had happened at that crossing, as tending to show a defective condition of the track. On like considerations the defendant should be allowed the benefit of proof that the track, as it was at the time, was constantly crossed by other persons, under similar conditions, without inconvenience, hindrance, or peril, as evidence tending to show the absence of the alleged defect, or that it was not the cause to which the injury complained of should be imputed. The negative proof in the one case, equally with the affirmative proof in the other, serves to furnish the means of applying to the matter the prac-

tical test of common experience. A knowledge of the experience of others, who were, in like manner with the plaintiff, brought into contact with the alleged defective structure, may enable the jury to weigh all the evidence before them in the light of the rule that like causes, operating under like conditions, produce like results. If the question is looked at from the standpoint of common sense, it is plain that one seeking to reach a satisfactory conclusion as to whether or not the defect existed or caused the injury would not reject the aid furnished by the fact that other vehicles were constantly passing over the track at that point without any observable hindrance. The court erred in excluding the evidence upon this subject."

In *City of Aurora v. Brown*, 12 Ill. App. 122, an action for an injury alleged to have been sustained by reason of a slippery walk, the court said:

"Questions are made by appellant in regard to the admissibility of certain evidence to the effect that others slipped and fell on this walk, and a great deal of authority is quoted on both sides on the subject. The court admitted this class of evidence against the objection of appellant. We are of the opinion that the evidence was admissible. The defect claimed in the walk was that it was so smooth that it was dangerous to travel on account of travelers slipping down upon it. How could it be told whether men's feet would slip while passing over it, unless by experiment or trial, or to what extent or how badly they would slide? It was material to know whether the feet would slide from under a person while walking on an ordinary walk, or, if he was taking short, careful steps, what the effect would be."

In *Calkins v. City of Hartford*, 33 Conn. 57, 87 Am. Dec. 194, the court said:

"In this case the plaintiff offered evidence tending to show that she sustained an injury by slipping on a formation of ice, which had remained about four days on a sidewalk, * * * and that it was dangerous to cross. * * * The defendants offered evidence to show that a number of persons during the whole time claimed repeatedly passed along and over the sidewalk in question, without slipping thereon or experiencing any inconvenience whatever. * * * One important question in this case was whether, if the ice was there, it was or was not in a slippery and dangerous condition. If the plaintiff had offered evidence to show that a number of persons had actually slipped upon it, it would have been strong proof that it was in a slippery and dangerous condition. Men always act on such evidence in deciding whether they will risk their limbs or not. Why, then, should not proof that a number of persons passed over it and did not slip be admitted as tending to show that it was not in a slippery condition?"

In distinguishing the rules relative to cases of the class involved herein, the Supreme Court of Connecticut in *Taylor v. Town of Monroe*, 43 Conn. 36, used the following language, which seems particularly pertinent:

"The object of the proposed evidence was to show that actual use had tested the way and had shown it to be safe. * * * To reach that object the use and experience of others relied upon must have been of a nature to have tested the alleged defect; or, in other words, it must have been a use and test substantially similar to that of the plaintiff."

The application of this rule would seem to leave much to the discretion of the trial court in determining whether or not the case falls within the class where such evidence is admissible. Certainly, in the case at bar the evidence of the witnesses for the defendant showed tests and experience similar to that of plaintiff. We believe the court committed no error in admitting the evidence.

[5] Specification No. 28 needs no discussion, as that assignment of error is based upon the refusal of the court to strike the answer of the witness Wesch to a certain question; the question itself not having been objected to. In this the court certainly committed no error.

[6] Appellant tendered the following instruction, and specification of error No. 29 is based upon the court's refusal to give the same:

"The court instructs the jury that if they believe from the evidence that the plaintiff was injured and sustained damages as charged in the complaint, and that such injury was the combined result of the elements and the defective and improper construction of said sidewalk (if they find the construction of said walk to be defective and improper), and that the damage would not have been sustained but for such defective and improper construction of said sidewalk, although the primary cause was due to the elements, still if the jury further believe from the evidence that the plaintiff was guilty of no fault or negligence on her part, and the accident one which common prudence and ordinary sagacity on the part of the plaintiff could not have foreseen and provided against, then the defendant is liable, provided the jury believe from the evidence that the defendant was guilty of negligence in not remedying the improper and defective construction of said sidewalk, within a reasonable time after the defendant either had actual notice of said defective and improper construction or in the exercise of ordinary care and diligence should have discovered the existence of such defective and improper construction."

We believe the court did not commit error in the respects contended for by appellant. There is no evidence in the case that the elements were the primary cause, or any cause whatever, of the injury to appellant, or that the elements in any way or to any extent caused or contributed to appellant's injury. On the contrary, appellant's own testimony, as heretofore recited, was to the positive effect that the elements in no way contributed to the injury.

[7-9] Error is likewise assigned by appellant upon the court's refusal to give her pro-

posed instructions numbered 6 and 10 (specifications 30 and 31), which are as follows:

No. 6: "The court instructs the jury that the city of Billings, by its officer, Mr. McDonald, one of its aldermen, had notice of the existence of a smooth, slippery, and glassy condition of the surface of the sidewalk, at the point complained of, at and prior to the time of the alleged injury to plaintiff; and if you find that the existence of such smooth, slippery, and glassy condition of the surface of the sidewalk constituted a dangerous defect therein, on account of the defective and imperfect construction, then the city would be liable for any damages sustained by plaintiff on account of the existence of such defect, if you find from the evidence that the same was a defect and the plaintiff was in the exercise of ordinary care while walking thereon and thereover."

No. 10: "The court instructs the jury that the positive testimony of one credible witness to a fact is entitled to more weight than the testimony of several witnesses equally credible who testify negatively, or to collateral circumstances merely persuasive in their character from which a negative may be inferred."

We believe that both of these instructions were comments upon the weight of the evidence, and, as has been so often held by this court, were not proper instructions to be submitted to the jury. In addition, the sixth proposed instruction does not embody the rule relating to proximate causes. *Cummings v. Reins Copper Co.*, 40 Mont. 599, 107 Pac. 904.

Error is also assigned by reason of the giving by the court of instructions 7, 9, 10, 11, and 12 (specifications 32-36), as follows:

No. 7: "You are instructed that if you believe from the evidence in this case that the particular sidewalk described in the complaint herein, and which it is alleged was improperly constructed, was at the date of the accident in question, and prior thereto, reasonably safe for public use and travel, then the plaintiff cannot recover in this action, and you should find for the defendant."

No. 9: "You are instructed as a matter of law that a city is not required to have its sidewalks so constructed as to secure to persons using them absolute and complete immunity from injury, nor is it bound to use the utmost care and exertion to that end. It is not an insurer against injuries, and its legal duty in this connection is fully discharged if it constructs and maintains its sidewalks in such manner as to be reasonably safe for use by persons exercising ordinary care and caution."

No. 10: "You are instructed that an 'accident' is an unusual and unexpected occurrence, to which human fault does not contribute, and that if the injuries sustained by plaintiff, if any, were purely the result of an accident as above defined, then she cannot recover in this action. In other words, if the sidewalk upon which plaintiff fell was at the time in a reasonably safe condition for public use and travel, and the plaintiff was at that time exercising reasonable care and caution for her own safety, then the occurrence must be deemed to be pure-

ly an accident or a misfortune, for which the city is not liable."

No. 11: "You are instructed that the ordinary and reasonable care required of plaintiff is that degree of care which might reasonably be expected from an ordinarily prudent person under the circumstances surrounding her at the time. If you find from the evidence that at the time in question the sidewalk was improperly constructed, and by reason of such improper construction was unusually slippery or otherwise dangerous, and you further find that such facts were then known to plaintiff, then the law required her to use more care than if she had not such knowledge, and if she neglected to do so, and such neglect contributed to the injury she sustained, if any, she cannot recover in this action, and your verdict should be for the defendant."

No. 12: "You are instructed that the negligence charged against the defendant in this case is the alleged improper and defective construction of the sidewalk in question, and it is contended by plaintiff that the accident was caused by the slippery and dangerous condition of the surface of the sidewalk, due wholly to such alleged improper construction. Therefore, if you find from the evidence that the accident was caused by the plaintiff stepping or slipping upon ice or snow which lay upon such sidewalk, or if you find that such accident was due to any cause whatsoever other than the particular cause charged in the complaint, then the plaintiff cannot recover in this action, and you should find for the defendant."

[10-12] No. 7, we believe, correctly states the law. Complaint is made that the instruction "denies the plaintiff the presumption that the walk was in a reasonably safe condition for travel." We do not think the instruction can be so construed. If the plaintiff desired an instruction covering the point now urged by her, it was the duty of counsel to tender one upon the point embodying their ideas.

[13] To instruction No. 9 the only objection urged was that it was repetition, and this, we think, may be disregarded.

[14] The objection urged at the trial to instruction No. 10 was that it was "an attempt to raise the question of contributory negligence, which is not an issue in the case." In this construction we do not agree. *Hunter v. Montana Central Ry. Co.*, 22 Mont. 525, 57 Pac. 140.

[15] Instruction No. 11 was objected to upon the trial solely because there was no evidence, as contended by appellant, to support the instruction, and nothing to show whether or not plaintiff had any notice of the alleged defects in the walk. We think a reading of the portion of the testimony set forth in this opinion will disclose that there was sufficient testimony by plaintiff herself to justify this instruction.

[16-17] Instruction No. 12, under the testimony, might well have been omitted; but we fail to find where any prejudice to plain-

tiff's rights could follow from the giving of the same.

No error appearing in the rulings of the trial court, the motion for new trial should have been denied. The judgment and order appealed from are affirmed.

Affirmed.

BRANTLY, C. J., and HOLLOWAY, PAT-TEN, and COOPER, JJ., concur.

(105 Kan. 369)

DUNHAM v. BOKEL. (No. 22115.)

(Supreme Court of Kansas. Oct. 11, 1919.)

(Syllabus by the Court.)

1. APPEAL AND ERROR ⇐796(4)—REFUSAL TO GRANT A NEW TRIAL NOT REVIEWABLE WITHOUT ABSTRACT OF EVIDENCE.

A judgment refusing to grant a new trial on the ground of newly discovered evidence will not be reversed, where the evidence introduced at the trial is not abstracted, and there is nothing in the abstract to show clearly that the newly discovered evidence was not cumulative.

2. NEW TRIAL ⇐102(1), 140(3)—FOR NEWLY DISCOVERED EVIDENCE DENIED IN ABSENCE OF DILIGENCE.

Before a new trial can be properly granted on the ground of newly discovered evidence, the applicant must show affirmatively that the failure to obtain it so as to produce it at the trial was not due to his own want of diligence. Evidence that the defeated party did not know of the fact relied on until after the trial, when he was told of it by his attorney, is insufficient, because it fails to show a similar ignorance on the part of his attorney.

(Additional Syllabus by Editorial Staff.)

3. NEW TRIAL ⇐102(5)—NEWLY DISCOVERED EVIDENCE BY WITNESSES AT TRIAL INSUFFICIENT CAUSE.

As a rule, newly discovered evidence cannot be presented by witnesses who testified at the original trial, and a very strong case must be made out to justify a new trial by their additional testimony.

Appeal from District Court, Shawnee County.

Action by W. H. Dunham against A. Bokel. Judgment for plaintiff, and defendant appeals. Affirmed.

P. H. Forbes and Tinkham Veale, both of Topeka, for appellant.

Jamison & Jamison, of Topeka, for appellee.

MARSHALL, J. This action, one for a real estate agent's commission for effecting

an exchange of real property, resulted in a judgment in favor of the plaintiff for \$250, and the defendant appeals.

No evidence given at the trial is abstracted, and it does not appear that there is a transcript of the evidence. A motion for a new trial, on the ground of newly discovered evidence, was filed, and was denied. The only question presented arises on the order denying that motion.

Affidavits were used on the hearing of the motion. These affidavits showed that the plaintiff was acting as the agent of the defendant, and of Mrs. I. W. Waldron, the party with whom the plaintiff brought about a verbal contract for the exchange of property with the defendant; that neither Mrs. Waldron nor the defendant knew that the plaintiff was acting as agent for the other; and that the defendant "did not know of any such facts until after the trial * * * when he was informed of said fact by his attorney." No further showing of diligence on the part of the defendant was made.

The plaintiff asserts that Mrs. Waldron was a witness on the trial; that in the absence of the evidence there is no way of knowing that the matter was not then fully disclosed; and that Mrs. Waldron "told all she knew, and all that was true at the time, concerning the transaction, and nothing has developed since the trial that was not brought out at that time."

[1] 1. Because none of the evidence introduced at the trial is abstracted, and because there is no statement in the abstract that the evidence presented at the hearing of the motion was not cumulative, this court cannot say that the newly discovered evidence was not cumulative. If the evidence was cumulative, it would not require the granting of a new trial. *Sheahan v. Kansas City*, 102 Kan. 252, 169 Pac. 957.

[2] 2. A further fatal difficulty with the defendant's contention is that there was no sufficient showing of diligence on his part. The statute authorizes a new trial "for newly discovered evidence material for the party applying, which he could, not, with reasonable diligence, have discovered and produced at the trial." Civ. Code, § 305, Gen. St. 1915, § 7205. It has been repeatedly held that diligence must be affirmatively shown. *Carson, Pirie, Scott & Co. v. C. M. Henderson & Co.*, 34 Kan. 404, 8 Pac. 727.

The only evidence on the subject here was the statement in the defendant's affidavit that he did not know the facts referred to until after the trial, when he was informed of them by his attorney. It is not always easy to show affirmatively that no step, which ought to have been taken to discover a particular fact, was omitted; but the statement that the defendant learned of the matter after the trial through his attorney natural-

ly suggests the inquiry as to when his attorney first knew of it. It has been held that evidence that the attorney in a case did not know of a fact raises no implication that his client did not (*Morgan v. Bell*, 41 Kan. 345, 21 Pac. 255); and it seems equally clear that want of knowledge by the client does not imply a similar ignorance on the part of his attorney, through whom he finally receives the information. Of course, if the newly produced evidence was known to the defendant's attorney at the time of the trial, it cannot be made the basis of granting the motion.

[3] If, as the plaintiff asserts, Mrs. Waldron, by whom the defendant proposed to prove the newly discovered facts, testified at the trial, the circumstance affords an additional reason for requiring a full showing of diligence on his part. "As a rule, newly discovered evidence cannot be presented by means of witnesses who testified at the original trial, and a very strong case must be made out to justify a new trial by the additional testimony of such witnesses." 20 Standard Encyc. of Proc. 575.

The judgment is affirmed.

All the Justices concurring.

(105 Kan. 361)

GIGOUX v. MOORE et al. (No. 22056.)

(Supreme Court of Kansas. Oct. 11, 1919.)

(Syllabus by the Court.)

1. **BILLS AND NOTES** §358—CORPORATIONS §387(2)—RIGHT OF CITIZEN TO QUESTION VALIDITY OF DEPOSIT OF COLLATERAL SECURITY AS ULTRA VIRES — CONSIDERATION — GOOD FAITH.

The plaintiff was the holder of the note of a realty company, which was secured by deposit of collateral, consisting of notes to the amount of \$15,000, and of the value of \$15,000. A railroad company then secured the note of the realty company by deposit of collateral consisting of notes of the face value of \$6,500, which were exchanged and substituted for the other collateral notes. Among the notes deposited by the railroad company was one given the railroad company by the defendant. It was complete and regular on its face, and was not dishonored or overdue; but it had been procured by fraud, and was negotiated in violation of a restrictive agreement. *Held*: (a) The plaintiff gave value for the defendant's note; (b) the defendant was not at liberty to assert that deposit of collateral security by the railroad company for the debt of the realty company was void because ultra vires; (c) the fact that one corporation was securing the debt of another did not charge the plaintiff with notice of infirmity in the instrument or defect in the railroad company's title; (d) such fact did not render acceptance of the instrument by the plaintiff an act of bad faith, or otherwise deprive him of the character of a holder in due course.

2. **BILLS AND NOTES** §387—"BAD FAITH," AS USED IN NEGOTIABLE INSTRUMENTS LAW, MEANS BAD FAITH IN FACT.

The "bad faith" which is referred to in section 63 of the Negotiable Instruments Law, and which is the antithesis of the good faith referred to in section 59, is bad faith in fact, derived by inference of fact, as distinguished from inference of law, and the substantial equivalent of fraud.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Bad Faith.]

(Additional Syllabus by Editorial Staff.)

3. **EVIDENCE** §80(1) — PRESUMPTION THAT FOREIGN LAW IS SAME AS LAW OF FORUM.

Where there is neither pleading nor proof to the contrary, the presumption is that the law of Colorado is the same as the law of Kansas.

4. **BILLS AND NOTES** §327—POLICY OF NEGOTIABLE INSTRUMENTS LAW TO PROMOTE FREE MOVEMENT OF NEGOTIABLE PAPER.

It is the policy of the Negotiable Instruments Law to protect and to promote the free movement of negotiable paper in trade and commerce, and a holder has the privileges of a holder in due course, other requirements being fulfilled, unless in acquiring the paper, or unless in his attitude toward the maker, who has defenses, he act in such bad faith that his conduct is substantially equivalent to fraud.

Appeal from District Court, Sedgwick County.

Action by J. F. Gigoux against W. D. Moore and another. Verdict and judgment for plaintiff, and defendants appeal. Affirmed.

Kos Harris and V. Harris, both of Wichita, and W. W. Schwinn, of Wellington, for appellants.

Brown & Brown, of Wichita, and Danforth & Kavanaugh, of Denver, Colo., for appellee.

BURCH, J. The action was one by the indorsee of a promissory note, to recover from the maker. The defense was that the note was procured by fraud, that negotiation to the plaintiff was in violation of an agreement, and that the plaintiff was not a holder in due course. The verdict and judgment were for the plaintiff, and the defendant appeals.

The Denver, Laramie & Northwestern Railroad Company was a corporation organized for the purposes indicated by its name. Three subsidiary corporations were organized for purposes related to the railroad project. They were the Denver & Laramie Realty Company, the Northwestern Land & Iron Company, and the Colorado & Wyoming Coal Company. The four companies had some directors in common, and had offices with a common lobby on the same floor of a building

in Denver, Colo. C. S. Johnson was president of the railroad company, was a director of the realty company and the iron company, and was "fiscal agent" of all the companies.

The plaintiff lived at Greeley, Colo., and was freight agent of the railroad company at Greeley. He was a stockholder of the railroad company and of the realty company. He had a pass over the railroad, and frequently visited the Denver office. He took some part in the business of the railroad and allied companies, and on one occasion acted as a member of a committee to examine the affairs of the railroad company and make a report intended for general circulation. He signed what was given him to sign, as a "kind of bill of health for the railroad," believing "everything was all right and in good shape, and the head officers were doing their best."

At the solicitation of Johnson, the plaintiff made advancements of money, by checks to the realty company, amounting to \$6,000, and a note for that amount was given the plaintiff by the realty company. Johnson said he wanted the money for the railroad company, but the plaintiff could have the note of any company he desired. Johnson suggested the realty company, and because the plaintiff owned \$5,000 of its stock, he took the note of the realty company. The plaintiff understood the money was going to the realty company on its books, and that it would go round and keep the books straight, and Johnson would get the money and use it for the railroad company. The note was secured by a deposit of notes amounting to \$15,000, payable to the iron company, given by a man named Failing. Afterwards the plaintiff bought stock of the iron company to the amount of \$2,000.

Representatives of the railroad company came to Wichita, Kan., on a money-raising campaign. By means of representations which were not refuted at the trial, and which need not illuminate these pages with their dazzle, the defendant and others were induced to give notes to the railroad company. Some of the representations were not actionable because they contradicted essential terms of the instruments, and some of the representations were not proved at the trial; but there was an agreement that the notes should not be negotiated, except to a specified trust company, for a specified purpose. The defendant's note was for \$1,000, and was dated September 8, 1911. In 1912 the defendant became a director of the railroad company.

On September 13, 1911, the defendant's note came into the hands of the plaintiff under these circumstances: The Failing notes were good, and were about to be paid. In order to keep the money in his clutches, Johnson told the plaintiff the Failing notes were of no account; but he had some glittered Kansas paper, which he would turn

over to secure the plaintiff's realty company note, in place of the Failing notes. Substitution of Kansas notes to the amount of \$6,500, including the note sued on, was made for Failing's notes, which were afterward paid.

[1] As a part of the defense that the plaintiff was not a holder in due course, the answer alleged that the defendant's note was delivered to the plaintiff without any consideration passing from the plaintiff to the railroad company. In another part of the answer the defendant described just what occurred. The defendant's note, and other Kansas notes, were exchanged and substituted for the Failing notes. The general allegation is controlled by the detailed statement of facts. Section 32 of the Negotiable Instruments Law defines value as any consideration sufficient to support a simple contract. Gen. Stat. 1915, § 6552. Consideration is present in an exchange of one set of notes for another, to the same extent as if cash were paid, and a valuable consideration did pass, as a matter of law and of fact, from the plaintiff to the railroad company.

The obligation secured was that of the realty company. The security was furnished by the railroad company. Assuming that one corporation is not permitted to secure the debt of another, the plaintiff seems to regard the assumed fact as effecting, in some way, valuable consideration. Restriction of corporate power is one thing, and consideration is another. Whether or not the railroad company acted within its corporate power, the plaintiff gave it the Failing notes, actually worth \$15,000, for the Kansas notes of the face value of \$6,500, which certainly constituted consideration.

The defendant's main contention is that, since the railroad company was not indebted to the plaintiff on the note of the realty company, the railroad company lacked corporate power to secure the note of the realty company. From this premise three conclusions are drawn: First, the deposit of the defendant's note by the railroad company to secure the realty company's note was contrary to public policy, illegal and void; second, the plaintiff had notice of the defect in the railroad company's title; third, the plaintiff did not acquire the paper in good faith. This theory was fully presented in the answer by proper allegations.

The first conclusion is one which the plaintiff has no standing to deduce, because the premise involves a matter between the corporation and the state, not open to collateral inquiry by private persons. *Harris v. Gas Co.*, 76 Kan. 750, 92 Pac. 1123, 13 L. R. A. (N. S.) 1171.

The second conclusion is unsound. The Negotiable Instruments Law reads as follows:

"The title of a person who negotiates an instrument is defective within the meaning of this act when he obtained the instrument, or

any signature thereto, by fraud, duress, or force and fear, or other unlawful means, or for an illegal consideration, or when he negotiates it in breach of faith, or under such circumstances as amount to a fraud.

"To constitute notice of an infirmity in the instrument or defect in the title of the person negotiating the same, the person to whom it is negotiated must have had actual knowledge of the infirmity or defect, or knowledge of such facts that his action in taking the instrument amounted to bad faith."

Gen. Stat. 1915, §§ 6582, 6583.

The notice contemplated by the statute is of two kinds—actual knowledge and factual knowledge. Actual knowledge is knowledge of the very defect in title—in this instance, fraud on the maker in procuring and in negotiating the instrument. Factual knowledge is knowledge having a relation to the same subject, defect of title, and the bad faith referred to is bad faith in respect to that subject. The defendant set the paper afloat, and the plaintiff owed him no duty to inquire under what circumstances. There was nothing about the note to suggest that the railroad company did not hold it free from all defenses and free from all restrictions on negotiation. Knowledge on the part of the plaintiff that the railroad company was securing the debt of the realty company was not knowledge, either actual or factual, that the security itself was tainted, or that its negotiation was tainted. The two subjects bear no relation to each other, and suggestion of one has no tendency whatever to awaken the mind to the other. Conceding the railroad company was diverting its assets to uses not permitted by its charter, to the detriment of its stockholders, the question was: Did the plaintiff have notice of the fraud in procuring the paper, or notice of the restriction on its negotiation? The fact that the railroad company was securing a debt not its own bore no relevancy whatever to that question.

The third conclusion is likewise unsound. The Negotiable Instruments Law defines holder in due course as follows:

"A holder in due course is a holder who has taken the instrument under the following conditions: (1) That it is complete and regular upon its face; (2) that he became the holder of it before it was overdue, and without notice that it had been previously dishonored, if such was the fact; (3) that he took it in good faith and for value; (4) that at the time it was negotiated to him he had no notice of any infirmity in the instrument or defect in the title of the person negotiating it." Neg. Inst. Law, § 59; Gen. Stat. 1915, § 6579.

In this instance the note was complete and regular on its face, the plaintiff became holder before it was overdue, it had not been previously dishonored, the plaintiff paid value, and he was without notice of infirmity

in the instrument, or defect in the title of the person negotiating it. The plaintiff possessed every qualification of a holder in due course, unless the fact that the railroad company was securing the debt of another company deprived the transaction of the quality of good faith on his part. Leaving at one side the fact that the defendant is not privileged to usurp a prerogative which the state does not share with individuals, by questioning the propriety of the transaction, acceptance of security from one corporation for the debt of another does not, of itself, constitute bad faith.

The railroad company may have been acting under express charter authority, or it may have been exercising a power legitimately implied from the charter grant. One corporation may lawfully give security for the debt of another. Such an act may be on ample consideration, moving from the company whose debt is secured, or may be in direct and immediate furtherance of the interests and objects of the corporation supplying the security. It is a matter of common knowledge that unimpeachable transactions of that character are frequent in the course of present-day corporate business. The plaintiff rested under no duty to any one to investigate the circumstances and decide, at his peril, whether or not the railroad company was transgressing the limit of its power. He was protected in any event. If the railroad company were not permitted to secure the debt of the realty company, the state might administer proper correction to the railroad company; but the railroad company could not repudiate the transaction, and the debt would be secured as effectually as if the railroad company possessed requisite capacity. *Harris v. Gas Co.*, supra. Here, as in case of notice of infirmity in the instrument or defect in title of the holder, bad faith is bad faith in fact—bad faith derived by inference of fact, as distinguished from inference of law. Here, as in case of notice of infirmity or defect in title, failure to use ordinary diligence in following up suggestive facts, or facts arousing suspicion, is not sufficient. *Bank v. Reid*, 86 Kan. 245, 120 Pac. 339. The expression found in the old law of bills and notes, "usual course of business," is not found in the section of the Negotiable Instruments Law quoted. Actual bad faith is essential. Unless, therefore, the security transaction were not, in truth, what it purported to be, and the plaintiff were intentionally colluding in misappropriation of the corporate assets, or were resorting to some deceitful practice or device, or were otherwise acting from reprehensible motives, to achieve some unconscientious or unjustifiable result, he was not guilty of bad faith. The naked fact that one corporation furnished security for the debt of another was not enough.

Admitting for the moment that a corpora-

tion exceeding its power by giving security for the debt of another might plead *ultra vires*, acceptance of the security does not, alone, spell fraud on the part of the taker. The transaction is merely irregular, in the sense that it is not according to general business custom. Because it is not according to the usual course of business, the taker of the security is put upon inquiry respecting the corporation's actual authority. If he accept the security without inquiry, the corporation may interpose its defense; but he is not chargeable with that moral delinquency which is essential to actual bad faith. When, as in this instance, the corporation does not complain, and the question of *ultra vires* is raised by a private person, disqualified to do so, it is quite obvious bad faith must be established by proof of something more than the fact that one corporation secures the debt of another.

[3, 4] Since there was neither pleading nor proof to the contrary the presumption is the law of Colorado is the same as the law of Kansas. Sections of the Negotiable Instruments Law which have been quoted are, however, the same as the corresponding sections of the Negotiable Instruments Law of Colorado. It is the policy of the Negotiable Instruments Law to protect and to promote the free movement of negotiable paper in the channels of trade and commerce, and a holder is entitled to the privileges of a holder in due course, other requirements being fulfilled, unless in acquiring the paper, or unless in his attitude toward the maker, who has defenses, he act in such bad faith that his conduct is substantially equivalent to fraud.

[2] In discharging the burden of proving he was a holder in due course, fraud in procuring and negotiating the paper being tacitly recognized, the plaintiff produced evidence tending to show the four corporations which have been named were allied in interest in the railroad project, and were in the habit of borrowing from each other, and of exchanging assets and collateral for their common benefit. Such transactions were adjusted by a system of bookkeeping, and were

ultimately cleared on the books of the railroad company. The various boards of directors were fully cognizant of the practice, and made no objection, and after the practice had become established steps were initiated to make the corporate records of the various companies formally correspond. The court instructed the jury in the light of this evidence. Error is assigned in respect to the admission of portions of the evidence, in respect to instructions given, and in respect to the refusal of the court to instruct the jury according to the defendant's theory of the case, which has been considered at length. It is not necessary to examine the assignments of error in detail. The plaintiff was not obliged to extend his proof as he did, and that feature of the trial may be disregarded. There is no contention, and under evidence properly admitted, and not disputed, there could be no serious contention that the plaintiff knew of the fraud in procuring and negotiating the note, or was otherwise guilty of bad faith. The facts upon which the defendant relied as establishing bad faith were not sufficient for the purpose.

It is not necessary to review the cases cited by the defendant. Those from other states discuss matters upon which this court has expressed itself. Those from this state are either distinguishable, or else not authoritative. In this instance the corporation was not one whose constitution was such that it could not, under any circumstances, give security for the debt of another. In giving the security, the officers of the corporation acted in its behalf in a corporate matter, and not for personal advantage in their own private business. The plaintiff gave value for the security he received, and the corporation is not complaining. Some expressions in some of the earlier cases must be regarded as modified by the decision in the case of *Harris v. Gas Co.* In none of the cases cited was the Negotiable Instruments Law involved.

The judgment of the district court is affirmed.

All the Justices concurring.

(106 Wash. 412)

BULLOCK v. YAKIMA VALLEY TRANSP.
CO. et al. (No. 15295.)

(Supreme Court of Washington. Oct. 10, 1919.)

1. BOUNDARIES ⇨8(3) — **MONUMENTS CONTROL OVER METES AND BOUNDS.**

Where a deed described the lands by metes and bounds so as to extend into a highway, beyond its south line, and further described the land as running to such south line, the latter description, being by monument, must control over that by metes and bounds.

2. COUNTIES ⇨218—**SUFFICIENCY OF NOTICE OF PERSONAL INJURIES NOT DEMANDING PAYMENT.**

A notice of claim for personal injuries served upon the board of county commissioners, but not making demand for payment, held sufficient, in view of Rem. Code 1915, § 3909, relating to appeals from county commissioners, and providing that nothing therein shall be construed to prevent claimant from enforcing collection by civil action within three months after the claim has been disallowed.

3. COUNTIES ⇨213—**PRESUMPTION OF REJECTION OF CLAIM ON FAILURE TO ACT.**

Although a county cannot be sued without legislative permission, under Rem. Code 1915, § 3909, requiring actions on claims to be brought within three months of their disallowance, where the county commissioners have failed to act within a reasonable time after presentation of claim, it will be conclusively presumed as a matter of law that they have rejected the claim, and 7 months is more than a reasonable time.

4. COUNTIES ⇨216—**TIME OF REJECTION OF CLAIM AS AFFECTING RIGHT OF ACTION.**

In an action against a county for personal injuries, a contention that a claim must be considered as rejected where the commissioners failed to act within three months after it was filed, so that a suit, brought seven months thereafter, was not brought within the three months after rejection, as required by Rem. Code 1915, § 3909, cannot be upheld, since the claim would be considered as rejected from the time claimant elected to sue, and county cannot take advantage of its own wrong.

5. APPEAL AND ERROR ⇨1165 — **WRONGFUL ADMISSION OF EVIDENCE AT INSTANCE OF CO-DEFENDANT REVERSIBLE.**

A plaintiff cannot answer an objection of one defendant that photographs wrongly introduced in evidence were admitted over plaintiff's objection and at the instance of another defendant, since each party is entitled to a fair trial, and must bear the burden of errors resulting to his own advantage.

6. EVIDENCE ⇨359(3) — **ADMISSION OF PHOTOGRAPHS IN ACTION FOR PERSONAL INJURY.**

In an action for personal injuries resulting from a fall on a sidewalk brought against a county and a railroad company, photographs of other parts of the walk, showing its condition, would be admissible to show notice on the part of the county of the particular defect.

7. TRIAL ⇨207 — **INSTRUCTION LIMITING EVIDENCE TO PURPOSE FOR WHICH ADMISSIBLE.**

Where in personal injury action photographs were admissible on issue of contributory negligence but not to show defect in street, court must limit the evidence to purpose for which admissible.

8. EVIDENCE ⇨123(2) — **LETTER OF PROSECUTING ATTORNEY AS TO REPAIRS TO SIDEWALK INADMISSIBLE.**

In an action against a county and a railroad company for personal injuries resulting from a fall on a sidewalk in a public road and on a right of way, a letter of a deputy prosecuting attorney for the county, written 15 months after the injury, setting forth the commissioners' desire that the sidewalk be repaired or removed, was not a part of res gestae, and could not bind the county, and was inadmissible for any purpose.

9. HIGHWAYS ⇨187(2)—**COUNTY MUST KEEP SIDEWALK IN REASONABLY GOOD REPAIR.**

In view of Rem. Code 1915, § 951, relating to actions against the county, and section 3890, authorizing the commissioners to lay out, discontinue, and alter highways, and section 5575 et seq., giving county commissioners supervision and control of roads, a sidewalk on a county road is a part of the road authorized by law which it is the duty of county to keep in reasonably good repair.

10. RAILROADS ⇨114(1)—**VARIANCE IN ACTION FOR INJURY UPON SIDEWALK AT CROSSING IMMATERIAL.**

In an action against a county and a railroad for injuries by a defective sidewalk both on the right of way and the highway, the submission of the case to the jury on the theory that the railroad merely had a statutory right to cross the highway was not a fatal variance, where complaint alleged that the railroad owned, controlled, and maintained the right of way.

11. RAILROADS ⇨95(1)—**COMMON-LAW DUTY TO KEEP UP SIDEWALK AT CROSSING.**

A railroad's duty to maintain a sidewalk leading up to its track crossing a highway is not imposed by Rem. Code, § 8730 et seq., which relate only to stock crossings, nor by Laws 1907, p. 192, giving railroads authority to cross highways, but is a duty imposed by the common law.

12. RAILROADS ⇨95(5)—**DUTY TO MAINTAIN PORTION OF HIGHWAY AT CROSSING.**

The common law imposes the duty upon a railroad crossing a highway to maintain that portion of the highway used or occupied by it, and where the railroad company made a fill and replaced a sidewalk, it was its duty to maintain such walk in a reasonably safe condition.

13. TRIAL ⇨352½, New, vol. 9A Key-No. Series—**INSTRUCTION THAT AGREEMENT OF TEN JURORS WAS SUFFICIENT PROPER.**

In view of Rem. Code 1915, § 358, providing that agreement of ten jurors is sufficient for verdict, and section 864, relating to general and special verdicts, upon submitting interrogatories which with their answers amounted to special verdicts, any ten jurors might answer any one of the interrogatories.

14. TRIAL \Leftrightarrow 296(4, 5) — INSTRUCTION THAT CONTRIBUTORY NEGLIGENCE MUST BE PROXIMATE CAUSE PROPER.

Though an instruction was objectionable as telling the jury that plaintiff's negligence must be "the proximate cause" as distinguished from "a proximate cause" it was not improper, where the court was manifestly instructing as to the difference between proximate and remote cause, particularly where there was another instruction, properly covering contributory negligence and proximate cause.

Department 2.

Appeal from Superior Court, Yakima County; Harcourt M. Taylor, Judge.

Action by Libbie Bullock against the Yakima Valley Transportation Company and another. Judgment for plaintiff, and defendants appeal. Reversed and remanded for new trial as to appellant County, and affirmed as to appellant Transportation Company.

John F. Reilly and A. C. Spencer, both of Portland, Or., and Richards & Fontaine, of North Yakima, for appellant Yakima Valley Transp. Co.

O. R. Schumann, J. Lennox Ward, and Dolph Barnett, all of Yakima, for appellant Yakima Co.

Snively & Bounds, of Yakima, for respondent.

BRIDGES, J. Respondent brought suit against Yakima county and Yakima Valley Transportation Company to recover damages for personal injury. A county road, for convenience called Naches highway, ran from the town of Selah, past several factories and canneries, to the Northern Pacific Depot some distance away. It was extensively traveled, both by vehicles and pedestrians. Originally this road was much narrower than it now is. About 1909, the property owners, wishing to have the road widened, deeded strips of land to the county for that purpose. Shortly after the road was thus widened the property owners and certain others citizens, at their own expense, built a wooden sidewalk along the southerly margin of the newly widened road. This sidewalk consisted of stringers with boards nailed crosswise. It was approximately 4 feet in width. The county has never repaired or worked on this sidewalk, although it has had knowledge that it was extensively traveled by pedestrians. The sidewalk mentioned was approximately 2 feet lower than the graveled roadway. In 1915, the Transportation Company obtained permission from the State Public Service Commission to build its railroad across this highway at the grade of the graveled portion thereof. In order to do so it was necessary to make a fill of about two feet in that por-

tion of the highway south of the graveled portion and where the sidewalk was located. In making this crossing the transportation company's employes sawed off the sidewalk at the point of crossing, and lifted the easterly section thereof about 15 feet in length, out of the way, leaving the same intact, and did likewise with the section on the westerly side of the track. It then made its fill of about 2 feet, laid its ties and rails thereon, and replaced the sections of the sidewalk just as they originally were, except originally they were level but were now placed on the fill, thus giving some incline up to the railroad crossing. On the 23d of November, 1916, the respondent was walking on this sidewalk with a friend. When the friend stepped on one end of the fourth board east of the easterly rail, that board lifted and caused the respondent to trip and fall, whereby she was injured. After making the crossing the transportation company had never maintained any portion of the sidewalk, but did plank between its rails and for about 1 foot on the outside of each rail.

[1] The respondent undertook to prove that the transportation company actually owned the title to that portion of the roadway which covered the sidewalk crossing and the location of the offending board, whereas that company contends that its ownership reaches only to the boundary line of the roadway as widened. The deed which the transportation company received described the lands by metes and bounds, and, as so described, would carry the description into the road, and would give title to the transportation company to that portion of the roadway covered by the crossing and the sidewalk here involved. But that deed further recites that the land conveyed "runs to the south line of the road now used and traveled as a public road." This south line of the road had a fence on it. It is a well-established rule of law that description by monuments will control over description by metes and bounds, consequently we are of the opinion, and hold, that the transportation company's ownership went only to the south line of the road, and did not include the crossing involved in this suit.

Judgment was rendered in favor of the respondent against both the appellants. The appellants appeared separately in the trial court, and have separately appealed. They have raised many questions, some of which are of considerable importance and difficulty. We will first discuss the questions raised by the appellant county.

[2] 1. The complaint alleged that on the 24th day of March, 1917, the respondent caused to be served and filed with the county auditor of the appellant county a notice of claim which the board of county commissioners had failed, neglected, and refused to pass

upon, although the board had had more than a reasonable time within which so to do. In support of her action the respondent introduced such claim or notice in evidence. This notice is full and complete; it sets out the place, time, manner, and extent of the injury and the amount of her damages. It seems to be conceded that the notice is all that the statute required, except that it does not, upon its face, make demand of the county for payment. It was contended by the county that this claim or notice was insufficient for the reason that it made no demand upon the county for payment or compensation. Section 3909, Rem. Code, after providing for appeals from the actions of the county commissioners, contains the following clause:

"Nothing herein contained shall be so construed as to prevent a party having a claim against any county in this state from enforcing the collection thereof by civil action in any court of competent jurisdiction, after the same may have been presented and disallowed in whole or in part by the board of county commissioners of the proper county: Provided, that such action be brought within three months after such claim has been acted upon by such board."

The trial court was right when it ruled that this claim was sufficient. While on its face it does not make any demand for payment, yet the only possible purpose the respondent could have had in making the claim was to make a demand against the county for reimbursement.

[3] 2. It seems to be assumed in the briefs, although there was no testimony that we can find on the subject, that the county commissioners never acted on this claim either by allowing it in whole or in part, or by rejecting it, and the appellant county now contends that this suit was prematurely brought for the reason that the statute, above quoted from, contemplates that no action may be brought on such claim until the same "has been acted upon" by the board. In coming to the conclusion we have, we are mindful of the rule of law that a county may not be sued at all by a private individual except by permission of statute, and then only upon such terms and conditions as the legislative act may prescribe. Nearly all other similar statutes in this and other states contain a provision to the effect that suit shall not be commenced until the claim has been presented and a reasonable time for action thereon has elapsed. There appear to be very few authorities directly in point on this question. The briefs cite none such. We hold that, under this statute, after the county commissioners have failed to act within a reasonable time, it will be conclusively presumed, as a matter of law, that they have rejected the claim. The appellant contends that if the commissioners have had a reasonable time within which to act, and have failed and refused to act, the claimant may bring man-

damus to force the commissioners to take action. They cite a large number of cases showing that mandamus is the proper remedy in that instance. We have no doubt that respondent might have resorted to this remedy, but the law abhors a multiplicity of suits, and the courts will always so construe the law as to avoid them if possible. It would seem absurd that the law should be such that the county commissioners might arbitrarily refuse to act on a claim and thus hold the claimant out of her just rights or force her into expensive litigation to compel them to do that which the law has imposed upon them. If the commissioners have not acted upon this claim within a reasonable time they ought to be estopped to deny that by such neglect they have rejected the claim. The case of *Kraft v. City of Madison*, 98 Wis. 252, 73 N. W. 775, is almost directly in point. The statute there provided that no action should be maintained against the city until the claim on which it is based shall have been first presented to the council for allowance, and that the disallowance of the claim is final, except by an appeal to the circuit court. The plaintiff in that case had presented a claim which the council had failed within a reasonable time to act upon, and she brought suit directly on her claim. The court said:

"But there is no provision in the charter for the case of an entire omission of the common council to act upon the claim. * * * No doubt the common council is to be allowed a sufficient and reasonable time in which to make an audit of the claim. * * * Until the expiration of such reasonable time the city should not be subject to be harassed by an action. But, by omitting to act upon the claim within such reasonable time, it may fairly be deemed to waive the benefit of its exemption from an action instituted in the usual way. It cannot by inaction stand off the claimant indefinitely. * * * But it is urged that the claimant had a remedy, by way of mandamus, to compel the common council to act upon his claim, and that he was limited to that remedy. Doubtless, that remedy was open to him. But that affords a remedy only by a circuitous route. * * * The law favors directness, rather than circuitry, of action. The plaintiff was not limited to the remedy by mandamus. He had an election. It was within his election to bring his action in the usual way, directly against the city. *Sharp v. City of Mauston*, 92 Wis. 629 [66 N. W. 803]."

This claim was filed with the county commissioners on the 6th day of April, 1917. This suit was brought nearly 7 months thereafter, on the 19th day of November, 1917. It is perfectly plain that more than a reasonable time was allowed the commissioners within which to act upon the claim, and, having failed to act, we hold that they have thereby rejected the claim, and the respondent had a right to maintain her suit.

[4] But counsel for the appellant assert that if it be concluded that the failure of the

commissioners to act within a reasonable time was tantamount to a rejection of the claim, then, since 3 months' time after the rejection is given by the statute within which to bring such suit, it would be reasonable to conclude that three months would be a reasonable time within which to give the commissioners to act upon the claim. Consequently they contend that the claim must be considered as rejected within three months after it was filed, and, if so, then this suit was not brought within three months after the rejection. We do not attach much weight to this contention. In the first place, the claim would be considered as rejected as of the time the claimant elected to sue; and, secondly, the county may not take advantage of its own wrong.

[5] 3. During the trial the county's codefendant, the transportation company, offered in evidence various photographs, showing the dilapidated condition of this sidewalk at various points somewhat distant from the place of the actual injury. The special purpose of these photographs was to attempt to show that the sidewalk throughout its length was in a very dangerous condition, and that the respondent was guilty of contributory negligence in walking thereon at all. The court received these photographs over the objection of both the county and the respondent. The county contends that, in no event, as against it, could such photographs be admitted in evidence, except to show, or as tending to show, notice on its part of the particular defect in question. The respondent does not answer this argument except to say that she did not offer these photographs in evidence, and that she objected to them, and, consequently, if there was any error in receiving them, that error cannot be attributed to her, and she cannot be made to pay the penalty. This, however, is not the rule. Each party to a lawsuit is entitled to a fair trial. The court itself represents each and all of the litigants, and each litigant must bear the burden of any errors which may be made by the court. If the court himself should ask and require of the witness an answer to a highly prejudicial question, certainly the party who was not injured thereby could not be heard to say that he ought not to be held responsible and be required to bear the burden of the court's error. Instructions which the court gives the jury are acts of the court for which no party litigant is directly responsible, and yet any litigant injured by such instruction can complain thereof. In the case of *Palmer v. New York, etc. Co.*, 76 Hun, 181, 27 N. Y. Supp. 561, the court said:

"But the respondent claims that the evidence in regard to the custom was offered by appellant's codefendant, and not by him, and hence appellant's objection to the introduction of such evidence is not available against the plaintiff on this appeal. * * * The jury were not instructed that the objectionable evidence was not

to be considered as against appellant, as in the case last cited. *Schneider v. Railroad Co.* [59 Super. Ct. 556] 15 N. Y. S. 556. * * * Although the plaintiff did not introduce the evidence as to the custom, or request the charge above referred to, the effect of such evidence and charge being, in all probability, to influence the verdict, we think a new trial should be granted. The plaintiff's position is like that of a party where a trial judge asks of the witness an improper question, which is objected to, and the objection overruled, and an exception taken. If such exception is well taken, a new trial will be granted on account of the error of the court, although such error occurred without any fault on the part of such party."

In the case of *Zimmer v. Third Ave. R. Co.*, 86 App. Div. 285, 55 N. Y. Supp. 308, where this question was involved, the court said:

"However, as to such requests as the court did charge, the source from which they proceeded was immaterial, and, if erroneous, the aggrieved party is entitled to reverse the judgment to the same extent as if the charge had not been made at the instance of its codefendant."

See, also, the case of *Pierce v. Michel*, 60 Mo. App. 187.

[6, 7] It is therefore necessary for us to determine whether or not these photographs were admissible as against the county. It appears that under the almost universal rule such photographs would within the reasonable discretion of the court be admissible for the purpose of showing notice on the part of the county of the particular defect which caused the injury. But such testimony is not admissible for any other purpose. 8 Enc. of Evidence, 911; *Olson v. Town of Luck*, 103 Wis. 33, 79 N. W. 29; *Lyon v. Grand Rapids*, etc., 121 Wis. 609, 99 N. W. 311; *Laurie v. Ballard*, 25 Wash. 127, 64 Pac. 906; *Shearer v. Buckley*, 31 Wash. 370, 72 Pac. 76.

We heartily approve of what was said by the court in the case of *Olson v. Town of Luck*, supra, as follows:

"The plaintiff was allowed to prove, against objection, that the highway between the place of the accident and the place where the wagon was found (a distance of more than a mile) was full of rocks and holes. Of course, the fact that there were other serious defects in the road at other points, at a distance from the alleged defect which caused the accident, can have no legitimate bearing on the question as to whether the projecting stone in question was or was not an actionable defect, but it is manifest that such evidence would be almost certain to have great weight with the jury upon this very question. It is true that there are a number of cases in this court holding that, where a defect in a certain sidewalk, bridge, or other similar structure is charged to have caused an injury, evidence of the general bad condition of the same sidewalk, bridge, or structure may be shown, provided the general disrepair proven is of the same general character as the defect in question.

Shaw v. President, etc., 74 Wis. 105, 42 N. W. 271; Barrett v. Village of Hammond, 87 Wis. 654, 58 N. W. 1053. In these cases, however, such testimony was not admitted for the purpose of proving negligence or that the defect in question existed, but only for the purpose of proving constructive notice to the corporation of the defect in question, which would be fairly inferable from the existence of many similar defects, resulting from the same general cause, in the same structure."

It must be remembered that these photographs were offered for the purpose of showing contributory negligence on the part of the respondent. It is probable they were admissible for that purpose, but in receiving them the court should have warned the jury that they could not be considered as tending to prove that the defect complained of existed. Without such warning the jury would likely conclude that proof of defects away from the place of injury would be proof of the existence of the defect in question.

We conclude that the court committed error in the manner of receiving these photographs.

[8] 4. During the trial the transportation company offered in evidence a letter written by the then deputy prosecuting attorney of the county to a resident thereof, concerning this sidewalk. This letter was received over the objection of the county and the respondent. It was written some 15 months after the injury involved in this action occurred. It was as follows:

"Yakima County.

"Office of Prosecuting Attorney.

"North Yakima, Washington,

February 16, 1918.

"Mr. Ira S. King, Pres. Selah Business Men's Association, Selah, Washington—Dear Sir: Upon investigating the sidewalk running from the village of Selah to the Northern Pacific Railway Station, we notice that the same is in bad condition, some boards are loose, others are partially gone, still others have holes in which the foot of a pedestrian might be caught, causing them to fall and become seriously injured.

"The county is now defending a damage case which has been instituted because of alleged defect in the sidewalk.

"The county commissioners have instructed me to inform the business men of Selah, through you, that they desire to co-operate with them in every way for the convenience of the residents of Selah, but that owing to their liability in case of accident or injury to pedestrians, they deem it advisable to require said sidewalk to be entirely removed unless the same is put in a safe condition in the immediate future and so maintained.

"Respectfully, [Signed] Lenox Ward,
"Deputy Prosecuting Attorney."

We cannot understand upon what principle of law this letter was received in evidence. It certainly was very detrimental to the county. If the letter had been written at the time of the injury and as a part of

the res gestæ then there might have been some reason for its introduction. In the case of Weldeman v. Railroad Co., 7 Wash. 517, 35 Pac. 414, it was held that the declarations of an agent, made sometime after an accident, cannot bind the principal unless they were made as a part of the res gestæ.

The case of Randall v. N. W. Tel. Co., 54 Wis. 140, 11 N. W. 419, 41 Am. Rep. 17, was one for damages on account of personal injury. At the trial a telegram sent by the railroad superintendent was read in evidence. This telegram was as follows:

"Many thanks for your kind words for us to the gentlemen who were hurt by our old wire. I hoped to be with you tomorrow and see them, but I must go home. Have them make a bill and send me. We will pay any reasonable bill. My instructions, if obeyed, would have prevented the accident, but the repairman neglected his duty, and we must pay the penalty. Answer."

The telegram was sent on October 20th, and the accident referred to occurred during the previous August. The court said:

"It is clear that this telegram was not a part of the res gestæ, and its admission as original evidence against the defendant can only be sustained upon the ground that the admission of the general agent or superintendent of the company bound the company. In the absence of any proof showing that the superintendent was authorized by the company to bind it by his admissions, we do not think the court was justified in assuming that he had such power."

This letter ought not to have been received for any purpose.

[9] 5. The county further contends that the statutes of the state of Washington do not authorize it to build sidewalks in its roads, and therefore it cannot be made liable for any negligence in failing to properly maintain them if any are built. The authorities cited by the appellant in support of this contention are not in point.

Section 951, Rem. Code, provides:

"An action may be maintained against a county, or other of the public corporations mentioned or described in the preceding section, either upon a contract made by such county or other public corporation in its corporate character, and within the scope of its authority, or for an injury to the rights of the plaintiff arising from some act or omission of such county or other public corporation."

Section 3890, Rem. Code, authorizes the county commissioners to lay out, discontinue, and alter county roads and highways and do all other acts relative thereto. Section 5575 et. seq., Rem. Code, gives the county commissioners supervision and control of the county roads and bridges, and authorizes the levy of taxes therefor. We have no doubt that a sidewalk in a county road is a part of the road authorized by law, and that it is the duty of the county to keep it in reasonably good

repair. This exact question has at least by inference been decided by this court. In the case of *Clark v. Lincoln County*, 1 Wash. 518, 20 Pac. 576, the plaintiff sued the county for personal injuries caused by a defective sidewalk. This court held that the county was not by law authorized to build and maintain sidewalks, and was not therefore liable for an injury resulting from a defect therein. However, in the case of *Kirtley v. Spokane County*, 20 Wash. 111, 54 Pac. 936, the doctrine of the *Clark Case* was repudiated. See, also, *Orrock v. S. Moran Tp. et al.*, 97 Wash. 144, 165 Pac. 1096.

We will now consider the errors contended for by the appellant transportation company.

[10] 6. This appellant contends that the complaint alleged that it was the owner of the property where this crossing of the sidewalk was made, but the court erroneously submitted the case to the jury on the theory that the transportation company merely had a statutory right to cross. It is contended that this was a fatal variance; that if the appellant transportation company actually owned the title to this land one set of laws would be applicable to its duties, but if it had nothing more than a right of way given by the statute, entirely different duties would devolve upon it. It is true the respondent did undertake to prove that this appellant was the owner of the title to the land covered by this sidewalk and crossing, and that it failed in its proof, but we think the allegations in the complaint were broad enough to allow the court to submit the case to the jury upon the theory that the appellant had nothing more than a statutory right of way. The complaint alleges that the transportation company "owned, controlled and maintained a right of way across said Naches avenue." The right of way there pleaded may be construed to mean the right of way given by the statute or the statutory privilege of crossing the county road. In any event, the appellant did not claim surprise nor ask a continuance on this account, and we do not see that there was such a variance from the complaint as that the appellant was prejudiced.

[11] 7. The trial court was of the opinion that the duties devolving upon the transportation company to construct and maintain the crossing in question were imposed by section 8730 et seq. of Rem. Code. Appellant contends that that section of the Code had reference only to stock crossings, and is inapplicable to the question involved in this case. With this contention we agree. That section was a part of the Laws of 1907, p. 169, and provided that every company building or operating a railroad shall cause to be constructed and maintained in good repair a substantial fence along its right of way, and wherever the railroad shall cross a public highway a safe and sufficient crossing must be built and maintained, and on each side of the crossing there must be cattle guards, and

that the railroad company shall be liable on account of stock killed or injured if it fail to comply with the statute. The title of the act is as follows:

"An act compelling railroads to fence their right of way and to protect the owners of stock injured by moving railway trains, declaring a law of negligence with regard to stock injured by railway trains."

It is very plain to us that this statute was passed solely for the protection of stock, and is wholly inapplicable to this case. However, a later act of the same session (Laws 1907, p. 192) gives authority for railroads to cross highways. It provides, among other things, as follows:

"In case any such railroad or railway, is or shall be located in part on private right of way, the owner thereof shall have the right to construct and operate the same across any county road or county street which intersects such private right of way, if such crossing is so constructed and maintained as to do no unnecessary damage: Provided, That any person or corporation constructing such crossing or operating such railroad or railway on or along such county road or public street shall be liable to the county for all necessary expense incurred in restoring such county road or public street to a suitable condition for travel."

Appellant contends that this statute is controlling, and that it does nothing more than announce the principles of the common law. We are of the opinion that this last statute does not pretend to set out the duties of a railroad company with reference to the construction or maintenance of crossings, but only authorizes a railroad to cross a highway. This statute does not affect the duty imposed by the common law to keep the crossing in reasonable repair. The appellant, having built its road across this highway, its duty to the public and to the respondent in this case must be measured by the rules of common law. It becomes necessary for us to determine what were such duties under the common law.

[12] Counsel for appellant has presented a forceful brief and argument to the effect that at the common law, when one way was laid over an existing way, the junior way was required to do no unnecessary damage in making the crossing, and if new structures are necessary to the crossing of the old way by the new, the new way must construct and maintain those new structures. The authorities cited by counsel support this contention as to what the common law is on this question. From this statement of the common law the appellant draws the conclusion that the only duty devolving upon it was to replace the sidewalk in as good condition as it was before it crossed the same, and that it had no duty to maintain it. We think, however, appellant misconstrues and misinter-

prets the duties imposed upon it by the common law. It must be remembered that in constructing its road across the highway it found the sidewalk in question to be about 2 feet beneath what would be the grade upon which its road would be built. It therefore made a fill of about 2 feet where the sidewalk was. The sidewalk was then placed back on top of this fill; the plank upon which the respondent tripped was 26 inches from the easterly rail. The overlap of an engine or car passing the sidewalk would be about 23 inches from the rail. In other words, the overlap of the train would not reach the plank on which the respondent was injured. However, the defective plank was upon that portion of the sidewalk which lay upon the fill made by the appellant. The exact question to be determined is whether or not it was the duty of this appellant to maintain that portion of the sidewalk upon which the respondent was injured.

It is our opinion that the common law imposes the duty upon a railroad crossing a highway by virtue of a statutory permission, to maintain that portion of the highway used or occupied by it, and since, in this case, the fill where the sidewalk was located was necessary for the uses of appellant, and since the appellant occupied all that portion of the highway actually covered by its fill, and since that portion of the sidewalk upon which the respondent was injured was laid on a portion of this fill, we hold that it was the duty of the transportation company to maintain that portion of the sidewalk.

The case of *Omaha & R. V. Ry. v. Brady*, 39 Neb. 27, 57 N. W. 767, was a personal injury case at a railroad crossing. The court there said:

"I am not aware of any statute in this state which expressly provides that railroad companies shall construct and maintain in good order street crossings at the grade intersections of their railroad and sidetracks with the streets of the cities of this state; but railroad companies are by the statutes given the right to lay their tracks in and across the streets of the municipalities of the state, and this right carries with it the corresponding duty on the part of the railroad companies to construct and maintain at all times proper crossings on the streets intersected at grade by their tracks and side tracks, and, if any injury is caused by reason of their neglect to do either, they are liable therefor."

At page 273, 33 Cyc., it is said:

"It is not sufficient for a railroad company properly to construct a crossing and to restore the highway crossed to a proper condition; but it is the duty of the company subsequently to keep and maintain the crossing in a safe and suitable state of repair, including not only the crossing of the tracks, but also the approaches thereto. This is a common-law duty, but is frequently expressly imposed by statutory or charter provisions."

In the case of *Moundsville v. Ohio River Ry. Co.*, 37 W. Va. 92, 16 S. E. 514, 20 L. R. A. 161:

"By the common law, if a railroad or canal company cross or build its work upon a public highway, it must make and maintain a proper, convenient, and safe crossing, and restore the highway to as good condition for public use as the condition in which it was before such interference with it, though such company be acting under leave from the proper authority."

Palatka v. State, 23 Fla. 546, 3 South. 158, 11 Am. St. Rep. 395, states the rule thus:

"Where the statute is silent, the common law applies, and a statute which expresses specifically no further exaction than a restoration of the highway to its former condition is not to be construed as abridging the common-law duty of maintaining the crossing in such plight as to make it reasonably safe."

In *People ex rel. v. C. & A. R. R. Co.*, 87 Ill. 118, the court says:

"It is a well-settled principle of the common law, resting upon the most obvious considerations of justice, that any person or corporation that cuts through a highway for the benefit of such person or corporation must furnish to the public a proper crossing, even though acting under a license from the proper authorities. We refer, of course, to cases where the legislative power has not, in terms, relieved the person or company that interferes with a highway from the necessity of removing any obstructions they may create. In the absence of such an express provision, it is palpable that a railway company is under obligation to leave every highway that it crosses in a safe condition for the public. * * * An obligation to keep up a crossing, imposed as a condition of the right to cross a highway, must be regarded as necessarily attaching to whatever person or corporation may be the owner of the road as long as the right is exercised. It is a continuing condition inseparable from the enjoyment of the franchise."

At section 1112, vol. 3, *Elliott on Railroads*, it is said:

"The duty of a railroad company in regard to the restoration and repair of highway crossings is not fully performed and ended by the mere restoration of the highway or the construction of a proper crossing in the first instance. It should keep the crossing in reasonably safe condition and repair, with reference both to the use of the same for its own purposes and for ordinary travel upon the highway."

To the same effect see the following cases: *Maltby v. Chi. & W. M. Ry. Co.*, 52 Mich. 108, 17 N. W. 717; *Moberly v. Kansas City, etc.*, 17 Mo. App. 518; *State of Minn. ex rel. v. St. Paul Ry.*, 98 Minn. 380, 108 N. W. 261, 28 L. R. A. (N. S.) 298, 120 Am. St. Rep. 581, 8 Ann. Cas. 1047; *Paducah & E. R. Co. v. Commonwealth*, 10 Am. & Eng. Ry. Cas. 318; *Cleveland v. Augusta*, 102 Ga. 233, 29 S. E. 584, 43 L. R. A. 638; *Farley v. C., R. I. & P. Co.*, 42 Iowa, 234; 2 *Elliott on Roads and*

Streets, § 1010; *Birlew v. St. Louis & S. F. R. Co.*, 104 Mo. App. 561, 79 S. W. 490; *Chesapeake, etc., v. Dyer Co.*, 87 Tenn. 712, 11 S. W. 943.

We have no hesitancy in laying down the rule that where a railroad crosses a highway (in the absence of statutory regulation) it is the duty of the railroad company to maintain that portion of the highway which it actually occupies and uses, including such approaches to the railroad tracks as are necessary in order to make a reasonably safe crossing. If the crossing is on the exact grade of the highway, the approach would be only that portion of the highway very near to the track, where it would be necessary to board or otherwise improve so as to make a reasonably safe way over the rail; but if the railroad cross the highway either above or below grade, then the approach would be of such proper length as would furnish a reasonable grade to the crossing and be of such width as to furnish a reasonably safe crossing. The width of the approach would depend upon how much of the highway right of way is improved and traveled.

Counsel for appellant seems to admit that it is the duty of the railroad to maintain that portion of the crossing which is between the rails. We know of no rule of law or reason which would require the railroad company to maintain that portion of the highway which is between the rails and would relieve it of the duty to maintain that portion of the highway upon which it has its fill. If in this instance the railroad company had put its railroad on blocks where it crossed the sidewalk, and had elevated the sidewalk on blocks to make a proper crossing of the track, it would seem clearly to be the duty of the transportation company to maintain that portion of the sidewalk which it had so elevated. It would seem that there could be no difference in principle whether the sidewalk is propped up or whether it is laid on a fill made by the transportation company.

We think the court was justified in submitting the question of negligence to the jury in so far as the transportation company was concerned. The conclusion to which we have come makes it unnecessary to discuss some of the instructions complained of with reference to approaches.

[13] 8. The court submitted to the jury certain interrogatories to be answered by them. We do not think it is necessary to set out here these interrogatories, or to say more than that we are of the opinion that they were unobjectionable. In this connection, the court instructed the jury that any ten of their number might answer any one of these interrogatories, and the appellant complains of this portion of the instructions. The matter, however, seems to be controlled by our statute. Section 358, Rem. Code, provides as follows:

"In all trials by juries of twelve in the superior court, except criminal trials, when ten of the jurors agree upon a verdict, the verdict so agreed upon shall be signed by the foreman, and the verdict shall stand as the verdict of the whole jury, and have all the force and effect of a verdict agreed to by twelve jurors."

Section 364, Rem. Code, is as follows:

"In every action for the recovery of money only, or specific real property, the jury, in their discretion, may render a general or special verdict. In all other cases, the court may direct the jury to find a special verdict in writing upon all or any of the issues, and in all cases may instruct them, if they render a general verdict, to find upon particular questions of fact to be stated in writing, and may direct a written finding thereon. The special verdict or finding shall be filed with the clerk and entered in the minutes."

It would appear, therefore, that these interrogatories were special verdicts under the statute, and since the statute authorizes ten jurors to return a verdict in certain actions, it would seem that the court's instructions authorizing any ten of the jurors to answer the questions was in accordance with the statute.

[14] 9. In instruction No. 34 the court undertook to define to the jury proximate cause, and in so doing used the following expressions:

"In event you believe that one or the other or both of the defendants were negligent, and that the plaintiff was also negligent, you must ascertain which negligence was the proximate cause of the injury as distinguished from the remote cause, and base your verdict accordingly. Any one or all of the parties may have been negligent. If the negligence of the plaintiff was the proximate cause of the injury, the plaintiff cannot recover; but if her negligence, if any, was not the proximate cause, but the remote cause, and the negligence of one or both of the defendants was the proximate cause, then the plaintiff would be entitled to recover."

The appellant transportation company objects to this instruction because the court told the jury that the respondent's negligence must be the proximate cause, as distinguished from a proximate cause, in order to prohibit her recovery. The distinction made by the appellant is correct as a principle of law; but in this instruction the court was manifestly instructing the jury as to the difference between proximate and remote cause, and, when read in that light, the instruction is not improper. Instruction No. 30 covered the question of contributory negligence, and set forth that contributory negligence arises from the failure on the part of the person injured to exercise reasonable care, and if the failure to exercise such reasonable care "proximately contributes to the cause of the injury," then there can be no recovery. This instruction properly defines

proximate cause in connection with contributory negligence.

One or two other minor questions raised by the transportation company's briefs have been duly considered, but we do not find any merit in them.

The case is reversed and remanded for new trial as to the appellant county, and the judgment is affirmed as to the appellant transportation company.

HOLCOMB, C. J., and MOUNT, PARKER, and FULLERTON, JJ., concur.

(32 Idaho, 426)

GLOVER v. BROWN et al.

(Supreme Court of Idaho. Oct. 1, 1919.)

(Per Budge, J.)

1. HUSBAND AND WIFE §286—ATTACK BY THIRD PARTY ON CONVEYANCE OF INTEREST IN COMMUNITY PROPERTY TO WIFE.

The validity of a conveyance from husband to wife of the husband's interest in community property cannot be questioned by a third party, unless such party was a creditor of the husband before the conveyance was made or was a subsequent purchaser without notice.

2. DESCENT AND DISTRIBUTION §74 — ON DEATH OF MOTHER—STATUTE.

Upon the death of respondent's mother intestate, an undivided one-half interest in her separate property passed immediately to respondent under section 5702, Rev. St. 1887, which was the succession law of this state at that time. The title to such interest vested in said heir at her death, subject only to proper administration.

3. EXECUTORS AND ADMINISTRATORS §315 (1)—PROVISIONS OF STATUTE AS TO DISTRIBUTION OF ESTATE MANDATORY.

The provision of section 5702, Rev. St. of 1887, that "it [the estate] * * * must be distributed * * * in equal shares to the surviving husband or wife and child * * *" is mandatory, and makes it the imperative duty of the probate court to distribute the property in the manner and to the heirs therein specified. Any other attempted distribution of the property in question is in excess of the probate court's jurisdiction and void.

4. JUDGMENT §441 — RELIEF IN EQUITY FROM FRAUD IN PROBATE PROCEEDINGS.

The validity of probate proceedings may be attacked upon the ground that such proceedings have worked a fraud, and a court of equity has jurisdiction to compel the restoration of lands or proceeds fraudulently acquired by such proceedings.

5. VENDOR AND PURCHASER §231(3)—PURCHASER CHARGEABLE WITH NOTICE OF RECORDED DEEDS.

One claiming title to lands is chargeable with notice of every matter affecting the estate which appears on the face of any recorded deed

forming an essential link in his chain of title, and also with notice of such matters as he might have learned by inquiry, which the recitals in such instruments made it his duty to pursue.

6. GUARDIAN AND WARD §108 — RULE OF CAVEAT EMPTOR APPLIES TO GUARDIAN'S SALE.

A guardian sale of real estate is a judicial sale, and the rule of caveat emptor applies.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Judicial Sale.]

7. APPEAL AND ERROR §179(1), 719(1)—ASSIGNMENT OF ERROR NECESSARY TO REVIEW.

Held, that appellants cannot raise the question of bona fide purchase upon this appeal: First, because they have made no assignment of error raising that question in this court; and, second, because the pleadings on their part do not properly raise the issue.

(Additional Syllabus by Editorial Staff.)

(Concurring Opinion per Morgan, C. J.)

8. HUSBAND AND WIFE §276(5)—PROBATE JURISDICTION — DISTRIBUTION OF SEPARATE PROPERTY OF DECEASED WIFE.

Where land was the separate property of a deceased wife, and not community property as found by the probate court, which has jurisdiction as to separate property, but not as to community property, that court in distributing it to husband, etc., did not deal with estate, but assumed to distribute to him property already belonging to him, so that that part of its decree was a nullity.

9. JUDGMENT §16—"JURISDICTION OF THE SUBJECT-MATTER."

In addition to jurisdiction of parties and subject-matter it is necessary to validity of a judgment that court have jurisdiction of question which its judgment assumes to decide, or of the particular remedy or relief which it assumes to grant; "jurisdiction of the subject-matter" meaning not only authority to hear and determine the particular class of actions, but authority to hear and determine the particular questions the court assumes to decide.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Jurisdiction of the Subject-Matter.]

10. VENDOR AND PURCHASER §231(8) — PROSPECTIVE PURCHASER PUT ON INQUIRY AS TO DISTRIBUTION OF ESTATE.

Where a prospective purchaser of land from a surviving husband, on whom probate court's decree of distribution in his wife's estate had not conferred title, or from his guardian, would have discovered on examination of record that it had been distributed to him as community property of himself and wife, and, being presumed to know of Rev. St. 1887, § 5712, relating to community property, would know that decree was a nullity, he would be put on inquiry as to nature of the title which would disclose all the infirmities.

Rice, J., dissenting.

Appeal from District Court, Canyon County; R. N. Dunn, Presiding Judge.

Action to quiet title and for partition by George R. Glover against Frank L. Brown and others. Judgment for plaintiff, and defendants appeal. Affirmed.

S. L. Tipton, of Boise, and F. A. Hagelin, of Nampa, for appellants.

George H. Rust, of Boise, for respondent.

BUDGE, J. This action was brought by respondent to quiet title to an undivided one-half interest in certain property in Canyon county, for partition thereof, and to have a decree of distribution made and entered in the probate court adjudged to be null and void. The cause was tried to the court on the second amended complaint and the answer thereto. Findings of fact and conclusions of law were made in accordance with the allegations of the complaint, and judgment entered for respondent in accordance with the prayer thereof. This appeal is from the judgment.

The facts necessary to a determination of the points presented by appellant are that the property was originally and prior to June 22, 1896, the community property of George S. Glover, the father, and Marietta Glover, the mother, of respondent. On the latter date, George S. Glover deeded the property to Marietta Glover. This deed was recorded in Canyon county, July 16, 1896, and contained the following recitals:

"That the said party of the first part, for and in consideration of the love and affection which he bears towards his wife, the said Marietta Glover, and for the purpose of making her a gift, does hereby give, grant, alien and convey unto his said wife, the said party of the second part, all that certain property situate in Canyon county, Idaho, and described as follows, to wit: The S. W. $\frac{1}{4}$ of sec. 34, T. 3 N., R. 2 W., B. M., Canyon county, Idaho, as the same appears of record in the recorder's office of said county.

"To have and to hold the same unto the said party of the second part, her heirs and assigns, for her sole and separate use, benefit and behoof forever. To hold and enjoy all and singular the same and every part and parcel thereof as and for her separate estate, especially relinquishing for himself and his heirs all right or claim to the same or any part thereof as community property, so that the same may be held by her as separate and not in any respect as community property."

Prior thereto, on January 6, 1896, Glover and his wife had mortgaged the property to Prosper Aveline. This mortgage was satisfied of record, January 29, 1903. On September 15, 1902, the property was again mortgaged to Prosper Aveline for \$1,800. This mortgage was satisfied of record August 1, 1907. Before the satisfaction of the latter mortgage, Marietta Glover died, intestate, June 16, 1905. Letters of administration of her estate were granted to George S. Glover by the probate court of Ada county, July 19, 1906. The property was returned and ap-

praised in the inventory as community property, and on February 1, 1907, the final decree of distribution of her estate purported to distribute as community property the entire property to George S. Glover, as the husband of the deceased, Marietta Glover.

On August 1, 1907, George S. Glover as a single man mortgaged the property again to Prosper Aveline, for \$5,000. The latter mortgage was foreclosed for nonpayment, and a decree of foreclosure and order of sale was filed October 31, 1908. On December 15, 1908, W. H. Thorpe, as sheriff of Canyon county, executed a certificate of sale of the property to Prosper Aveline, subject to redemption in one year.

In September, 1908, George S. Glover was adjudged insane by the probate court of Ada county and committed to the care and custody of the Idaho Insane Asylum at Blackfoot, where he remained at all times thereafter until the date of his death on November 30, 1913. One D. D. Williams was granted letters of guardianship of the estate of George S. Glover, October 2, 1908. Proceedings were had in the guardianship matter for the sale of the property, and on March 11, 1909, an order confirming the sale from D. D. Williams, as guardian, to T. W. Crane, was made, and pursuant thereto a guardian's deed was filed for record, April 1, 1909. On March 24, 1909, D. D. Williams, as guardian of the estate of George S. Glover, an insane person, paid to Prosper Aveline the sum of \$5,898.83, in full payment of the judgment on foreclosure of the mortgage, and interest and costs, against the property, and thereby redeemed the land from the foreclosure sale and sheriff's certificate thereof. All of the appellants derive their interests, either mediately or immediately, through T. W. Crane, who purchased the property at the guardian sale.

It is apparent that at the time of his mother's death, respondent was not quite 15 years of age.

The main points sought to be made by appellants are that there is no finding that the property was the separate property of Marietta Glover; that the property was in fact community property and not her separate property; that there is no sufficient allegation in the complaint as to fraud; and that the decree of distribution awarding the property to George S. Glover can only be attacked on appeal therefrom.

[1] As to the first point, the court found the facts above recited, and found as a conclusion of law that the property "was the sole and separate property of Marietta Glover." It was eminently proper to so find as a conclusion of law, if the facts as found upon which the conclusion is based are adequate to support the legal inference that the property was her separate property. Appellants contend that community property can only be conveyed so as to become the separate

property of the wife when there are no community or other debts of the husband, and rely upon the case of *Bank of Orofino v. Wellman*, 26 Idaho, 425, 148 Pac. 1169. The most that can be deduced from the opinion in the latter case, however, is that such a conveyance is void as to existing creditors. The true rule is that—

"No third party can question the validity of a conveyance from the husband to the wife unless he was a creditor of the husband before the conveyance was made, or was a subsequent purchaser without notice." *De Garca v. Galvan*, 55 Tex. 53; *Lehmberg v. Biberstein*, 51 Tex. 457.

The deed to Marietta Glover manifests on its face a clear and unequivocal intention to convert the property into the separate property of Marietta Glover. This deed was recorded long prior to the time that Crane took title through the guardian, upon whose title, as has been already observed, the rights of all of the appellants depend. No existing creditor is here complaining, and the facts show that the claims of all creditors in existence at the time the property was deeded to Marietta Glover were satisfied and the property redeemed.

It is clear, therefore, that the property was the separate property of Marietta Glover, and that the court properly so found.

[2] The statute of succession in force at the time of the death of Marietta Glover, defining the manner in which such property should be distributed, was section 5702 of the Revised Statutes of 1887, the material portion of which reads as follows:

"Sec. 5702. When any person having title to any estate not otherwise limited by marriage contract, dies without disposing of the estate by will, it is succeeded to and must be distributed, unless otherwise expressly provided in this Code, subject to the payment of his debts, in the following manner:

"1. If the decedent leave a surviving husband or wife and only one child, or the lawful issue of one child in equal shares to the surviving husband or wife and child, or issue of such child. * * *

Notwithstanding the fact that this property was separate property, it was caused to be returned by George S. Glover, as administrator of his wife's estate, as community property, inventoried, appraised, and distributed as such. It is immaterial whether George S. Glover was acting with an honest intention and in the belief that the property was community property. The result of this proceeding worked a fraud upon this respondent. As was said by the Supreme Court of Washington:

"It may be conceded that there was no intention—and we think that is a fact—on the part of the attorneys, the probate judge, Tull, and the respondent, to injure the appellants, and that they acted from the best of motives; but the fact stands out, nevertheless, that they perpetrated in law a fraud upon the children."

Dormitzer v. German Savings & Loan Society, 23 Wash. 132, 220, 62 Pac. 862, 891. Judgment affirmed 192 U. S. 125, 24 Sup. Ct. 221, 48 L. Ed. 373.

The foregoing language is quoted with approval in *German Savings & Loan Society v. Tull*, 136 Fed. 1, 69 C. C. A. 1.

Upon the death of Marietta Glover, an undivided one-half interest in the property passed immediately to respondent as her son and heir. His title vested at her death, subject only to proper administration. In re *Newlove's Estate*, 142 Cal. 377, 75 Pac. 1083; *McCaughy v. Lyall*, 224 U. S. 558, 32 Sup. Ct. 602, 56 L. Ed. 883.

The statute in force at the time vested the title, and a decree of distribution of the probate court neither gave a new title nor transferred any rights. *Bates v. Howard*, 105 Cal. 173, 38 Pac. 715; *Robinson v. Fair*, 128 U. S. 53, 9 Sup. Ct. 30, 32 L. Ed. 415; *Blinswanger v. Henninger*, 1 Alaska, 509; *Hume v. Laurel Hill Cemetery (O. C.)* 142 Fed. 552; *Carter v. Frahm*, 31 S. D. 379, 141 N. W. 370.

[3] But entirely apart from the question of fraud and its effect upon the validity of the decree of the probate court, that decree possesses no validity, for if any force is to attach to the finding of the probate court that the property was the community property of George S. and Marietta Glover, then that court became ipso facto divested of any further jurisdiction to administer upon the property. If, on the other hand, the finding of the probate court that the property was community property is to be disregarded and treated merely as an error, then its decree, which gave the whole estate to George S. Glover, is void as to the interest of this respondent, a minor heir, because in excess of the jurisdiction of the probate court.

Let it be conceded that it is the office of the probate court to determine who are the heirs. This was done, and the probate court found that George S. Glover and this respondent were the heirs. The law of succession already referred to in existence at that time gave one-half of the estate immediately upon the death of Marietta Glover to respondent, then a minor, subject only, as previously observed, to proper administration, and the probate court had no jurisdiction to decree the entire estate to one heir and to leave the other heir without estate, having found him to be such heir. The language of the statute is:

"* * * It [the estate] * * * must be distributed * * * in equal shares to the surviving husband or wife and child. * * *

The admonition expressed therein is not merely good advice, but is mandatory, leaves no discretion in the court, and makes it the imperative duty of the court to distribute the property in the manner and to the heirs

therein specified and found by the court. Any different attempted distribution of the property would be in excess of the probate court's jurisdiction and void. The authorities cited by respondent upon this principle are conclusive. The principle, briefly summarized, may be stated thus: Even though a court has jurisdiction over the subject-matter and the parties, if it proceeds to dispose of matters over which it is not authorized to act or to grant relief of a character which it has no power to grant, its judgment is in this respect void. *Anthony v. Kasey*, 83 Va. 338, 5 S. E. 176, 5 Am. St. Rep. 277, 278; *Furman v. Furman*, 153 N. Y. 309, 47 N. E. 577, 60 Am. St. Rep. 629, and note at 643, 644; *Day v. Micou*, 18 Wall. 156, 21 L. Ed. 861; *Ex parte Lange*, 18 Wall. 163, 21 L. Ed. 872; *In re Klumpke's Estate*, 167 Cal. 415, 139 Pac. 1062; *Freeman on Judgments*, § 116, p. 176.

With respect to void judgments, the latter author says:

"A void judgment is, in legal effect, no judgment. By it no rights are divested. From it no rights can be obtained. It neither binds nor bars any one. All acts performed under it and all claims flowing out of it are void. The parties attempting to enforce it may be responsible as trespassers. The purchaser at a sale by virtue of its authority finds himself without title and without redress. The first and most material inquiry in relation to a judgment or decree, then, is in relation to its validity. For if it be null no action on the part of the plaintiff, no inaction on the part of the defendant, no resulting equity in the hands of third persons, no power residing in any legislative or other department of the government, can invest it with any of the elements of power or validity. It does not terminate or discontinue the action in which it is entered, nor merge the cause of action; and it therefore cannot prevent the plaintiff from proceeding to obtain a valid judgment upon the same cause, either in the action in which the void judgment was entered or in some other action."

This proceeding is not a collateral attack on the judgment, but is a direct attack. *Campbell v. Campbell*, 149 Cal. 712, 87 Pac. 573.

The district court had jurisdiction under its general equity powers to entertain this action. As was said by this court:

"If through fraud or perjury an heir has been deprived of property without any laches or fault on his part, he has his remedy in a court of equity." *Connolly v. Probate Court*, 25 Idaho, 35, 47, 136 Pac. 205, 209.

[4] The validity of probate proceedings may be attacked for fraud, and the jurisdiction of a court of equity to compel restoration of lands or proceeds fraudulently acquired by such proceedings is clear. *Rhino v. Emery*, 72 Fed. 382, 18 C. C. A. 600; *Johnson v. Waters*, 111 U. S. 640, 4 Sup. Ct. 619, 28 L. Ed. 547; *Arrowsmith v. Glea-*

son, 129 U. S. 86, 9 Sup. Ct. 237, 32 L. Ed. 630; *McDaniel v. Traylor*, 196 U. S. 415, 25 Sup. Ct. 369, 49 L. Ed. 533; *Griffith v. Godey*, 113 U. S. 89, 5 Sup. Ct. 383, 28 L. Ed. 934.

In the celebrated case of *Johnson v. Waters*, supra, the court used the following pertinent language:

"In a general sense, it is true that the decisions of that court [probate] in the matter of the succession are conclusive and binding, especially upon those who were parties. But this is not universally true. The most solemn transactions and judgments may, at the instance of the parties, be set aside or rendered inoperative for fraud. The fact of being a party does not estop a person from obtaining in a court of equity relief against fraud. It is generally parties that are the victims of fraud. The court of chancery is always open to hear complaints against it, whether committed in this or by means of judicial proceedings. In such cases the court does not act as a court of review, nor does it inquire into any irregularities or errors of proceeding in another court; but it will scrutinize the conduct of the parties, and if it finds that they have been guilty of fraud in obtaining a judgment or decree, it will deprive them of the benefit of it, and of any inequitable advantage which they have derived under it."

Another case much in point is *Sohler v. Sohler*, 135 Cal. 323, 67 Pac. 282, 87 Am. St. Rep. 98. The opinion in the latter case so clearly elucidates one of the main principles decisive of the present case that we feel constrained to quote therefrom at some length. The court said:

"The executrix of the estate was not alone the trustee of all of the heirs of the estate and all of the parties in interest thereto and thereunder. She was the mother of these minor plaintiffs, had their actual custody and control, and, as their natural guardian, was chargeable with all the high duties pertaining to that relationship. As executrix, merely, it might be argued that she was a disinterested party, having no concern whatsoever in the question of heirship or right of distribution, standing indifferent between the parties, and interested only in carrying into effect the determination of the court upon these questions. But as the mother and natural guardian of these plaintiffs her position was a very different one. She was under most solemn obligation to protect the legal rights of her infant and dependent offspring. She was under like obligation to disclose to the court, on their behalf and in their interest, all knowledge which she possessed, and she was under the same obligation to see that their legal claims to the estate were properly presented before the court in probate; and with peculiar force did this duty press upon her, in view of the fact that during all of this time she was executrix of, and administered upon, the estate through which her children were to derive their property. Such being her position, it is charged that, in violation of this duty, and of the rights of her minor children, she connived with her adult son—not an heir to the estate of the deceased—to procure for him a distributive portion of that estate, and that the conspiracy was carried to a successful termination. Here certain-

ly is a charge of concealment upon the part of the guardian, when she should have spoken in the interest of her wards, and collusion upon the part of the guardian with another not in interest in the estate, to the end that that other might despoil the wards of their rightful inheritance. It cannot to this be answered that the probate proceeding upon distribution was not an adversary proceeding. It becomes adversary in every case where there are conflicting claims, and where there be not the most perfect understanding and harmony between the claimants. The moment heirship was set up by the false claimant, Reuss, that moment between him and the rightful heirs an adversary proceeding was at issue, and from that moment it became the duty of the guardian of these minor heirs to see that the fullest presentation of their claims was put before the court. This, by conspiracy with her codefendant, it is asserted she did not do, and it is clear that her fraud in pushing on behalf of Reuss his false claim to heirship and distribution, and in concealing the truth from her own minor children, the rightful heirs, and in leaving them in ignorance that they were thus to be deprived of their patrimony, was fraud extrinsic to the case, which prevented their being properly represented at the hearing, or from being represented at all."

Of all of these matters, the purchaser at the guardian sale through whom these appellants seek to claim, upon the theory that they are bona fide purchasers, was as fully advised at the time he took the guardian's deed as were appellants at the time they purchased, for, as has been noticed, the deed from George S. Glover, which constituted this property the separate property of Marietta Glover, was and had for years been on record, before the guardian sale.

[5] The general rule is fairly stated in 39 Cyc. 1713, that:

"One claiming title to lands is chargeable with notice of every matter affecting the estate which appears on the face of any deed forming an essential link in the chain of instruments through which he derives his title, and also with notice of whatever matters he would have learned by any inquiry which the recitals in those instruments made it his duty to pursue * * *"—citing numerous authorities from nearly every jurisdiction in the land. 2 Pomeroy's Equity Jurisprudence (4th Ed.) § 655, p. 1296.

A clear exposition of the principle involved will be found in *Dormitzer v. German Savings & Loan Society*, supra. The court, after discussing the principle, quoted the following statements of the rule from the authorities cited:

"Whatever is notice enough to excite the attention of a man of ordinary prudence and call for further inquiry is, in equity, notice of all facts to the knowledge of which an inquiry suggested by such notice, and prosecuted with due and reasonable diligence, would have led. *Kerr, Fraud & M.* 236. It will not do for a purchaser to close his eyes to facts; facts which were open to his investigation by the exercise of that diligence which the law imposes. Such purchasers

are not protected. * * * No principle is better established than that a purchaser must look to every part of the title which is essential to its validity. * * * When a purchaser cannot make out his title but through a deed which leads to a fact, he will be affected with notice of that fact." *Brush v. Ware*, 15 Pet. 93, 10 L. Ed. 672."

[6] A guardian sale of real estate is a judicial sale and the rule of caveat emptor applies. *Black v. Walton*, 32 Ark. 321; *Guyann v. McCauley*, 32 Ark. 97.

There is no question of latent equity in this case. The facts which rendered the probate court's decree void were clearly expressed upon its face, independent of the fraud which in law had been practiced upon respondent.

Moreover, these appellants are in no position to urge the question of bona fide purchase upon this appeal: First, because they have made no assignment of error raising the question in this court; second, because the pleadings on their part do not properly raise the issue.

The rule is stated by Mr. Pomeroy as follows:

"The allegations of the plea, or of an answer so far as it relates to this defense, must include all those particulars which, as has been shown, are necessary to constitute a bona fide purchase. It should state the consideration, which must appear from the averment to be 'valuable' within the meaning of the rules upon that subject, and should show that it has actually been paid, and not merely secured. *It should also deny notice in the fullest and clearest manner, and this denial is necessary whether notice is charged in the complaint or not.*" (Italics ours.) 2 Pomeroy, Equity Jurisprudence (4th Ed.) § 785, at 1606.

[7] The question of bona fides, therefore, is not presented upon this appeal. Be that as it may, appellants' predecessors in interest had all the notice which the law is capable of giving them. It certainly cannot be argued that any duty rested upon this minor heir, who was without representation in fact and whose rights have been purportedly destroyed by the fraud of his natural guardian, to rush in to the guardian sale and by proclaiming his interests give actual notice in fact to Crane, the purchaser thereat. No such duty rests upon a minor. If the notice which Crane had is insufficient to defeat his claim that he is a bona fide purchaser, then there is no means known to the law by which the rights of this minor could have been protected, in view of the conduct of the probate court and his natural guardian. It would be a reproach upon the law and upon our form of jurisprudence to hold that a court of equity is impotent to afford a minor relief under such circumstances.

There is no merit in the contention of appellants that they are entitled to equitable

relief by reason of the fact that money of their grantor, Crane, went to pay off the mortgage referred to herein under the belief that George S. Glover had the entire title to the land. They are not subrogated to the rights of the mortgagee. There was no mistake of fact. The only mistake was one of law, against which a court of equity will not grant relief. *Kleimann v. Geiselmann*, 114 Mo. 437, 21 S. W. 796, 35 Am. St. Rep. 761; *German Savings & Loan Society v. Tull*, supra; 2 *Jones on Mortgages* (6th Ed.) § 874f, p. 417; *Wadsworth v. Blake*, 43 Minn. 509, 45 N. W. 1131.

The judgment is affirmed. Costs awarded to respondent.

MORGAN, C. J. (concurring). While I concur in the conclusion reached in the foregoing opinion, I do so for reasons that are entirely foreign to those therein expressed.

At the time Marietta Glover died, and during the time an attempt was being made to probate her estate, Rev. Stats. § 5712, was in force, and contained the following provision:

"Upon the death of the wife, the entire community property, without administration, belongs to the surviving husband. * * *

The record before us discloses that the probate judge, in his decree of distribution, found the heirs to the estate of Marietta Glover to be her husband and her son; also that the land, title to which is here in litigation, was community property, which he thereupon assumed to distribute to the husband.

[8] It is clear the land in question was the separate property of the decedent, and that the probate court had jurisdiction of it. It is also clear that tribunal did not have jurisdiction of the community property because it did not belong to the wife's estate, but upon her death belonged, without administration, to the husband. That court, having found the land to be community property, did not, in purporting to make distribution of it, deal with the estate of the wife, but assumed to distribute to the husband property which already belonged to him, not because he inherited it, but because he owned it. This was beyond the jurisdiction of the court, and that portion of the decree is a nullity.

[9] "In addition to jurisdiction of the parties and the subject-matter, it is necessary to the validity of a judgment that the court should have jurisdiction of the question which its judgment assumes to decide, or of the particular remedy or relief which it assumes to grant. * * *" 23 Cyc. 684; *Munday v. Vail*, 34 N. J. Law, 418; *Waldron v. Harvey*, 54 W. Va. 608, 46 S. E. 603; *Standard Savings & Loan Association v. Anthony Wholesale Grocery Co.*, 162 Pac. 451, L. R.

A. 1917D, 1029; *Sharp v. Sharp*, 166 Pac. 175, L. R. A. 1917F, 562. " 'Jurisdiction of the subject-matter' means, not only authority to hear and determine a particular class of actions, but authority to hear and determine the particular questions the court assumes to decide." *Sache v. Wallace et al.*, 101 Minn. 169, 112 N. W. 886, 11 L. R. A. (N. S.) 803, 118 Am. St. Rep. 612, 11 Ann. Cas. 348.

It was beyond the jurisdiction of the probate court to distribute community property to the surviving husband because it was not a part of the deceased wife's estate. Although it had jurisdiction to do so, that court did not distribute to him the separate property of his wife; it failed to find she had separate property. That which it attempted it was without jurisdiction to do; that which it had jurisdiction to do it did not attempt.

[10] The decree did not confer title upon George S. Glover, and it is not available to appellants in support of their contention that they are innocent purchasers and incumbancers. A prospective purchaser of this land from Glover, or his guardian, would discover, upon examination of the record, that it had been distributed to him by the probate court as community property of himself and his wife. Such a purchaser, being presumed to have knowledge of the provision of section 5712, supra, would know the decree was a nullity; that it could neither add to nor detract from the title Glover had, and would be put upon his inquiry as to the nature and condition of that title, which inquiry would disclose all its infirmities.

I dissent from that portion of the opinion which holds a decree of a probate court distributing property other than as directed by statute to be in excess of its jurisdiction and void; also from that portion which holds this action to be a direct, and not a collateral attack upon the judgment (*O'Neill v. Potvin*, 13 Idaho, 721, 93 Pac. 20, 257), and from that portion which announces that "the validity of probate proceedings may be attacked for fraud and the jurisdiction of a court of equity to compel restoration of lands or proceeds fraudulently acquired by such proceedings is clear," unless that rule is limited by a statement to the effect that decrees of probate courts in probate matters are subject to attack in like manner and to like extent only as are judgments and decrees of other courts of record in matters within their jurisdiction.

RICE, J. (dissenting). The property involved in this action was the separate property of Marietta Glover at the time of her death. From the stipulation of facts filed in this case we must assume that the probate court acquired jurisdiction of her estate. Under Rev. Statutes, § 5702, subd. 1. her surviving husband, George S. Glover, and her minor son, George R. Glover, plaintiff below,

were entitled to succeed to this property in equal shares. Such proceedings were had in the administration of her estate in the probate court that a decree of distribution was entered, reciting that the property was community property, and distributing the whole thereof to the surviving husband, George S. Glover. No appeal was taken from this decree of distribution.

It is true that it is not the office of a decree of distribution by the probate court to create titles, or to transfer rights. In *re Newlove's Estate*, 142 Cal. 377, 75 Pac. 1083; *Bates v. Howard*, 105 Cal. 173, 38 Pac. 715; *Gossage v. Crown Point M. Co.*, 14 Nev. 153; *Chever v. Ching Hong Poy*, 82 Cal. 68, 22 Pac. 1081. But it is the office of a decree of distribution to determine who the heirs are to whom the estate has descended, in the absence of a testamentary disposition thereof, and apportion the parts to which each heir is entitled. In Idaho a decree of distribution applies to personal property and real estate alike. See *Toland v. Earl*, 129 Cal. 148, 61 Pac. 914, 79 Am. St. Rep. 100.

Involved in every decree of distribution in the matter of any estate of which the probate court has jurisdiction, and which has not been disposed of by will, is the determination of the question as to who are the heirs of the intestate, and the further question of the parts or proportions of the estate to which each heir is entitled. *Miller v. Mitcham*, 21 Idaho, 741, 123 Pac. 941; *Connolly v. Probate Court*, 25 Idaho, 85, 136 Pac. 205; *Crew v. Pratt*, 119 Cal. 139, 51 Pac. 38; *Cunha v. Hughes*, 122 Cal. 111, 54 Pac. 535, 68 Am. St. Rep. 27; *St. Mary's Hospital v. Perry*, 152 Cal. 338, 92 Pac. 864; *In re Burdick's Estate*, 112 Cal. 387, 44 Pac. 734.

If the property in fact had been community property, under Revised Statutes in force at the time this administration was had, the probate court would have had no jurisdiction of the estate. In *re Rowland's Estate*, 74 Cal. 523, 16 Pac. 315, 5 Am. St. Rep. 464; *In re Young's Estate*, 123 Cal. 337, 55 Pac. 1011; *In re Klumpke's Estate*, 167 Cal. 415, 139 Pac. 1062.

The claim advanced by the husband that the property was community property and belonged to him, not as heir but as owner, is a claim adverse to the estate, and presents a question of which the probate court had no jurisdiction. In *re Klumpke's Estate*, supra; *In re Rowland's Estate*, supra. The probate court, under our statute, is not required to make and file findings of fact as a basis for its decree of distribution. If the probate court in this case was attempting to pass upon the adverse claim of the surviving husband that the property was community property, and therefore belonged to him as owner without administration, its action in so finding was beyond its jurisdiction and void.

I think the mere fact that the court found, by way of recital, that the property involved in this action was community property would not have the effect of divesting the court of jurisdiction of the estate. Notwithstanding such finding, it was the court's duty to proceed and make a decree of distribution, a duty which, in case of refusal, it might have been compelled to perform by writ of mandate. It did not dismiss the probate proceedings, but did make and enter its decree of distribution.

That the court was intending to decree a distribution of the estate of Marietta Glover, deceased, and was not settling over the estate to George S. Glover, the surviving husband, because as community property it belonged to him without administration, I think is patent on the face of the decree itself. The decree contains the following:

"George S. Glover, the administrator of the estate of Marietta Glover, deceased, having on the 21st day of January, 1907, filed in the court his petition, setting forth, among other matters, that all accounts have been finally settled, * * * and that a portion of said estate remains to be divided among the heirs of said deceased; * * * said matter coming on regularly to be heard this 1st day of February, 1907, * * * and it appearing to the satisfaction of this court that the residue of said estate, consisting of the property hereinafter particularly described, is now ready for distribution; * * * that the said estate is community property; that the said Marietta Glover died intestate in the county of Los Angeles, state of California, on June 16, 1907 [1905] and his [her] only heirs at law are George S. Glover, husband, and Raymond Glover, son; * * * that the said George S. Glover, as the husband of the said Marietta Glover, is entitled to all the residue of said estate. * * *

"It is hereby ordered, adjudged, and decreed that the residue of said estate of Marietta Glover, deceased, hereinafter particularly described, and now remaining in the hands of said administrator, and any other property not now known or discovered, which may belong to said estate, or in which the said estate may have an interest, be and the same is hereby distributed as follows, to wit: [To] George S. Glover. * * * (Then follows a particular description of the property involved in this action.)

Failure to mention an heir, or distribution to one not an heir, or erroneously determining the proportions or parts of the estate to which the heirs are entitled, does not render the decree void. *Sohler v. Sohler*, 135 Cal. 323, 67 Pac. 282, 87 Am. St. Rep. 98; *Mulcahey v. Dow*, 131 Cal. 73, 63 Pac. 158. To so hold would be to deny power in the court to commit error. To hold a decree of distribution, awarding to one heir that portion of an estate which by the statute of succession belongs to another heir, void pro tanto because in excess of the jurisdiction of the probate court, would result in unsettling the probate titles of the state. It would

lead to the evil which the law was designed to remedy. I think, therefore, that the decree of distribution in this case was erroneous, but not void.

No appeal having been taken, it became final and conclusive. *C. L. § 5627; Miller v. Mitcham, supra; Connolly v. Probate Court, supra; Wm. Hill Co. v. Lawler, 116 Cal. 359, 48 Pac. 323; Crew v. Pratt, supra; Goad v. Montgomery, 119 Cal. 552, 51 Pac. 681, 63 Am. St. Rep. 145; In re Trescony, 119 Cal. 568, 51 Pac. 951; Cunha v. Hughes, supra; Jewell v. Pierce, 120 Cal. 79, 52 Pac. 132; In re Miner's Estate, 143 Cal. 194, 76 Pac. 968; St. Mary's Hospital v. Perry, supra; In re Kennedy's Estate, 129 Cal. 384, 62 Pac. 64; In re Burdick's Estate, supra; Chever v. Ching Hong Poy, supra.*

The decree of distribution, being a proceeding in rem, was binding upon the minor heir. *Mulcahey v. Dow, supra; Connolly v. Probate Court, supra.*

Decrees of probate courts in probate matters, however, are subject to attack in equity to the same extent as decrees or judgments of other courts in other actions. *Bacon v. Bacon, 150 Cal. 477, 89 Pac. 317.*

The second cause of action in the complaint alleges fraud in the procurement of the decree of distribution, and the complaint contains a prayer for general relief.

Respondent in this case should have been granted any relief to which he was entitled under the allegations of his complaint, and the proof produced at the trial. *Dormitzer v. German Savings & Loan Soc., 23 Wash. 132, 62 Pac. 862.* His allegations and proof of fraud were sufficient within the rules laid down in the cases of *Sohler v. Sohler, supra*, and *Diamond v. Connolly, 251 Fed. 234, 163 C. C. A. 390.*

Under the Constitution and statutes of this state, probate courts are granted exclusive original jurisdiction in the matter of the settlement of estates. *Connolly v. Probate Court, supra; Idaho Trust Co. v. Miller, 16 Idaho, 308, 102 Pac. 360.* The district court, therefore, could not have set aside the decree of the probate court and substitute such a decree as would have been proper in its judgment; neither is it within the province of the district court, unless the matter reaches it on appeal, to direct the probate court as to what decree it shall make. *Toland v. Earl, supra.*

Doubtless, in proper cases where those interested in the estate can be made parties to the action, a decree of distribution may be set aside in equity for fraud. In such cases the estate reverts to the probate court to complete the administration. *In re McFarland's Estate, 10 Mont. 586, 27 Pac. 389.* But in this case the surviving husband died long prior to the institution of the action. Appellants, defendants below, had derived title through the father, George S. Glover.

Respondent was not entitled to have the decree set aside so as to divest appellants of their title, or cast a cloud thereon, if they were bona fide purchasers of the property. It may be conceded that at the time the guardian's deed was given the property was impressed with a constructive trust, that is, that George S. Glover held an undivided one-half of the property as trustee for his minor son. *Diamond v. Connolly, supra; Sohler v. Sohler, supra; Estate of Hudson, 63 Cal. 454.* A guardian's sale of real estate is a judicial sale, and the rule of caveat emptor applies. *Black v. Walton, 32 Ark. 321; Bachelor v. Korb, 58 Neb. 122, 78 N. W. 485, 76 Am. St. Rep. 70; Leuders v. Thomas, 35 Fla. 518, 17 South. 633, 48 Am. St. Rep. 255.* But a purchaser in good faith of trust property at a judicial sale thereof is not affected by the trust, and takes the property freed therefrom, unless he had notice of the trust at the time of the purchase. *17 Cyc. 1302; 39 Cyc. 562.*

Respondent alleged in his complaint that the appellants took their title with notice of his equities, and that they were not bona fide purchasers, which allegations appellants denied. In their answer, they did not affirmatively allege that they were bona fide purchasers. The court found that the defendants, appellants here, purchased their title to the land described with notice of the rights and interests of respondent. Appellants do not specify as error in their brief that the evidence was insufficient to support this finding, although they argue that appellants were bona fide purchasers for value.

It is apparent from the record, however, that the question of the bona fides of appellants was considered in the trial of the case below. Since the evidence consisted principally of a stipulation of facts, and no question of credibility of witnesses is involved, and this court has before it for consideration all that the trial court had on this feature of the case, I think we should consider the question of the bona fides of appellants, even in the absence of a direct specification of error as to the insufficiency of the evidence, and even though the burden of alleging and proving that appellants were bona fide purchasers rested with them. *Ewald v. Hufton, 31 Idaho, 373, 173 Pac. 247; Johansen v. Looney, 31 Idaho, 754, 176 Pac. 778.*

There is nothing whatever in the record upon which the finding that the appellants took with notice can be based, except the fact that the deed of gift from the husband to the wife was duly recorded. But between the time of the recording of that deed and the guardian's sale the probate court had distributed the property to the surviving husband. A decree of distribution of the probate court is entitled to all the presumptions in its favor which are applicable to a decree

of a court of general jurisdiction. In the absence of any proof of notice, extrinsic to that contained in the records in the office of the county recorder, it seems to me to be manifest that a purchaser would have a right to rely upon the subsequent decree.

I am of the opinion that the judgment should be reversed, and the cause remanded to the district court for a new trial.

(181 Cal. 342)

JOHNSON v. RAZEY et al. (L. A. 5251.)

(Supreme Court of California. Oct. 8, 1919.)

1. MORTGAGES § 137, 241—A LIEN AND NOT AN INTEREST IN PROPERTY.

Under Civ. Code, § 2888, a mortgage lien is not an interest in the property, but a mere lien; so that transfer of the mortgage does not transfer title to the mortgaged land.

2. MORTGAGES § 235 — SECURITY FOR DEBT AND NOT TRANSFERABLE WITHOUT TRANSFER OF DEBT.

A mortgage being a mere security for debt, is not transferable without transfer of the debt.

3. MORTGAGES § 268—KEPT ALIVE TO PROTECT INTEREST OF CREDITOR.

Where mortgage was assigned to a married woman and the mortgaged land deeded to her husband, and they then deeded the land, expressly subject to the mortgage, it will be held not to have merged in the fee; equity keeping it alive where necessary to protect rights of the one to whom the debt is due.

Department 1.

Appeal from Superior Court, Los Angeles County; John W. Shenk, Judge.

Action begun by Arnold Vetter, Anna M. Johnson being substituted as plaintiff, against H. B. Razey and another. From an adverse judgment, defendant O. S. James appeals. Affirmed.

Hammack & Hammack, of Los Angeles, for appellant.

Charles J. Kelly and D. A. Stuart, both of Los Angeles, for respondent.

SHAW, J. The defendant James appeals on the judgment roll from a judgment foreclosing a mortgage. The action was begun by one Arnold Vetter. Before the trial the mortgage was assigned to Anna M. Johnson and she was substituted as plaintiff.

The facts presented by the record are as follows: The defendant Razey, being at the time the owner of the land involved, executed a mortgage thereon to said Vetter to secure a note for \$1,500. Default having been made in payment of the note, Vetter began this action to foreclose the mortgage. The defendant James was made a party upon

the allegation that he had some interest in the property. After the suit was begun, Razey conveyed the land, subject to the mortgage, to Peter Johnson, who was the husband of said Anna M. Johnson. Thereafter Vetter assigned the mortgage to said Anna M. Johnson. The consideration for this assignment was paid from her separate funds, and the mortgage thereupon became her separate property. The land held by Peter Johnson under his conveyance from Razey must be presumed to have been community property, although the record is silent on the subject. Before the trial Peter Johnson and his said wife, Anna M. Johnson, joined in a deed conveying the land to the defendant James. This deed expressly stated that the land was conveyed to James subject to the said mortgage, suit to foreclose which was then pending. By a supplemental answer James set up these transactions, and he now claims that by reason of the deed from Peter Johnson and wife to James the mortgage became satisfied and he became vested with the entire interest in the property free from all liens and claims thereon of either of the parties to said deed. His theory is that, since the deed purported to convey the fee, it carried with it all lesser interests which she held in the land and liens which she held thereon including this mortgage lien, and that the provision in the deed itself that the grantee took the property subject to the mortgage was of no effect.

[1-3] We cannot agree with this contention. The mortgage belonged to the wife as her separate property. The land belonged to the husband as community property. It does not appear that the wife received any consideration for the conveyance of the land by her husband to James going to her separate estate. As all presumptions must be indulged in support of the judgment and facts which are justly inferable from the facts found must be presumed to exist, we must assume that she joined in the deed because it was a conveyance of community property to which her signature would, under some contingencies, be necessary to give title satisfactory to the purchaser. A mortgage lien is not an interest in the property, but a mere lien thereon. A transfer of the mortgage does not transfer title to the land mortgaged. Civ. Code, § 2888. A mortgage is a mere security for the debt, and it cannot pass without a transfer of the debt. The conveyance of the land and the assignment of the mortgage are distinct transactions, different in character; the intention of one being to convey the title to the land, and of the other to transfer a debt with its securities. Civ. Code, § 2936; *Peters v. Jamestown Bridge Co.*, 5 Cal. 336, 63 Am. Dec. 134. In view of the express reservation in the deed that it was conveyed subject to the mortgage, it is obvious that there was no

transfer to James of the debt due to the wife or of the security therefor. Under these circumstances, equity will regard the title to the land and the lien thereon as separate and keep the lien alive for the purpose of protecting the owner of the debt. The principle that equity will keep alive a mortgage lien under circumstances similar to this where it is necessary to do so in order to accomplish justice and protect the rights of the party to whom the debt is due is fully established by our decisions. *Davis v. Randall*, 117 Cal. 12, 48 Pac. 906; *Anglo California Bank v. Field*, 146 Cal. 653, 80 Pac. 1080; *Rumpp v. Gerkens*, 59 Cal. 502; *Tolman v. Smith*, 86 Cal. 280, 24 Pac. 743. The court did not err in applying these principles and holding that the mortgage still remained effective notwithstanding the conveyance to said defendant.

The judgment is affirmed.

We concur: **LAWLOR, J.; OLNEY, J.**

(181 Cal. 389)

CONTINENTAL CASUALTY CO. v. PILLSBURY et al., State Industrial Accident Commission. (Sac. 2952.)

(Supreme Court of California. Oct. 8, 1919.)

MASTER AND SERVANT §388—WIFE RECEIVING SEPARATE MAINTENANCE CAN RECOVER UNDER WORKMEN'S COMPENSATION ACT.

A wife who is not living with her husband, but who is receiving from him money paid pursuant to a decree awarding her separate maintenance, is, within Workmen's Compensation Act, § 14, declaring that a wife shall be conclusively presumed dependent for support upon a husband with whom she was living or for whose support such husband was legally liable, and an award in her favor for his death cannot be defeated on the ground that the legal liability in the act meant the common-law liability defined by Civ. Code, §§ 174, 175, for the decree merely reduced to a definite form the common-law liability of the husband to support her.

In Bank.

Application for writ, by the Continental Casualty Company, directed to A. J. Pillsbury and others, members of and constituting the Industrial Accident Commission, to review an order of the commission awarding compensation to the surviving widow of a deceased workman. Award affirmed.

Devlin & Devlin, of Sacramento, for petitioner.

A. E. Graupner, of San Francisco, for respondents.

OLNEY, J. One Cox was killed while in the employ of the Sacramento Northern Railroad. No question is made but that the accident resulting in his death occurred un-

der such circumstances that his dependents, if he had any, are entitled to compensation under the Workmen's Compensation Act (St. 1917, p. 831). He left a wife, and she petitioned the commission for such compensation, and it was awarded her as wholly dependent upon him. The insurance carrier for the employer thereupon petitioned for and secured an alternative writ from this court to review the award. The sole question is as to whether the decedent's wife was wholly dependent upon him within the meaning of the Workmen's Compensation Act.

The material provisions of the act are the following portions of section 14:

"(a) The following shall be conclusively presumed to be wholly dependent for support upon a deceased employé: (1) A wife upon a husband with whom she was living at the time of his death, or for whose support such husband was legally liable at the time of his death. * * * (b) In all other cases, questions of entire or partial dependency and questions as to who constitute dependents and the extent of their dependency shall be determined in accordance with the fact, as the fact may be at the time of the injury of the employé."

The wife was not living with the decedent at the time of his death. In order to support the award of the commission, it must therefore appear either that the decedent was legally liable for her support or that she was in fact wholly dependent upon him. The commission found in favor of the wife on both these issues. As we are of the opinion that the award must be sustained upon the first ground—that is, that her husband at the time of his death was legally liable for her support—there is no necessity for considering the second.

The facts upon the first issue are that the decedent deserted his wife in 1911, and never lived with her afterwards. No proceedings for a divorce were ever brought, but in 1912 his wife filed in Iowa a suit for separate maintenance and secured a decree awarding her such maintenance in the sum of \$50 a month. This decree remained in effect until the decedent's death. Pursuant to the decree the decedent sent his wife money from time to time, the amounts averaging about \$20 or \$25 a month. The position of the insurance carrier is that, by reason of the existence of this maintenance decree, the husband was not legally liable for his wife's support. The mere statement of this position is well-nigh enough of an answer to it. It is rather difficult to see what the maintenance decree means if it does not mean that the husband is legally liable for his wife's support.

The contention of the insurance company is that, when the act speaks of the husband being legally liable for the wife's support,

"the liability therein referred to must necessarily mean the common-law liability defined by sections 174 and 175 of the Civil Code, and *cannot mean liability to the wife.*" (The italics are ours).

Section 175 has nothing to do with the case. It provides that when a wife abandons her husband, or lives apart from him by agreement, he is not liable for her support. Here the wife had not abandoned her husband, nor was she living apart from him by agreement.

Section 174 provides that, if the husband neglects to make adequate provision for the support of his wife, any other person may furnish her with necessities and recover the reasonable value thereof from the husband. The point is made that by the maintenance decree the husband was relieved from liability to third persons under this section. It is immaterial whether he was or not. The compensation provided by the act is for the benefit of the wife, not for that of her creditors, or of those who may supply her with necessities. It is true that the liability of the husband to persons supplying the wife with necessities where he neglects to provide for her is an incident of the obligation which rests upon him to support her. But it is only an incident, not the main obligation. The incident may be removed, and the main obligation remain wholly unaffected.

There are cited in petitioner's behalf authorities to the effect that, when there has been a divorce a mensa et thoro with a decree of maintenance to the wife, the common-law obligation of the husband is supplanted by the obligation of the decree and the husband's responsibility is measured by the decree. This is true in the sense that the husband's obligation, previously indefinite as to the amount of support or the manner in which it should be provided, is by such a decree made certain by requiring that the obligation be met by paying a certain amount of money, and paying it to the wife. Thereafter the husband's obligation is measured by the decree, but the fundamental obligation continues. The decree is, in fact, a judicial determination of the fact that the obligation exists, although the parties are separated. That an action for maintenance is but an action to enforce the husband's duty to support his wife was decided in *Galland v. Galland*, 38 Cal. 265.

It follows that at the time of the decedent's death he was legally liable for the support of his wife, and the action of the commission in making its award upon that basis was correct.

The award is affirmed.

We concur: ANGELLOTTI, C. J.; SHAW, J.; WILBUR, J.; MELVIN, J.; LENNON, J.; LAWLOR, J.

(181 Cal. 386)

NEWELL v. E. B. & A. L. STONE CO.
(S. F. 8482.)

(Supreme Court of California. Oct. 8, 1919.)

1. VENDOR AND PURCHASER ⇐85—NOTICE AND CONDUCT NOT AMOUNTING TO RESCISSION BY CONSENT.

Giving of notice of tender of deed to the vendee by the vendor of land, after the vendee was in default in making installment payments, notice being intended as basis to declare a forfeiture, together with the conduct of the parties thereafter, held not to have amounted to a rescission by their mutual consent, to entitle the vendee to demand return of moneys paid.

2. VENDOR AND PURCHASER ⇐187—ACCEPTANCE OF OVERDUE PAYMENTS WAIVER OF PROVISION AS TO TIME BEING OF ESSENCE.

The vendor of land, by accepting installment payments after the time specified, waived the provision of the contract with reference to time being of the essence as to such payments, and could not thereafter effectually declare forfeiture of the vendee's right to purchase and of the payments already made, without notice that in the future a strict performance would be required.

3. VENDOR AND PURCHASER ⇐107—RIGHT OF PURCHASER, AFTER HIS OWN DEFAULT IN PAYMENTS, TO CLAIM RESCISSION.

The vendee of land, who contracted to pay in installments could not take advantage of his own default in making payments, and claim rescission, when the vendor tendered deed conditionally on payment in full, and in the alternative declared a forfeiture.

In Bank.

Appeal from Superior Court, City and County of San Francisco; Daniel C. Deasy, Judge.

Action by E. W. Newell against the E. B. & A. L. Stone Company, From a judgment for plaintiff, defendant appeals. Reversed.

W. F. Williamson, of San Francisco (Ernest L. Brune and Sloss, Ackerman & Bradley, all of San Francisco, of counsel), for appellant.

Harding & Monroe, of San Francisco, for respondent.

MELVIN, J. The plaintiff, E. W. Newell, and the defendant corporation, entered into a written contract on April 7, 1913, whereby the former agreed to purchase and the latter to sell certain real property for \$9,200. Of this amount the sum of \$500 was paid at the date of the agreement. The sum of \$1,500 was due August 1, 1913, and the balance was to be paid in monthly installments of at least \$200. There was a provision for the monthly payment of interest, time was expressly made of the essence of the agreement, and it was further provided that upon default in the payment of any

of the installments the vendor, E. B. & A. L. Stone Company, might at its option, without notice to the vendee, declare the entire principal and interest immediately due.

The vendee failed to pay the first installment of \$1,500, due August 1, 1913, but on December 13, 1913, a payment, on account, of something more than \$500 was accepted, and thereafter other sums were paid, at various times not specified in the contract, until \$2,894.83 had been received by the vendor. On April 28, 1915, the vendor (defendant in this action) served upon plaintiff a notice reciting the terms of the agreement. The notice contains the following statement by way of recital:

"At all times the undersigned [E. B. & A. L. Stone Company] has stood ready, willing, and able to comply with the terms of said contract, and that it is not the intention of the undersigned in any manner to rescind or abandon said contract, and nothing herein shall be construed to be a consent in any way to a rescission or abandonment of said contract."

Then follow recitals that time is of the essence of the contract, and that default has been made by the vendee, in consequence of which he has abandoned the contract, and the vendor notifies the vendee that, in order to determine that it is the latter's "express intention as purchaser to abandon said contract," a deed to the land is ready and is thereby tendered to the vendee upon payment of the balance of the purchase price, with interest as specified in the agreement, provided the entire balance should be paid immediately upon receipt of the notice. The closing words of the notice are as follows:

"Unless said entire balance shall be paid immediately as aforesaid, the undersigned, in accordance with the terms of said contract, hereby declares that it shall be relieved from all obligations in law or equity to convey the property hereinbefore described, or any part thereof, and that you shall forfeit all right thereto under this contract, and all rights to any and all moneys paid thereon, which shall be deemed payments for the right to have the option to purchase said property, and none of the same shall be returned, and the undersigned hereby further notifies you that it will thereupon, in accordance with its rights, immediately, or at its convenience thereafter, enter upon said lands and premises, and take possession thereof, together with the improvements constructed thereon, and the appurtenances thereunto belonging."

On August 4, 1916 (more than a year after the service of notice), the vendee demanded return of the moneys paid under the contract, and this demand being refused, instituted the present action.

The court found that defendant, although it had accepted payments from plaintiff while he was in default, by the writing of April 28, 1915,

"notified plaintiff * * * that it exercised its option under said contract to cancel the same,

and notified plaintiff that all his rights under said contract had terminated; that the moneys paid to defendant were forfeited and that defendant would retake possession of said real property, and defendant did re-enter and take possession of said real property in said contract described; that no notice was ever given to plaintiff of any intention on the part of defendant to insist upon its right to forfeit said contract, and no notice whatever was served upon plaintiff, except the notice of cancellation and claim of forfeiture above referred to."

This finding is attacked by appellant as being without justification, and appellant also insists that the further finding that "plaintiff accepted said notice of forfeiture as a rescission on the part of defendant of said contract" is not sustainable.

[1] The question to be determined by this court is whether or not the giving of the notice and the conduct thereafter of the parties to the contract amounted to a rescission by their mutual consent. We are of the opinion that it did not. In the first place, there was an express declaration by the vendor that it was not seeking to rescind. This, of course, would amount to nothing if the other parts of the notice were in contradiction of the vendor's declared intention. But we do not so interpret them.

[2, 3] Under the authorities the vendor, by accepting payments after the times specified in the agreement, waived the provision with reference to time being of the essence of the contract as to those payments, and could not thereafter effectually declare a forfeiture of vendee's right to purchase, and of the payments already made, without notice that in the future a strict performance would be required. That is the doctrine of such cases as *Boone v. Templeman*, 158 Cal. 290, 110 Pac. 947, 139 Am. St. Rep. 126, *Stevinson v. Joy*, 164 Cal. 279, 128 Pac. 751, *Butte Creek Consolidated Dredging Co. v. Olney*, 173 Cal. 697, 161 Pac. 260, and *Pearson v. Brown*, 27 Cal. App. 125, 148 Pac. 956. The vendee was in default over 20 months at the time the notice was served; that is to say, more than \$4,000 in monthly installments had not been paid when due. If, within a reasonable time after receipt of the notice, the purchaser had tendered payment of the amounts due under the terms of the contract, perhaps the seller would have been bound to accept such tender. But this is not a case in which a vendee having offered to perform seeks to compel performance of the contract by the vendor. By its notice the vendor was not seeking to rescind the contract, but to declare the vendee's rights forfeited and itself entitled to the moneys previously paid by Newell because of the latter's supposed breach of the agreement. The mere fact that the vendor may have been in error in supposing and declaring that, unless immediate payment were made of the entire balance

of the purchase price, it could consider the rights of the vendee foreclosed, does not convert the notice into a declaration that the vendor elected to rescind. On the contrary, defendant sought to stand upon the contract and to enforce its terms. The corporation had done no act of abandonment of the agreement. On the contrary, it had extended to Mr. Newell the favor of accepting payments long past due. The plaintiff could not take advantage of his own default. *Glock v. Howard*, 123 Cal. 1-19, 55 Pac. 713, 43 L. R. A. 199, 69 Am. St. Rep. 17. Plaintiff was in default when the notice was received by him. True, his prior defaults had been condoned, and he could have reinstated himself by making prompt payments of the balance due under the terms of the contract; but he could not, by merely saying nothing, gain the right to demand repayment of the installments of the purchase price previously made. He could not place defendant in default unless he at least tendered to defendant all that was due under the agreement up to the date of his offer. He made no such tender. Therefore he should not prevail in this suit.

Judgment reversed.

We concur: ANGELLOTTI, C. J.; SHAW, J.; LENNON, J.; WILBUR, J.; OLNEY, J.; LAWLOR, J.

(181 Cal. 379)

BLAHNIK et al. v. SMALL FARMS IMP. CO. (S. F. 8500.)

(Supreme Court of California. Oct. 8, 1919.)

1. VENDOR AND PURCHASER §341(2)—COMPLAINT TO RECOVER PRICE ON SELLER'S FAILURE TO BUILD ROADS AS AGREED.

Complaint to recover on account of seller's breach so much of the price of land as had been paid, the contract showing that in consideration of the price plaintiffs were to have certain lots with roads constructed thereto, was not insufficient as not alleging that plaintiffs had suffered or would suffer damage by reason of defendant's failure to build the roads; it being apparent that they were a material part of the consideration, failure of which, under Civ. Code, § 1639, subd. 2, is ground for rescission.

2. PLEADING §216(3)—ON UNCERTAINTY IN COMPLAINT, OBJECTION RAISED BY DEMURREE.

In an action by the buyers of land to recover, for the seller's failure to build roads as agreed, so much of the price as had been paid, the complaint, because not describing the character of the roads, nor the character of work to be done on them within the time fixed, was uncertain rather than insufficient, and objection should have been presented by demurrer for uncertainty, and not for failure to state a cause of action.

3. EVIDENCE §442(6)—PAROL EVIDENCE OF COLLATERAL AGREEMENT NOT AFFECTING CONTRACT OF SALE ADMISSIBLE.

In an action by the buyers of land to recover from the seller so much of the price as had been paid on account of failure to build roads as agreed, the contract having been silent in regard to the character and kind of work to be done on the roads, evidence of conversations between defendant's agent and a buyer before and at the time of the execution of the contract held admissible as tending to show only an agreement collateral to the main contract.

4. VENDOR AND PURCHASER §341(5)—RECOVERY BY BUYERS ON RESCISSION OF ACTUAL VALUE OF LAND GIVEN IN EXCHANGE.

Where the buyers of land, rescinding for the seller's breach, had not paid the price in money but in land exchanged, if the seller had retained title to the land received, the buyers on rescission could have demanded only a reconveyance, and the seller, having parted with title, must compensate the buyers only for loss actually sustained, the actual value of the property when accepted on the contract of sale, and not the price placed on it by the parties.

In Bank.

Appeal from Superior Court, City and County of San Francisco; Geo. A. Sturtevant, Judge.

Action by Joseph Blahnik and another against the Small Farms Improvement Company. From judgment for plaintiffs, defendant appeals. Reversed.

J. L. Smith, of San Francisco, for appellant.

John J. O'Toole, of San Francisco, for respondents.

SHAW, J. The defendant appeals from the judgment.

The object of the action was to recover \$2,556.94, alleged to have been paid by the plaintiff Catherine C. Blahnik to the defendant as a part of the purchase price of certain lands which the defendant had contracted to sell to said plaintiff, which contract, it is alleged, was rescinded by the plaintiff because of the failure of the defendant to perform the covenants therein contained. The plaintiff Joseph is the husband of the plaintiff Catherine, and has no other interest in the case.

The contract of sale was executed on June 28, 1913. By its terms the defendant agreed to sell to said plaintiff four lots of land, containing about 25 acres, in a subdivision known as "Small Farms Improvement Tract, division R," for the sum of \$3,750. It acknowledges the receipt of \$2,300 of this price. The remainder was to be paid in installments of \$100 each every six months, beginning on December 28, 1914, and continuing until the whole was paid. The unpaid portion was to bear 6 per cent. interest, payable semiannual-

ly from the date of the contract. It contained the following stipulation:

"The seller agrees that it will have the roads in said division 'R' constructed during the fall of 1913 after the rains or when the ground is able to be worked. And construct the necessary bridges."

The complaint sets forth the contract in full and alleges that the defendant failed and refused to construct the said roads; that, because of said failure and refusal, the plaintiffs, before the commencement of the action, rescinded the contract and demanded repayment of the consideration theretofore paid thereon, amounting to \$2,556.94. Judgment was asked for the recovery of said sum of money.

The court found that all the allegations of the complaint were true, and thereupon gave judgment for the plaintiff as prayed for. The answer denied the alleged failure and refusal to construct the roads referred to in the contract. Upon the trial the defendant claimed it had constructed the roads before the plaintiff attempted the alleged rescission. The subdivision map of the tract in which the lots were situated showed two roads 40 feet wide, beginning at the county road abutting upon the north side of the tract and leading south to and beyond the plaintiff's lots. These roads afforded the only means of ingress and egress to and from the lots. Between these lots and the county road there was a creek running through the tract from east to west. It was necessary to build bridges over this creek in order to make these roads passable. Two other bridges were necessary at other points on these roads.

[1; 2] The defendant demurred to the complaint on the general ground that it does not state a cause of action. The objection that plaintiffs show no right to rescind because the complaint does not allege that they have suffered or will suffer any damage by reason of the failure to build the roads is not well taken. The contract shows that in consideration of the price to be paid the plaintiffs were to have the lots described, with roads constructed leading thereto for access and egress. That the roads were a material part of the consideration which they were to receive is apparent. The complaint alleges that the defendant failed and refused to render this consideration within the time fixed in the contract. That part of the consideration had failed through the defendant's fault. Where the consideration fails in whole or in part through the fault of the party whose duty it is to render it, the other party may rescind. Civ. Code, § 1689, subd. 2. It is also urged that the complaint is defective because it does not describe the kind of roads nor the character of the work to be done upon them by the defendant within the time fixed in the contract. The com-

plaint falls in this particular, but we are disposed to believe that it is a matter of uncertainty rather than insufficiency of the facts and should have been presented by demurrer for uncertainty. It is averred that the defendant failed and refused to construct the roads referred to in the contract and that the rescission was made because of said refusal. The contract itself is silent with respect to the kind of roads and the character of the work to be done thereon. Evidently that was the subject of some other agreement between the parties, either express or implied. As the case must be reversed for other reasons, we do not think it necessary to discuss this subject further or determine definitely how the objection should be raised, inasmuch as the plaintiffs may amend their complaint prior to the new trial by setting forth the agreement which they claim was made concerning the kind of roads and character of the work. This subject will be hereinafter further discussed in connection with an objection to the evidence.

[3] Upon the trial the defendant claimed that the only road work to be done, under the agreement actually made, was the building of bridges across the creek at its intersections with the roads and at the other two places where bridges were necessary, and the making of the fills or cuts required for convenient approaches to such bridges. The bridges and approaches thereto were constructed by the defendant prior to the time of the alleged rescission, and if they complied with the contract no cause of rescission was shown. For the purpose of showing the real agreement in that respect the defendant offered evidence of conversations between its agents and plaintiff Joseph, who made the deal for his wife, before and at the time of the execution of the contract. This evidence was excluded by the court on the ground that the subject was covered by the terms of the written contract and that the admission thereof would violate the rule that a written contract cannot be varied or contradicted by parol evidence of conversations between the parties prior to or at the time of its execution. This ruling was erroneous. The contract was altogether silent in regard to the character and kind of work that was to be done upon the roads. If there was any agreement on that subject, or any plan relating thereto adopted by defendant and acquiesced in by the plaintiffs, it was not set forth in the contract. So far as appears, it was in parol only. Such an agreement would be collateral and supplemental to the contract contained in the writing, and, as parol evidence thereof would not be inconsistent with the contract and would not alter it in any respect, evidence thereof would be admissible if material to the issues. *Sivers v. Sivers*, 97 Cal. 521, 32 Pac. 571; *Daly v. Ruddell*, 137 Cal. 676, 70 Pac. 784; 17 Cyc. 741. Afterwards, however, the court ad-

mitted testimony of these conversations, with the result that there was a sharp conflict in the evidence on the subject. Sufficient evidence was given on behalf of plaintiffs to sustain a finding that the bridges and necessary approaches thereto did not comprise all the work that the defendant had agreed to do in constructing the roads. The finding made by the court was in the general form that all of the allegations of the complaint were true. The complaint, as we have seen, merely alleged that the defendant had failed and refused to construct the roads referred to in the contract. It does not appear with certainty that the court adhered to its ruling that the evidence was immaterial and that the contract itself was sufficient, or whether it concluded that the evidence regarding the parol agreement sustained the contention of the plaintiffs rather than that of the defendants. Consequently, we cannot determine whether the rejection of the evidence when first offered was injurious to the defendant or not. We state our views concerning the matter for the guidance of the court below upon a new trial, if the parties proceed after the going down of the remittitur.

[4] By the recitals in the contract the defendant acknowledged the receipt of \$2,300 upon the purchase price. Upon the trial it was shown that this sum was not paid in money, but that the real transaction was an exchange of certain real property conveyed by the plaintiffs to the defendant, which property was taken by the defendant at the sum of \$2,300, and credited upon the contract price of the land sold by defendant to plaintiffs. Evidence was thereupon introduced concerning the value of the property so exchanged. At the highest value given to it by any witness, it would have been worth at the time the contract was executed at least \$300 less than the amount for which it was credited on the contract of sale to the plaintiffs. The court apparently disregarded this evidence and allowed the plaintiffs the full sum of \$2,300 as a payment made upon the contract and which they were entitled to recover. It also appeared at the trial that after the contract of sale was made, but before the offer to rescind, the defendant had conveyed the property received in exchange to other parties and was not able to restore that part of the consideration. The court, apparently, proceeded upon the theory that

the plaintiffs were entitled to treat the amount for which said property was taken in exchange as a payment in money upon the price of the property sold to the plaintiffs by defendant and to recover said amount upon a rescission. In this the court erred. If the defendant had retained the title to the property, the most that the plaintiffs could have demanded upon the rescission would have been a reconveyance thereof to them. The defendant having parted with the title thereto, and being unable to restore the plaintiffs to the position in which they were at the time the contract was made, the rule in equity is that they must compensate the plaintiffs for the loss thereby sustained. This would not be the price at which the property had been accepted upon the contract of sale, but would be its value at that time, and it was therefore necessary for the court to determine such value. "Where the grantee has conveyed the property, or part of it, to another, or for other reason cannot restore it, the plaintiff is entitled to a money judgment for the value of the land, the restoration of which is thus impossible; such relief being given on the principle that the court having obtained jurisdiction will retain the case for the purpose of giving complete relief." 6 Cyc. 340. Equity does not measure the damage by the price at which the property may have been taken in the exchange between the parties, but allows only the value of the property at the time the exchange was made. 9 Cor. Jur. 1263, § 211; *Forrest v. Wardman*, 40 App. D. C. 531; *Sedgwick on Damages* (9th Ed.) § 655b. The plaintiffs were not entitled to more than the actual value of the property at the time of the exchange. The judgment giving them the full amount at which it was taken in the contract is erroneous to the extent of the difference between the actual value and the price so fixed in the exchange. For this reason a reversal is necessary. The complaint did not raise this question, but it was put in issue by the allegations of the answer. There should have been a finding of the actual value of the property at that time and the judgment should have covered that amount only.

The judgment is reversed.

We concur: ANGELLOTTI, C. J.; WILBUR, J.; LENNON, J.; OLNEY, J.; MELVIN, J.; LAWLOR, J.

(181 Cal. 480)

HONORE v. LEMM et al. (S. F. 8398.)

(Supreme Court of California. Oct. 9, 1919.)

1. EVIDENCE \Leftrightarrow 425—PAROL, TO VARY TERMS OF CONTRACT.

In purchaser's action for specific performance involving issue of whether purchaser had paid certain amount, vendor's testimony that note given him for such amount was not received in payment thereof, but merely as security, was not inadmissible as varying terms of contract, notwithstanding contemporaneous execution of receipt for such note, where terms of contract were admitted, and there was no allegation that by terms of contract note was received in payment, or that money had been paid, and receipt was not offered or received in evidence as proof of terms of contract, but merely as evidence of payment.

2. ALTERATION OF INSTRUMENTS \Leftrightarrow 16—ALTERED RECEIPT AS ESTABLISHING CONTRACT OF SALE.

Where description was inserted in receipt after vendor had signed it and during vendor's absence, the receipt would be insufficient to establish a contract for the purchase and sale of the land described.

3. SPECIFIC PERFORMANCE \Leftrightarrow 121(11) — EVIDENCE OF PAYMENT OF PURCHASE PRICE.

In purchaser's action for specific performance involving issue of whether purchaser had paid vendor certain portion of the purchase price, evidence *held* to sustain finding that purchaser had not made such payment.

In Bank.

Appeal from Superior Court, San Mateo County; Geo. H. Buck, Judge.

Action by M. Honore against Hans Lemm and others. Judgment for defendants, and plaintiff appeals. Affirmed.

Stafford & Stafford, H. I. Stafford, W. F. Stafford, and Wm. M. Stafford, all of San Francisco, for appellant.

Drown, Leicester & Drown, of San Francisco, for respondents.

WILBUR, J. This is an action for specific performance brought by the vendee against the vendor. The contract is admitted, and the only question is whether the vendee has paid \$500 upon the purchase price in addition to the amount conceded by the vendor to have been paid. The trial court held that the payment had not been made, and gave judgment foreclosing the right of the vendee, unless within 30 days from the date of the decree he paid such \$500 in addition to other amounts conceded to be due. Plaintiff appeals. The complaint stated and the answer admitted the terms of the contract between the parties. The finding of the court is in accordance with such admission, to wit, that on or about August 22, 1913, the parties entered into an agreement or contract where-

by the defendant agreed to sell to the plaintiff the land described in the complaint for the sum of \$900, that the sum of \$100 was paid on said date, and that no time was agreed upon for the payment of the balance of the purchase price. Plaintiff alleged that on or about April 6, 1914, he paid the defendant the sum of \$500 as part payment on the purchase price of the lot, leaving a balance of \$300 due on account thereof. Upon the trial plaintiff offered two receipts, one dated August 22, 1913, as follows:

"Received from M. Honore the sum of \$100 in cash and a note for \$500 payable February 1, 1914, as part payment on two lots, Nos. 35 and 36, in block 26, Third addition, San Bruno, San Mateo County, Cal., and for which he agrees to pay \$900 and I agree to then furnish him with a clear title to said lots.

"[Signed] Hans Lemm."

The other, dated January 6, 1914, read as follows:

"Received from Mrs. Anna Honore the sum of \$500.00 (five hundred dollars), as part payment on lots Nos. 35 and 36, Blk. 26, Mastick avenue, Third addition, San Bruno, Cal., leaving a balance of \$300.00 yet to be paid on said lots.

[Signed] Hans Lemm."

[1] With relation to the receipt of August 22, 1913, it appears from the evidence that on that date the vendee delivered to the vendor a note for \$500, due February 1, 1914, signed by one Wolff. The vendor, however, testifies that this note was not received in payment of the said sum of \$500, but merely as security. To a consideration of this testimony the vendee objects on the ground that the receipt was the contract of purchase, and that therein it was agreed that the note should be accepted as payment to the extent of \$500, and that to receive evidence to the contrary is to vary the terms of the written contract between the parties. This objection is not well taken for the reason that the contract between the parties and the terms thereof were admitted in the pleadings, and there is no allegation that by the terms of the contract the note in question was given or received in payment, or that the amount of \$500 was then thereby or otherwise paid. On the contrary, it is specifically alleged that the sum of \$500 was paid in April, 1914. The receipt in question was not offered or received in evidence as proof of the terms of the contract between the parties, but was offered and received without objection as evidence of payment.

[2, 3] Moreover, plaintiff testified that at the time the defendant signed the receipt in question the above description of the property was not contained therein, but was subsequently inserted therein by the plaintiff in defendant's absence. In such case it would be insufficient, in any event, to estab-

lish a contract for the purchase and sale of the lot in question. It was proper, therefore, to receive defendant's evidence to overcome the claim that the \$500 was paid by said note. The defendant testified that the note for \$500 signed by Wolff, received as security, was retained by him until January 6, 1914, when he surrendered the note to plaintiff at plaintiff's request. Wolff and the plaintiff were partners, doing business under the name of the North Star Iron Works. The defendant Lemm was an employé of the firm. The business had been established by the plaintiff for many years, and Wolff had recently purchased a half interest therein, and in payment thereof had given plaintiff \$450, a promissory note for \$600, and the \$500 note above referred to, as evidence of the indebtedness due from him to the plaintiff on account of said purchase price. The business was apparently regarded of the value of \$3,000, and the interest of each partner as \$1,500. Under these circumstances plaintiff and defendant and Wolff agreed that defendant for \$1,000 should have a third interest in the copartnership. Defendant Hans Lemm was to pay \$500 in cash, and Honore agreed to pay the other \$500. Upon the faith of plaintiff's promise the defendant claims that he executed the receipt for \$500 dated January 6, 1914, acknowledging the receipt of \$500 on account of the purchase price of the lots in question. The defendant claims that the \$500 was never paid, while the plaintiff claims that it was paid in the following manner, to wit: He arranged with Wolff to reduce Wolff's interest in the partnership from \$1,500 to \$1,000, and in consideration of such agreement returned to Wolff the note for \$500, thus canceling the indebtedness due from Wolff to himself; that in pursuance of the agreement between plaintiff and defendant entries were made upon the books of the copartnership showing that each partner had paid in \$1,000; that the defendant thus secured exactly what he bargained for, namely, a third interest in the copartnership, for which he gave plaintiff a \$500 credit on account of the purchase price of the lots and paid \$500 in cash into the copartnership. The evidence as to the agreement between the plaintiff and defendant concerning the partnership arrangement is, however, conflicting, for Wolff and Lemm, and indeed the plaintiff himself at one point, testified that the \$1,000 was to be paid into the copartnership, \$500 by Lemm and \$500 by plaintiff, as a part of the capital, and the evidence is all to the effect that the \$500 to be paid into the copartnership by the plaintiff, on behalf of the defendant, never was so paid, unless the surrender of the note in question was such payment. Wolff left the partnership on April 27, 1914, and the defendant May 28, 1914, apparently without any settlement of partnership affairs. It also appears that the Wolff note for \$600

was returned to him before the Lemm copartnership arrangement because of his complaint that the copartnership was indebted for \$1,600 above the amount communicated to him when he purchased, thus apparently leaving Wolff's investment in the copartnership \$450. If the agreement was as contended by the defendant, that the \$1,000 was to be paid into the business in cash, and that after such payment the defendant should have a third interest therein, the defendant thereby retained a third interest in the \$1,000, whereas, if \$500 was to be used to pay one of the partners off without augmenting the assets of the copartnership, the defendant retained no interest in such amount. There was, then, substantial evidence to the effect that the second \$500 receipt was given in pursuance of a promise of the plaintiff which he did not fulfill. The finding of the trial court must therefore be affirmed.

The judgment is affirmed.

We concur: LENNON, J.; MELVIN, J.; LAWLOR, J.

OLNEY, J. I concur in the result, but I do not agree with what is said in the main opinion as to the writing of August 22, 1913, being a receipt merely, with the result that evidence was permissible to show that the Wolff note was taken by the defendant as security instead of in payment as specified in the writing. The writing was more than a receipt. It was intended by the parties as the written expression of their understanding. Its terms must therefore be taken as final as to what their understanding was. The question of whether the Wolff note was taken as security or in payment is one as to what was understood between the parties; and, inasmuch as the written expression of this understanding says it was taken in payment, that ends the matter.

This conclusion, however, does not change the result. The Wolff note was taken in payment either conditionally or absolutely. The presumption is it was taken in conditional payment (*Griffith v. Grogan*, 12 Cal. 317), and the subsequent conduct of the parties leaves no doubt as to this being the fact. The final and crucial question in the case is as to whether the note was paid as a result of the subsequent transaction whereby Lemm endeavored to buy into the partnership with the plaintiff and Wolff. It appears that Lemm was to pay not to the plaintiff, but into the capital of the firm, \$1,000, of which \$500 was to be paid by the payment of the Wolff note to the firm. On this understanding Lemm redelivered the note to the plaintiff. But the note was never paid, and the partnership came to nothing. There was therefore a complete failure of the consideration for which Lemm gave up the note, and he has not, in fact,

received anything of value on account of the \$500 which constituted the part of the purchase price represented by the note. This being the situation, the plaintiff must pay this \$500 before he is entitled to a deed under his contract of purchase.

I concur: SHAW, J.

(181 Cal. 398)

MUNDELL v. WELLS et al. (TAYLOR, Intervener). (S. F. 8390.)

(Supreme Court of California. Oct. 8, 1919.
Rehearing Denied Nov. 6, 1919.)

1. BAIL §73—LIABILITY OF CLERK DEPOSITING MONEY ON ORDER OF COURT.

Where cash bail for one charged with a misdemeanor triable in the superior court was furnished, the clerk could satisfy out of the money in his custody the part of the judgment imposing fine, and the person who put up the bail and defendant's judgment creditor seeking to go against the deposit have no possible recourse against the clerk for following the mandate of the court which could order disposition of the money.

2. BAIL §73—APPLICATION OF CASH BAIL IN SATISFACTION OF FINE.

Under Pen. Code, §§ 1295, 1297, in contemplation of law, so far as a criminal action is concerned, money deposited as cash bail to insure defendant's appearance is his money, and the court is not required to protect the rights of any one who may have advanced it for him, though after conviction and on appearance for sentence defendant's counsel seeks to surrender him and asks an order remitting the bail to the parties who put it up; the duty of the court being to apply the money in satisfaction of judgment for a fine.

3. BAIL §73—OFFER TO SURRENDER AS PREREQUISITE TO RETURN OF CASH BAIL.

It is a prerequisite to the return of bail money under Pen. Code, § 1302, that defendant offer to surrender himself to the officer to whom the commitment is directed.

4. BAIL §73—CONSTITUTIONAL LAW §282—APPLICATION OF BAIL MONEY TO PAYMENT OF FINE NOT WANTING IN DUE PROCESS.

Pen. Code, § 1297, requiring the application of bail money by the clerk under direction of the court in satisfaction of judgment for a fine, held not unconstitutional as depriving of his property without due process the person who advances the money by placing him in a different and less advantageous position than a surety on a bail bond.

5. BAIL §73—DETERMINATION OF RIGHT TO BALANCE OF CASH BAIL AFTER PAYMENT OF FINE.

After part of cash bail has been applied, under Pen. Code, § 1297, to payment of defendant's fine, if the true ownership of the remainder be litigated, or refund of the balance to defendant contemplated, the court will inquire

who is entitled to the money, whether the person who put it up, or a judgment creditor of defendant's, and will award it accordingly.

6. BAIL §73—OWNERSHIP OF RESIDUE OF CASH BAIL AFTER PAYMENT OF FINE.

Where cash bail was put up for one charged with a misdemeanor, and after his conviction, under Pen. Code, § 1297, half of the bail was applied to payment of the fine, the surplus of the money remaining in the hands of the clerk was properly adjudged to be the money of the party who put it up, and not to belong to defendant's judgment creditor seeking to attach it.

In Bank.

Appeal from Superior Court, Contra Costa County; J. E. Barber, Judge.

Action by Esther A. Mundell against J. H. Wells and the Fidelity & Deposit Company of Maryland, wherein E. B. Taylor intervened. From judgment for plaintiff against defendant Wells, dismissing the action against the fidelity company, and adjudging that intervenor take nothing, plaintiff and the intervenor appeal. Affirmed.

Chas. S. Peery, of San Francisco, for appellant Mundell.

Appellant Taylor, in pro per.

T. D. Johnston, of Richmond, and A. B. Tinning, Alfred C. Skaife, and Guy Le Roy Stevick, all of San Francisco, for respondents.

MELVIN, J. Plaintiff sued as assignee of W. A. Mundell for \$2,000 deposited with defendant Wells, who is ex officio clerk of the superior court of Contra Costa county, as bail in the case of the People, etc. v. R. B. Cradlebaugh. The corporation defendant is the surety on the official bond of Mr. Wells, and the intervenor, Taylor, asserts an interest in the money by reason of an attachment and judgment against Cradlebaugh. The plaintiff and the intervenor Taylor are the appellants.

Cradlebaugh was charged with a misdemeanor triable in the superior court. After his arrest he was released on cash bail of \$2,000, deposited in that behalf by W. A. Mundell, who had borrowed the money for that purpose. He was preliminarily examined, was held to answer, and his bail was fixed at \$2,000. At his request, the fund deposited at the time of his arrest was transmitted to the county clerk. Cradlebaugh was tried and convicted; was readmitted to bail pending sentence; and the money in the hands of Mr. Wells, as clerk of the court, was by order of court accepted as security for his due appearance for sentence.

Cradlebaugh appeared for sentence, as ordered, and his counsel in open court, not in his behalf but for those who had advanced the money in lieu of bail, sought to surrender

him into custody, and asked for an order remitting the bail money "to the parties who put it up, and for the purpose of filing new bonds later on." The court did not act upon the suggestion of surrender, nor was there any ruling upon the motion to return the money. Cradlebaugh was arraigned and sentenced to imprisonment for one year in the county jail and to pay a fine of \$1,000.

After notice of appeal, the court, on request, fixed bail on appeal; the amount being \$2,000. Counsel for the prisoner then asked that the bail theretofore deposited be exonerated. The court instructed him to draw the order and present it to the district attorney. Later in the day the district attorney asked for an order directing the clerk to apply \$1,000 of the fund in his hands to the satisfaction of the fine imposed upon Cradlebaugh. After argument upon this matter, the court directed the clerk to satisfy that part of the judgment imposing a fine out of the money in his custody. He obeyed this order and offered the \$1,000 remaining, after satisfaction of the fine, to Cradlebaugh. This sum, however, was sought to be attached in the hands of the clerk by Mr. Taylor, in an action brought by him against Cradlebaugh to recover \$500 as a fee for his services as counsel in the criminal action. Mr. Taylor recovered a judgment against Cradlebaugh, which was in force at the time of the trial of the case at bar.

Upon these facts the superior court gave judgment for plaintiff against Mr. Wells, as clerk, for the sum of \$1,000 remaining in his hands after satisfying the fine imposed upon Cradlebaugh. The court dismissed the action against the sureties on the clerk's bond and adjudged that the intervenor take nothing.

Appellants, Mrs. Mundell and Mr. Taylor, contend that the offer to surrender Cradlebaugh into custody was sufficient to exonerate the bail; that the fund on deposit was not the property of the defendant in the criminal action out of which a fine might be satisfied; and that such payment of the fine deprived the real owner of that amount without due process of law.

[1] Even if appellants could uphold their declaration that the money deposited as bail was not in the contemplation of law the property of Cradlebaugh, but of the person who furnished it for that use, they could not prevail in this action against Wells, who, as county clerk and ex officio clerk of the superior court, only performed his duty as a ministerial officer of the court, acting under the order of the judge of said court when he applied half of the fund to the satisfaction of the fine. Regarding that portion of the fund, they can have no possible recourse against defendant Wells. The court had jurisdiction of the subject-matter and could order the disposition of the money in custodia legis. If the clerk had disobeyed the

order of the court in this case, he would have been guilty of contempt of court. A ministerial officer is protected and justified when acting under a process or order of a court possessing general jurisdiction over the subject-matter, in spite of any errors committed by the court issuing the process or giving the order. 22 R. C. L. 481.

[2] But the court acted correctly and fully within its powers in making the order of which appellants complain. Section 1295 of the Penal Code provides for the deposit of money for the release from custody of a person held to answer. Section 1297 is as follows:

"When money has been deposited, if it remains on deposit at the time of a judgment for the payment of a fine, the county clerk must, under the direction of the court, apply the money in satisfaction thereof, and after satisfying the fine and costs, must refund the surplus, if any, to the defendant."

It will thus be seen that in contemplation of law, so far as the criminal action is concerned, the money deposited for the purpose of insuring a defendant's appearance is his money, and the court is not required to protect the supposed rights of any one who may have advanced it for him. There is no pretense that Cradlebaugh in the criminal action surrendered himself into custody. His counsel, in making the motion, was seeking to protect the rights of the person or persons who had advanced the money as if bondsmen had appeared upon a written obligation. But persons who advance money in lieu of bail are not in the same position as sureties on a bond and have no such rights.

[3] When the defendant in the criminal action appeared for sentence, the counsel for Cradlebaugh, addressing the court, said:

"Now if the court please at this time at the request of the bondsmen I will ask for an order of court surrendering the defendant into custody and for an order of the clerk remitting the bail money back to the parties who put it up, and for the purpose of filing new bonds later on."

The court then proceeded to pronounce judgment. From the foregoing it will be seen that there was no offer of the defendant in the criminal action to surrender himself "to the officer to whom the commitment was directed"—a prerequisite to the return of the bail money. Section 1302, Penal Code. Therefore the court was not called upon to rule upon the motion to order Cradlebaugh into custody. Consequently, the money in the hands of the clerk was a fund remaining on deposit "at the time of a judgment for the payment of a fine." Under the statute (section 1297 of the Penal Code), there was but one correct method of disposing of half of it. The court adopted that method.

[4] Appellant Mundell contends that the statute (section 1297 of the Penal Code) is

unconstitutional, in that it deprives of property, without due process of law, the person who advances the money for bail, by placing him in a different and less advantageous position than the surety on a bail bond. There is no force in this contention. There is no constitutional reason why one who advances cash in lieu of bail money should occupy the identical position of a surety on a written contract. The latter is bound, and the court, clerk, and sheriff are bound, by the strict terms of the written promise, while the measure of the depositor's liability, as well as of the correlative duties of the court and its officers, are to be found in the statutes. The law does not provide for a written agreement between the state and one who advances cash in lieu of bail. It attributes the ownership of such a fund to the defendant, and one who furnishes money for the release of a person held under a criminal charge is presumed to know that fact. It is argued that the sheriff had no right to accept the money originally, and that the clerk therefore could not receive it in lieu of bail. But it is not contended that the money was not advanced for the purpose of obtaining Cradlebaugh's release. If it finally reached the proper judicial custody, and Cradlebaugh was in fact permitted to go at large, the plaintiff, Mrs. Mundell, cannot complain because the purpose of the payment by her assignor was accomplished, not by a direct deposit in court, but through the agency of the sheriff, who receipted for \$2,000, "being bail money, case of R. B. Henry" (one of Cradlebaugh's aliases).

That the money deposited for bail in a criminal action is regarded as the defendant's property is a rule sustained by the weight of authority. In *People v. Laidlaw*, 102 N. Y. 588, 7 N. E. 910, the court, construing statutes very similar to sections 1295 et seq. of the Penal Code of California, used the following language:

"All these sections treat the money deposited as belonging to the defendant, and in all cases where money is deposited in lieu of bail it may be applied in payment of any fine imposed, and the surplus, if any, after the fine has been satisfied, must be returned to the defendant. The relator when he deposited this money must be assumed to have known the provisions of these statutes, and the deposit must have been made in compliance with them. There is no authority for the county treasurer to take a deposit in lieu of bail except by virtue of these statutes, and the deposit must be made in strict compliance with the statutes. The statutes may have been framed as they are for the very purpose of avoiding a dispute like that which has arisen in this case. If the contention of the relator be upheld, then disputes may frequently arise as to whose money was deposited, and the county treasurer can never know with certainty to whom the money is to be returned, and the court cannot know in passing sentence, or in making its order, whether the money is properly applicable upon the

fine imposed. It is therefore wiser that the provisions of the statute should have their obvious meaning, to wit: The money is deposited as the money of the defendant, and if a fine is inflicted upon him it may be used to pay the fine, and the surplus is to be returned to him."

Other authorities upon this subject announcing substantially the same rule are *State v. Wisniewski*, 134 Wis. 497, 114 N. W. 1113; *State v. Ross*, 100 Tenn. 303, 45 S. W. 673; *People v. Gould*, 38 Misc. Rep. 505, 77 N. Y. Supp. 1067, and *State v. Owens*, 112 Iowa, 403, 84 N. W. 529. But it is suggested very earnestly that in California an entirely different rule has been adopted, and *Hudson v. Police Court of Oakland* (App.) 178 Pac. 172, is cited to support this theory. That was a case in which a writ of review was issued against the police court of the city of Oakland, and, after hearing, the District Court of Appeal annulled a judgment forfeiting money deposited as bail and applying it to the payment of a fine. It appears from the opinion in that case that before trial Mr. Hudson, counsel for the defendant in a criminal action, offered to surrender said defendant. There seems to have been no question regarding the sufficiency of this offer, and the District Court of Appeal correctly decided that the court was bound to accept it and to return the money to the counselor who had deposited it for his client. In the case at bar the facts are very different. No request was made for the acceptance of defendant's surrender in the criminal action, but the court was asked for an order accepting his surrender by his bondsman. He had no bondsman, and the court was neither bound to act nor to regard the request for the order as a personal surrender by Cradlebaugh to the sheriff.

[5] But although, as between defendant and the state, the money deposited in lieu of bail is regarded as a defendant's property and will be applied, so far as necessary, to the satisfaction of a fine, nevertheless, in a contest like the one waged in the case at bar involving the residue in the hands of the clerk after the payment of the fine, the court will regard the claims of the person who advanced the fund in order to bring about the release of the individual held in custody. While it is true that the statute provides for the payment to the defendant of the surplus, if any, after satisfaction of the fine (section 1297, Penal Code), if the true ownership be litigated, as in the case at bar, before the refunding contemplated by the statute, the court will inquire who is, in equity and good conscience, entitled to the money, and will award it accordingly. In *Way v. Day*, 187 Mass. 476, 73 N. E. 543, the Supreme Judicial Court of Massachusetts was considering a judgment dismissing a bill in equity whereby a judgment was prayed to enforce an assignment by Day of \$800 deposited as bail

and remaining in the hands of the clerk of the superior court after Day's conviction and sentence. It was found in the lower court that Greer, one of the defendants, had deposited the money and that it never was the property of Day, and that court ruled:

"That, while Greer cannot claim against the commonwealth that this money belongs to him and not to Day, yet this rule does not protect the plaintiff or give to him any rights against the real owner of the fund and that for this sole reason the bill cannot be maintained."

In approving this ruling and the dismissal of the bill, the Supreme Court used the following language:

"Even if it be assumed that a court of equity can interfere with the power and duty of the court in which the money is deposited and direct to whom it shall be paid—an assumption attended with great, if not insuperable difficulties—and even if it be further assumed that as between the commonwealth and Day the money must be regarded as belonging to Day and not to Greer, and, still further, that the court in which it is deposited has no power to order it to be paid to any other person than to Day or his order (see *Edelsten v. Adams*, 8 Taunt. 557; *Douglas v. Stanbrough*, 3 A. & E. 316; *Salter v. Weiner*, 6 Abb. Prac. [N. Y.] 191; *People v. Laidlaw*, 102 N. Y. 588 [7 N. E. 910]), still it is plain that the money being in fact Greer's and not Day's, and having been pledged only for a certain purpose, Day had no authority express or implied to divert it to a different purpose. In equity and good conscience the money should go to Greer, and as against him the assignment by Day to the plaintiff must be regarded as invalid to convey any interest in or right to the fund, and equity will not lend its aid to enable him to get possession of it."

In *Wright & Taylor v. Dougherty*, 138 Iowa, 195, 115 N. W. 908, the question presented to the Supreme Court was whether or not, when money is deposited with the clerk of a court by a friendly third person to secure the release from custody of one under indictment, such fund is subject to seizure in satisfaction of the claims of judgment creditors of the indicted person. After reviewing the authorities which hold that as between the state and the person under indictment the money deposited as bail may be used in satisfaction of a fine, the court said:

"True, under the statute, the money is to be deposited in the name of the defendant, and perhaps in a sense the legal title thereto is to be regarded as in him. But the money in the hands of the clerk is no more than a deposit, and this is only in favor of the state, the other party to the transaction; and the interest of the state does not extend to the actual ownership of the money. It goes no farther than that the defendant shall appear when called for trial, and that the deposit shall be available out of which to pay any fine or costs that may be assessed against him. This the depositor

must be held to have agreed to. The statute goes no farther, and the cases cited go no farther. As between the depositor and the defendant, or his creditors, the ordinary rules of property obtain."

[8] We are of the opinion that the true rule is clearly set forth in the passages quoted above, and therefore that the surplus remaining in the hands of the county clerk after satisfaction of the fine was properly adjudged to be the money of plaintiff. We also approve of that part of the judgment imposing costs upon plaintiff. Manifestly, it would have been unjust to charge costs against the officer who was the mere custodian of the fund.

The judgment is affirmed.

We concur: ANGELLOTTI, C. J.; SHAW, J.; LENNON, J.; OLNEY, J.; WILBUR, J.; LAWLOR, J.

(181 Cal. 392)

GREEN v. SOUTH SAN FRANCISCO R. & POWER CO. (S. F. 8298.)

(Supreme Court of California. Oct. 8, 1919.
Rehearing Denied Nov. 6, 1919.)

1. RAILROADS ⇐359(1)—DUTY TO TRESPASSER ON RIGHT OF WAY.

Where a railroad company runs its track on its own land, and not on a public way, one who goes on the right of way without the consent, express or implied, of the company, is a trespasser, and the company owes him no duty, except to use ordinary care to avoid injuring him after seeing him in danger.

2. RAILROADS ⇐859(1)—DUTY TOWARD TRESPASSERS AT CROSSING WITH OTHER RAILROAD.

The duty of a railroad towards trespassers on its right of way is not changed with regard to either road, when two railroads cross each other at a place where there is no other public way.

3. RAILROADS ⇐274(3)—GROUNDS AT STATION NEAR CROSSING WITH OTHER ROAD MUST BE SAFE.

When one of two railroad companies, whose lines intersect at a place where there is no other public way, establishes a passenger station near the crossing, such company is charged with a duty to exercise reasonable care to have suitable station grounds and to keep them safe and convenient for persons there for any lawful purpose.

4. STREET RAILROADS ⇐86(1)—TRACKS CROSSING RAILROAD PROPERTY MUST BE CONSTRUCTED ACCORDING TO ITS PLAN.

Obligation of street railroad, under Civ. Code, § 465, subd. 5, to lay its tracks and maintain its roadbed at a crossing of another road, so as to afford security for life and property, runs not only to the railroad's own passengers, but to passengers on the other road,

or about the other road's station for proper purposes, but is limited by the road's power to control the construction of tracks, which must be in accordance with method other road has first adopted.

5. STREET RAILROADS — 86(1) — NEGLIGENCE OF RAILROAD IN MAINTENANCE OF TRACKS AT STREET RAILROAD CROSSING.

If tracks were maintained by a steam railroad at its crossing with an electric road in a negligent manner, and without due regard to the safety of persons lawfully at the place on the steam road's invitation, the negligence was violation of a duty which the steam road owed to such persons, and not of any duty of the electric road.

In Bank.

Appeal from Superior Court, San Mateo County; George H. Buck, Judge.

Action by Kenneth M. Green against the South San Francisco Railroad & Power Company. From a judgment for plaintiff, defendant appeals. Reversed.

Wm. M. Abbott and Wm. M. Cannon, both of San Francisco (Kingsley Cannon, of San Francisco, of counsel), for appellant.

Green, Humphreys & Green, of San Francisco, Joseph J. Bullock, of Redwood City, and Vogelsang & Brown, of San Francisco (L. Seidenberg, of San Francisco, of counsel), for respondent.

SHAW, J. The defendant appeals from the judgment. The action was begun to recover damages from bodily injuries alleged to have been caused by the negligence of the defendant. The complaint alleged that the defendant was operating an electric street railway upon a public street in South San Francisco, which railway crossed the tracks of the Southern Pacific Company near the passenger station of said Southern Pacific Company. On the subject of negligence it alleged that where the defendant's track crosses the Southern Pacific tracks, and for more than 100 feet immediately west of the crossing, the defendant failed and neglected to pave, plank, macadamize, or fill in the ground between the tracks and on each side thereof, or to keep the track on said street flush with the street or flush with the surface of the ground, but, on the contrary, both rails of the defendant's track projected the full depth of the rail above the surface of the ground at said place, and that by reason thereof the said track was unsafe and dangerous; that at the time of the injury plaintiff approached the station of the Southern Pacific Company at South San Francisco to take passage on a train of that company which had stopped at said station for that purpose, and being unaware of the dangerous condition of the defendant's track, he tripped upon one of the rails of defendant's track so projecting above the level of the ground, and was thereby

caused to fall to the ground in such a position that his left arm was thrown across one of the rails of the track of the Southern Pacific Company; that the wheels of the said train passed over his arm and so injured him that his arm had to be amputated at the shoulder.

We think there was no proof that the defendant violated any duty owing by it to the plaintiff to exercise care in his behalf at the place of injury, and that for this reason the judgment must be reversed. The allegation that the tracks of the defendant were laid in a public highway at that place was not true. Neither the tracks of the defendant nor those of the Southern Pacific Company at that point were upon any public way. Both companies were operating their cars upon tracks laid upon property acquired by them respectively for railway purposes only. The obligations of a railway company which lays its tracks in a public street to maintain the same flush with the street and to otherwise exercise care for the safety of persons lawfully traveling thereon have no bearing upon the case. The liability of the defendant depends upon the duties it owed under the law to exercise care at a place where its track is not laid upon a public street or highway. The evidence showed that the train had stopped at the station of the Southern Pacific Company as alleged, that it was about to start on its journey again, that plaintiff attempted to board said train, and was injured by stumbling over the defendant's rails as alleged. The defendant street railway did not cross the Southern Pacific tracks immediately upon the grounds prepared and maintained for station purposes by the Southern Pacific Company. The defendant maintained no station at that point, and its cars did not stop there. It had no interest in maintaining the station.

The authority of the defendant to lay its tracks across those of the Southern Pacific Company is found in the Civil Code. Section 500 provides that any street railway track is permitted to cross any railroad track already constructed and that the crossing must be made "as provided in chapter 2, title 3, of this part." The provisions referred to are in sections 465 and 469. Section 465 enumerates and describes the powers given to ordinary railroad companies. It authorizes such railroad company, if the route of its road intersects any existing railway, or other public way, to construct its road across the same "in such manner as to afford security for life and property; but the corporation shall restore the * * * railroad [or other public way] * * * thus intersected to its former state of usefulness as near as may be, or so that the railroad shall not unnecessarily impair its usefulness or injure its franchise." Subdivision 5. Section 469 provides that, where the track of one railroad intersects another, "the

rails of either or each road must be so cut and adjusted as to permit the passage of the cars on each road with as little obstruction as possible."

[1, 2] Where a railroad company runs its track upon its own land, and not along or across a street or other public way, any person who goes upon such right of way without the consent, express or implied, of such company is a trespasser. *Toomey v. Southern P. Co.*, 86 Cal. 379, 24 Pac. 1074, 10 L. R. A. 139; *Baltimore, etc., Co. v. State*, 62 Md. 487, 50 Am. Rep. 233; *Palmer v. Railroad Co.*, 112 Ind. 253, 14 N. E. 70. To such person the company owes no duty "to facilitate his trespass or render it safe," although bound to use ordinary care to avoid injuring him in the operation of its road after seeing him so trespassing and in a dangerous position. *Id.* This duty towards persons thus trespassing is not changed, with regard to either road, when two railroads cross each other at a place where there is no other public way.

[3-5] If one of such railroad companies establishes a passenger station near such crossing, that company immediately becomes charged with the duty of exercising reasonable care to prepare and maintain suitable station grounds, and make them safe and convenient for persons leaving its cars there, or who may be there for any lawful purpose. This duty rests upon that company alone. The other company at the nearby crossing stands in no relation to the passengers of the first company, nor to persons who may come to its station for purposes connected therewith. We are here concerned solely with the duty of the street railway company in regard to the manner of maintaining its tracks and roadbed at the crossing in question. Section 460 relates merely to the duty of the road making the crossing to cut and adjust its rails, so as to permit the passage of cars of the other road with as little obstruction as possible. It is not claimed that this duty was not fully performed. The provisions of section 465 above quoted require such street railway to lay its tracks and maintain its roadbed at such crossing so as to afford security for life and property. This obligation runs, not only to its own passengers, but to persons who may be passengers upon the other railroad, or who may be about the station for proper and lawful purposes connected therewith; but it is obvious that the obligation of the defendant is limited by its power to control the matter of constructing and laying the tracks. It had no power or authority to compel the Southern Pacific Company to extend its station grounds, or to maintain them in a suitable or different manner or condition from that which existed at the time.

The Southern Pacific Company had laid its tracks at the crossing, so that the full width of the rails projected above the ties, and the

space between them was not filled in above the top of the ties. It was maintaining its rails and roadbed in this manner at the time the crossing was made and until the accident occurred. The defendant had laid its rails and was maintaining them in the same manner at that time. It had no power to compel the Southern Pacific Company to adopt a different plan. If the latter company had extended its station grounds to the place of the crossing, and had filled in the space between its tracks for the convenience and safety of its passengers, the defendant might have been bound thereafter, while maintaining the crossing, to co-operate and fill in between its own tracks to correspond with the plan of the Southern Pacific Company; but so long as the latter company did not extend its station grounds to the crossing, the plain duty of the defendant was to maintain its own tracks and roadbed to correspond with those of the Southern Pacific Company at that place. If it had maintained them at a different level, and a passenger of the other company had been injured thereby, the defendant might have been subject to a charge of negligence for such departure from the general conformation of the surface as established and maintained by the Southern Pacific Company at that place. It was under no obligation to adopt a manner of maintaining its own track at the crossing different from that adopted by the Southern Pacific Company at that place. If they were maintained in a negligent manner by the Southern Pacific Company, and without due regard for the safety of persons lawfully at that place upon its invitation, this negligence was a violation of the duty which the Southern Pacific Company owed to such persons and was not a violation of any duty which the defendant owed to them. It was the negligence of the Southern Pacific Company alone. The consequence is that such condition of the tracks and roadbed was not negligence by defendant toward the plaintiff. For these reasons we are of the opinion that the verdict is not sustained by the evidence. This conclusion renders it unnecessary to consider the other points presented in the case.

The judgment is reversed.

We concur: ANGELLOTTI, C. J.; OLNEY, J.; MELVIN, J.; LAWLOR, J.

WILBUR, J. I concur in the judgment. It is the duty of a railroad company towards its intending passengers to use care in the preparation and maintenance of its premises that a person of ordinary prudence would exercise in such matters. If we assume, as respondent contends we should, that the obligation of the appellant was the same as that of the railroad company with reference to that portion of its track which is sometimes used by passengers intending to take the Southern Pacific Company's passenger trains, the in-

structions in this case are erroneous for the reasons that, taken as a whole, they asserted the duty of the appellant to make its tracks at the point in question safe for intending passengers. Without further analysis of either the instructions or the evidence, it is sufficient to say that even on the theory of respondent the judgment must be reversed.

Upon the question of the duty of the care in this state with reference to the maintenance of its passenger depot grounds, see *Falls v. San Francisco, etc., Co.*, 97 Cal. 114, 81 Pac. 901, 20 L. R. A. 520, note; *Laffin v. Buffalo & S. W. R. Co.*, 106 N. Y. 136, 12 N. E. 599, 60 Am. Rep. 433. See, also, upon the analogous question of the duty to provide a safe place to work, *Sanborn v. Madera Flume & Trading Co.*, 70 Cal. 261, 11 Pac. 710; *Brymer v. Southern Pacific Co.*, 90 Cal. 496, 27 Pac. 371; *Sappenfield v. Main Street & Agricultural Park Railroad Co.*, 91 Cal. 48, 27 Pac. 590, *Thompson v. California Construction Co.*, 148 Cal. 35, 82 Pac. 367.

I concur: LENNON, J.

(181 Cal. 233)

**BENVENUTO v. SUPERIOR COURT IN
AND FOR SANTA BARBARA COUNTY**
et al. (L. A. 6292.)

(Supreme Court of California. Sept. 25, 1919.)

1. PROHIBITION §5(1) — DENIED WHERE
GRANT WOULD REQUIRE ANTICIPATION OF
ACTION.

An application for a writ of prohibition directed to an inferior court will be denied, where the granting of the application would require the appellate court to anticipate the action of the inferior tribunal.

2. PROHIBITION §3(2)—WRIT DENIED WHERE
THERE IS ADEQUATE REMEDY AT LAW.

Where it does not appear that petitioner does not have a plain, speedy, and adequate remedy by appeal, an application for a writ of prohibition will be denied.

In Bank.

Petition by Pastine Maddalena Benvenuto for writ of prohibition against the Superior Court of the State of California in and for the County of Santa Barbara, and Hon. S. E. Crow, Judge thereof. Application denied.

A. C. Postel, of Santa Barbara (O. H. Brock, of Los Angeles, of counsel), for petitioner.

PER CURIAM. The application for a writ of prohibition is denied.

[1] We deem it proper to say that this denial is without reference to the merits of the legal question attempted to be presented by the application. Regardless of all other questions, we cannot assume to anticipate

the action of the trial court on the application for confirmation of the attempted sale referred to in the petition.

[2] It may further be suggested that we are not satisfied that, in the event of unfavorable action on the part of the lower court, the petitioner's remedy by appeal would not be a plain, speedy, and adequate remedy.

All concur.

(181 Cal. 345)

SCOTT v. TIMES-MIRROR CO.
(L. A. 4954.)

(Supreme Court of California. Oct. 8, 1919.
Rehearing Denied Nov. 6, 1919.)

1. APPEAL AND ERROR §231(5) — SUFFI-
CIENCY OF GENERAL OBJECTION TO EVIDENCE
OF SIMILAR LIBELS.

In a libel action, although a specific objection as to the dissimilarity of subject-matter of other alleged published attacks upon plaintiff by defendant was not made, the general objection of incompetency, irrelevancy, and immateriality of such evidence, in each such instance, was sufficient to reserve for review the special point of dissimilarity of import.

2. LIBEL AND SLANDER §100(1) — ASKING
PUNITIVE DAMAGES OR ASSERTING JUSTIFICA-
TION MAKES ACTUAL MALICE ISSUE.

Where plaintiff seeks to recover punitive damages for libel, or where the defendant alleges that the publication was justified on the ground that it was privileged, actual malice or malice in fact becomes an issue.

3. LIBEL AND SLANDER §104(3), 112(2)—RE-
MOTENESS OF OTHER PUBLISHED ATTACKS
UPON PLAINTIFF.

In an action for libel, remoteness in time of the publication of other alleged attacks upon plaintiff by defendant, introduced to show malice, goes to the weight of the evidence only and not to its admissibility.

4. LIBEL AND SLANDER §104(3)—ADMISSI-
BILITY OF OTHER PUBLISHED ATTACKS OF
DISSIMILAR IMPORT.

A contention that other published attacks upon plaintiff by defendant not of similar import are not admissible in an action for libel cannot be sustained, where actual malice is an issue, since any evidence having a logical tendency to prove that the publication in question was prompted by actual malice is material, competent, and relevant.

5. COURTS §90(2) — CONCURRENCE OF AP-
PELLATE JUDGES IN DECISIONS IN BANC.

In view of Const. art. 6, § 2, requiring the concurrence of four members of court to a decision in bank, where only four justices participated in the decision and only three concurred on a point, the language used by them is not a decision of this court.

6. PLEADING §129(2)—PRESUMPTION FROM
UNDENIED ALLEGATION OF GOOD NAME AND
REPUTATION OF PLAINTIFF.

In an action for libel where an allegation in the complaint that "at all times prior to the 6th

(184 P.)

day of February, 1915," the plaintiff "did enjoy a good name and reputation as an attorney at law," was not denied, plaintiff's good name and reputation must be presumed.

7. LIBEL AND SLANDER ⇨107(1)—ESTIMATING DAMAGES TO PLAINTIFF, AN ATTORNEY.

An attorney, plaintiff in libel action, is not required to prove, and in the nature of things cannot prove, the extent of his damage by showing what legal fees he has been deprived of through the libelous circulation, or what clients he has lost because of it, and the jury may consider as a basis for award of actual damages the number of the plaintiff's employees, including lawyers and stenographers, their salaries, his gross income, the wide publicity given to the libel, his holding of political office and prominence in the community, his professional standing, good name, reputation, injured feelings, and mental suffering.

8. APPEAL AND ERROR ⇨979(5) — DISCRETIONARY RULING ON MOTION FOR NEW TRIAL FOR EXCESSIVE DAMAGES.

Where a motion for new trial, including the ground that an award of actual damages for libel was excessive, was denied, the amount of damages allowed stands approved by the trial court, and, the question of the verdict's excessiveness being a matter primarily addressed to the trial court's discretion, the verdict cannot be disturbed upon appeal unless the award is the result of passion or prejudice.

9. LIBEL AND SLANDER ⇨123(10) — PUNITIVE DAMAGES IN DISCRETION OF JURY.

In the matter of punitive damages for libel, juries have a wider discretion than in the matter of compensatory damages.

10. LIBEL AND SLANDER ⇨121(1) — DAMAGES NOT EXCESSIVE.

In an action by an attorney against a newspaper corporation for libel, an award of \$7,500 actual damages and \$30,000 punitive damages, where actual malice was proved as an issue and the defendant's property was worth about \$2,000,000, the average circulation of its paper about 60,000 daily and over 100,000 on Sunday, circulating in several states, held, that the amount of damages was not such as to warrant the disturbance of the award on the ground of jury's passion or prejudice.

11. APPEAL AND ERROR ⇨207—OBJECTIONS TO CONDUCT OF COUNSEL NOT MADE BELOW.

Where plaintiff, in arguing as his own attorney in an action for libel, referred to defendant as "the rottenest corporation I know of in California to-day," and the trial court was not requested to instruct the jury that such conduct was improper and should be disregarded by them, the matter will not be considered on appeal.

12. LIBEL AND SLANDER ⇨104(1) — EVIDENCE OF INTERVIEW BEFORE PUBLICATION OF ARTICLE ADMISSIBLE.

In an action for libel brought by an attorney against a newspaper company and consisting of an article concerning a divorce suit in which plaintiff was attorney, testimony of par-

ties present at the interview between defendant's reporter and other reporters, and the plaintiff in divorce, was relevant and material as bearing upon the good faith of the defendant in publishing the article complained of and upon the question of actual malice which was an issue.

13. LIBEL AND SLANDER ⇨105(1) — IN ACTION FOR LIBEL CONCERNING ATTORNEY IN DIVORCE SUIT, DIVORCE COMPLAINT ADMISSIBLE.

In an action by an attorney for libel against a newspaper arising out of a publication of matters concerning a divorce suit, wherein it was intimated that the attorney's client had no cause for divorce, and that he was meddling, attempting to ruin defendant, and break up his home to fill the attorney's own pocket, the verified complaint in such divorce suit was admissible to show that the detailed statement of facts in the complaint drawn by the plaintiff's employee did set forth a cause of suit, and that plaintiff acted upon the representations of his client as shown by her sworn complaint.

14. LIBEL AND SLANDER ⇨107(1) — EVIDENCE OF PLAINTIFF'S TRAINING, FAMILY, AND BUSINESS CAREER ADMISSIBLE.

In an action by an attorney against a newspaper for libel, it was proper for plaintiff to testify as to his early life and training, as well as to show that he has children, and that when he settled in the town of his residence his resources were limited, and that by his own industry he has built up a successful law business.

15. TRIAL ⇨106 — PERMITTING PLAINTIFF AN ATTORNEY TO ARGUE CASE.

In an action by an attorney against a newspaper for civil libel, it was not error for the court to allow the plaintiff, who was represented by an attorney at law, to appear as his own attorney and argue the case to the jury.

16. TRIAL ⇨260(6)—REFUSAL OF INSTRUCTIONS COVERED BY OTHERS GIVEN.

In an action by an attorney against a newspaper for damages for civil libel in publishing an article concerning a divorce case in which plaintiff was attorney, an instruction, that an attorney is required to take care and ascertain facts regarding his client's case before advising as to legal rights, was properly refused where the matter was covered by other instructions.

17. APPEAL AND ERROR ⇨260(1)—REFUSAL OF AN INSTRUCTION COVERED BY OTHERS NOT ERROR.

It is not error to refuse instructions upon matters sufficiently covered by other instructions.

18. APPEAL AND ERROR ⇨761—FAILURE TO CITE AUTHORITY OR ARGUMENT UNDER ASSIGNMENTS.

Where objections to the action of trial court in refusing defendant's instructions are merely stated without citation of authority or any argument beyond such bare statement that "the court also erred in refusing to give defendant's requested instructions," such assignment need not be considered.

In Bank.

Appeal from Superior Court, Los Angeles County; Pat R. Parker, Judge.

Action by Joseph Scott against the Times-Mirror Company for civil libel. Judgment for plaintiff, and defendant appeals. Affirmed.

See, also, 174 Pac. 812.

Geo. P. Adams, Joseph L. Lewinsohn, Hunsaker & Britt, Le Roy M. Edwards and Samuel Poorman, Jr., all of Los Angeles, for appellant.

Joseph Scott, of Los Angeles, John M. Ross, of Bisbee, Ariz., and J. B. Joujon Roche and A. G. Ritter, both of Los Angeles, for respondent.

W. H. Anderson, of Los Angeles, amicus curiae.

LAWLOR, J. This is an action for civil libel growing out of an article published in the Los Angeles Times, a daily paper owned and controlled by the defendant Times-Mirror Company, of and concerning the plaintiff, an attorney at law in the city of Los Angeles. The case was tried by jury, and a total verdict of \$37,500 rendered, \$7,500 as actual damages and \$30,000 as punitive damages. Judgment for the full amount was made and entered. The defendant interposed a motion for a new trial, which was ordered denied. The defendant appeals from the judgment.

The plaintiff at the time of the alleged libel was, and for more than 20 years prior thereto had been, an attorney at law, practicing his profession principally in the city of Los Angeles. He alleged in his complaint:

"That on the 6th day of February, 1915, the defendant, through evil motive, and malice, and ill will towards the plaintiff, willfully, wickedly, wrongfully, maliciously, and with intent and design to injure, disgrace, and defame this plaintiff, and to bring him into public discredit as a lawyer and as a man, and to cause the public to hold said plaintiff in contempt and ridicule, published in said newspaper of, and concerning the plaintiff, and of and concerning him in his said capacity and profession, the following false, libelous, malicious, and defamatory article, to wit:

"The Hillman Divorce Suit.

"Her Mind's Made Up; They Won't Make Up.

"Having sued her husband for divorce, Mrs. Bessie Olive Hillman returned home, joined her husband in dinner and passed part of the evening with him.

"Having been served with papers in his wife's suit, Clarence D. Hillman conducted himself about the house just as he always had, and as though no little thing like a divorce matter was pending.

"At least, Mrs. Hillman described her domestic situation in about this way: Yesterday she said that while she had brought suit and her husband had been officially informed of the fact, neither of them so much as mentioned the matter and their appetites for dinner were normal.

"In the office of her attorney yesterday Mrs.

Hillman regaled a corps of newspaper men with a series of alleged misdeeds on the part of her husband for many years. Extreme cruelty last Monday, she said, decided her to get a divorce. It was the culmination of sixteen years of ill treatment, according to her.

"Thursday afternoon she brought suit; Thursday evening she was very pleasant to her husband, and the same evening she is said to have told newspaper writers that she was not going to press the suit, but would go with her husband to court and dismiss the action. Her husband said the same thing.

"Friday morning she changed her mind; by noon she was closeted with her attorneys and after luncheon she returned home fully determined to leave her husband forever. Reports from the Hillman home last evening were that Mr. and Mrs. Hillman enjoyed their well-appointed dinner together, as usual.

"The Hillmans are reputed to be extremely wealthy. They live in an elegant home, and have all the other desirable things of the rich. They have eight children.

"Sued Once Before.

"In 1904 Mrs. Hillman brought suit for divorce, but later dismissed the action. She said yesterday she wished that she had pressed the matter. She says that her husband has a habit of remaining silent at home, only to discuss his domestic affairs through the press. When she sued for divorce before she says that he gave out interviews to the press, using there arguments which he expected to reach and convince her.

"This time I am going through with it," she said yesterday, "I am tired of his cruelty. All he thinks about is money. He never takes me out anywhere except to church, and that is only for show. After he found out I had brought suit for divorce he was awfully nice to me—but that doesn't make any difference, this time."

"Joe Scott, who is attorney of record in the case, says he knew nothing about the matter until the suit was filed.

"Son Blames Lawyer.

"Clarence Hillman, the 14-year-old son of Mr. and Mrs. Hillman, is endeavoring to patch up matters between his parents, and stated last night at their Pasadena home that if his mother's attorney would stop meddling he and his father "could fix things up." "Mother has absolutely no cause for acting as she has, and we are all heart-broken because of it," the young son said. "I am simply sick and can't think of anything since this trouble came up. I can't study and didn't go to school to-day. We thought everything was all right last night and we all had supper together and mother and father went to mass together this morning, happy as could be, but when he took the smaller children to school, Mr. Scott, her attorney, called her up on the telephone and she went to Los Angeles to see him, and as a consequence came back all wrought up again. Mother can't be right or she'd never do this thing; she is peculiar; she is Irish and when she gets mad she doesn't care for her children or anybody. Her lawyers have been telling her if she'd secure a divorce that she'd get \$10,000.00 cash and about \$3,000.00 a month spending money. Father

gives her everything in the world she could possibly want now. He lets her have from \$400.00 to \$800.00 every month to spend. *Father and every one of us children are all broken up, but things will adjust themselves in spite of Mr. Scott.*"

"'Won't Be, Says Husband.

"'Mr. Hillman said last night that the suit had come to him like a thunderbolt from a clear sky. He said he had no inkling of any trouble, and stated *the whole thing is a conspiracy to ruin him.* He said that since the suit was filed his wife's attorneys had sent men to hang around his place, to find out, he supposes, how much he is worth.

"'If they would let my wife alone we will fix this thing up," he said. "She is not right; she springs this thing on me every once in a while, but she has always before fallen into the hands of attorneys who would show her the error of her ways. This time it is different, and *her attorney is trying to ruin me and break up our home to fill his own pocket.* But he will not do it; we are going to live and die in this home which we all love so well. Even if my wife should get the \$10,000.00 and \$3,000.00 a month she would only get it for a short while, for it would break me, as I am heavily in debt, owing several hundred thousand dollars. I have been very busy the last few days, but not one unkind word have I spoken to my wife. I gave her about \$500.00 every month and she always keeps four servants and sometimes has six, while I have only one to help me on the outside with this twelve-acre estate."

"The Hillmans won first prize with their electric coupé in the recent tournament of roses parade. The machine was smothered in roses and the youngest child, representing Cupid, rode in a cleverly-arranged seat placed in the front of the coupé. Mr. and Mrs. Hillman and the other children rode in the machine." (*Italics ours.*)

It is further alleged in the complaint that the defendant "meant to say, and was understood to mean" by the portions of the publication which we have italicized:

"That said plaintiff had persuaded and induced said Bessie Olive Hillman to begin said divorce action, and was urging her to prosecute said action, and to refuse to become reconciled with her husband, for the purpose of breaking up the home of said Bessie Olive Hillman and said Clarence D. Hillman, and of ruining said Clarence D. Hillman, and thereby obtaining the property of said Bessie Olive Hillman and her said husband, or compelling the said Clarence D. Hillman to pay to the plaintiff a large sum of money."

After further alleging that the publication was false and defamatory and that "by means thereof the plaintiff has been, and is, greatly injured and prejudiced in his reputation as aforesaid, and has also lost and been deprived of gains and profits which would otherwise have arisen and accrued to him in his said business and profession," and that the publication "was made by the defendant through ill will and malice towards this plaintiff, and with the intent, design, and

purpose on the part of said defendant to injure this plaintiff in his professional standing and reputation, and to discredit and defame this plaintiff, and to bring this plaintiff into public discredit as an attorney at law, and bring him into public contempt and ridicule," the complaint prayed for \$80,000 damages—\$10,000 as actual damages and \$50,000 as exemplary or punitive damages.

The defendant's answer, after specifically denying all of the allegations of the complaint, alleged as a separate defense that the article "was privileged, in that the publication of the same was without malice and for the public benefit." And alleged further as a separate defense that the publication was made "without any malice whatever on the part of defendant against plaintiff, and with the belief on the part of defendant that the matter in said article set forth as having been stated to said reporter by the said Bessie Olive Hillman, her husband and her son was true."

The issue of actual malice thus having been raised by the pleadings, the plaintiff introduced ten other publications made by the defendant touching the plaintiff, which were admitted in evidence by the court over defendant's objection. The publications so offered and accepted were marked as plaintiff's Exhibits 2 to 10, inclusive.

Exhibit 2 was an article concerning the same divorce case and was published in the Times on the day preceding the publication of the article complained of. Concerning the plaintiff, the following appears:

"Unfortunately, it happened that Mrs. Hillman became wrought up while she had access to her lawyer, and he took advantage of her. Had she not been spurred to take some definite action she would not have done such an unnatural thing as to really bring a divorce action.

"There has been no particular reconciliation, for there was need of none. We are just as close as we have ever been, and we shall remain that way, and both Mrs. Hillman and I can assure you that there will never be a divorce in our family, no matter what prying lawyers may do. * * * Mrs. Hillman's suit was filed by Joe Scott."

Exhibit 3 being the Times News Bulletin of February 5, 1915, refers to the same matter in the following language:

"Wealthy Seattle-Pasadena man's wife sues for divorce in Los Angeles; he says lawyer took advantage of her."

Exhibit 4 is an account of the proceedings in the superior court whereby the Hillman divorce case was dismissed and contains the following comments concerning the plaintiff:

"Over Officious.

"Judge Raps Joe Scott; Ends Hillman Divorce.

"A change of mind on the part of Mrs. Bessie Olive Hillman, who brought a divorce suit

recently against Charles D. Hillman, a Pasadena millionaire, was sustained yesterday by Judge Monroe and she was freed from her attorney, Joe Scott, who refused to recognize her wishes in the matter. Attorney Scott was left out in the cold in the case and told to collect his fee and other expenses in the case as best he could. * * *

"Mr. and Mrs. Hillman then returned to Pasadena in their limousine. Members of the family said yesterday that now that the attorney in the case has been eliminated, they expect no further trouble between the father and mother."

Exhibit 5 is an attack upon the plaintiff's professional conduct in accepting employment as attorney for the McNamaras, charged with blowing up the Times building. The article appeared in the Times on August 18, 1912, and, after stating how much money was received from union labor for the defense of the McNamaras, continues:

"How much of it did Job Harriman get? How much of it did Joseph Scott get? You union labor men who pay the piper ought to be told what tunes the piper plays. * * *

"When to the folly of the striker is added dishonest repudiation of his solemn agreement, and the brutality of hounding unfortunate men and women out of house and home, or destroying their lives by dynamite, because they stand up for their liberty to work for their livelihood, the striker is more than a fool—he is a criminal, no matter what Darrow, Harriman, Scott & Co. may say to the contrary. In this connection the disgrace to Los Angeles is that Joseph Scott, of this dynamite-murderer defense trio, is still a member of the board of education."

Exhibit 6, which appeared in the editorial column, is an attack on the plaintiff as a member of the board of education, in opposition to his candidacy for re-election to the board. It appeared in the Times of April 22, 1913, and reads as follows:

"The School Board.

"Undoubtedly one of the most important issues to be tried out in the primary election of May 6 is the membership of the board of education. The municipal conference indorsed the present board—the whole of it for re-election. The Times cannot quite follow it; it cannot assent to the return of Joe Scott, defender of the McNamaras, or of Reynold Blight, who is more or less of an agitating anarchist, if he is anything. These men are not safe guides for youth, not suitable persons to be in charge of our public instruction. The ministerial associations are supporting a ticket of their own which includes one straight-out Socialist nominee, Mr. Wheat. Such a condition of things is beyond our comprehension. Socialism would destroy Christianity; its tenets are as subversive of the Christian foundations as are those of atheism. When a process of mixing crude oil and aqueduct water has been devised and made clear to the popular mind, somebody may be able to satisfactorily explain how leaders of the Christian church can favor the election of a Harriman ticket Socialist to the school board. Still we must admit that a Socialist might be found

who would be preferable to Darrow's companion, Joe Scott, or to R. Blight, who is a sort of blighted Clarence Darrow himself. We are glad that the church people are getting their eyes opened as to his true character. It is needless to say that the ministerial associations which are sincerely working in behalf of right influences in the schools, are opposed to Scott and Blight and have left them off their list."

Exhibit 7 appeared in the Times on July 23, 1914, and contained the following statements concerning the plaintiff in his position as a member of the board of education:

"The Exposure and Defeat of Joe Scott.

"The master-stroke of the majority members of the board of education on Tuesday evening will meet the unqualified approval of every friend of free education.

"In putting a quietus to the unseemly, unjustifiable and destructive squabble, which had been injected into school affairs through the malevolence of Joe Scott, by declaring that, notwithstanding the trumpeted publicity given so-called 'charges' against superintendent of schools Francis, they find no charges have been made and properly term them mere 'objections.' * * * To logically complete the miserable incident, but one more step is demanded—the resignation of Scott from the board he has disgraced.

"What a sorry spectacle this self-appointed censor has made of himself in his efforts to control the education of 70,000 children, under a system lauded by educators as the best in the country, but with which he is entirely out of harmony. For years he has treated with disrespect his colleagues on the board by seeking to do things, behind their backs, the while professing solicitude for the public schools. He has made life miserable for them behind closed doors and upbraided them in open session, all of which they have borne with a fair degree of humility in order to avoid clashes with the 'temperamentally unfit' member.

"Scott has been the steadfast objector to everything that failed to meet his approval, and has sought by technical delays and in other ways to circumvent the will of the majority; he has been the consistent fosterer of strife, but has conducted his activities so insidiously that the public has been slow to learn the truth; by his attitude toward the superintendent, whose functions he sought to usurp in many ways, he has encouraged insubordination and sneaking tactics, and is believed to have coached an under-official in an effort to discredit the superintendent; by his openly declared opposition to the intermediate schools, he has been the actual force behind the agitation of a coterie to destroy their efficiency.

"What right has a man of this sort to be a member of the Board of Education? Why did he wish to retain his place on the teachers and schools committee? His offer at Tuesday night's meeting, to gamble for the place, sets a sorry example to school children; and its prompt repudiation by President Frank was a deserved rebuke."

Exhibit 8 is an article published in the Times on February 14, 1915, after the publication of the alleged libel, and was in refer-

ence to a libel suit or suits brought by the plaintiff against the defendant. It contains the following remarks concerning plaintiff:

"Joe Scott's Fool Raids.

"Uneasy, not to say luckless, Joe Scott (once a McNamara attorney of the retiring sort), recently gave mental birth to the curious conceit that the Times was indebted to him in the sum of \$80,000.00 for publishing an alleged libel upon himself. * * * Joe Scott would do well to cease pursuing a delusive ignis fatuus; he might better try to get relief from his jejune, jagged and jeopardized plight by trying, even hopelessly, to earn the requisite ducats by practicing that profession in which he has never shown with the resplendent glory of the noonday sun. * * * Joe Scott—huh."

Exhibit 9 is a cartoon published in the Times on March 1, 1915, and entitled "Nothing but Holes." It presents a large hoop covered with paper which is full of holes and across which is written "Joe Scott's Complaint in the L. A. Investment Co. Case." A man bearing in his hand a roll of paper on which appears "Court's Decision" is seen standing on the backs of two horses which are in the act of jumping through the center of the hoop.

On December 5, 1915, plaintiff's Exhibit 10 was published in the editorial columns of the Times. It reads, in part, as follows:

"What a Monster!

"The Times is not, as was represented by Joe Scott and his Arizona attorney, Ross, in their arguments before the jury in both trials of Scott's libel suit against the Times-Mirror Company, a gigantic newspaper Minotaur, hiding in the Cretan labyrinth or fort-like structure at the corner of First and Broadway—a monster pulling into its relentless maw not only youths and maidens, but also full-grown alleged lawyers who exploit divorce suits, and progressive politicians and other vermin, and who

'Be they alive or be they dead,
Grinds their bones to makes its bread.'

"When examined in the true light of the actual facts of its long and open journalistic career, how different is the attitude, standing and character of the Los Angeles Times from the untrue and unsupported representations made by Joe Scott and his man Ross in two conspicuous Superior Court cases, when these special pleaders were suffered to do their worst in their demagogic efforts to conceal the truth and poison the minds of the juries against the Times and against its actual motives, course, career and journalistic record!

"It was a reckless and a desperate effort to make the jury believe something besides the truth and to bring in a verdict not in harmony with the facts and the merits of the case at issue—an effort that brought the plaintiff to the very ragged edge of failure."

All of these publications were admitted for the limited purpose of proving malice in fact. The offer of plaintiff was so limited, and the court, by its instructions specifically

confined the jury to a consideration of the articles in so far as they might be deemed evidence of malice in fact, and repeatedly advised the jury that they were "not to consider the truth or falsity of them, as the truth or falsity of said articles is not in issue in this case"; and that no award of actual damages could be based in whole or in part upon any of the publications admitted in evidence excepting the one sued upon.

The transcript on appeal shows that a large number of exceptions were reserved at the trial, but the only points urged in appellant's briefs are as follows:

"I. The court erred in admitting libelous articles not of similar import and remote in time.

"II. The verdict is so grossly excessive that it shocks the conscience because: (a) The award of \$7,500.00 actual damages is not supported by the evidence; (b) the evidence does not show malice on the part of the corporation in making the publication; or, if malice be shown, it is totally disproportionate to the award.

"III. The plaintiff, acting as his own counsel, was guilty of misconduct constituting prejudicial error.

"IV. Other errors in the admission of evidence.

"V. The court erred in allowing plaintiff, who was represented by an attorney at law, to appear as his own attorney; and in permitting him to argue the case to the jury.

"VI. The court erred in refusing to give instructions 2 and 8 requested by the defendant."

[1] Appellant does not criticize any of the instructions given by the court. But it is contended that the admission in evidence of plaintiff's Exhibits 5-10, inclusive, the relevant portions of which we have set out above, constituted reversible error because the articles are "not of similar import" to, and are too "remote in time" from, the publication set out in the complaint. To which respondent replies that—

"The objection here urged was not made in the trial court, and for that reason is not entitled to consideration in this court."

At the trial the defendant objected to the admission in evidence of all of the other publications, but the defendant does not claim that Exhibits 2, 3, and 4 were improperly admitted; the only assignment of error in that behalf being as to the admission in evidence of Exhibits 5-10, inclusive. We will therefore confine our discussion in this regard to a consideration of the sufficiency of the objections as made to reserve the specific objection that the articles admitted in evidence were "not of a similar import" to, and were too "remote in time" from, the one complained of.

The record shows that Exhibit 5 was objected to on the ground that it was "incompetent, irrelevant, and immaterial." Exhibit 6 was similarly objected to and upon the additional ground that it was a privileged com-

munication—a criticism of the plaintiff as a public official. Identically the same objection was made to Exhibit 7 as to Exhibit 6. To Exhibit 8 it was objected that—

"It was incompetent, irrelevant, and immaterial, and of a date subsequent to the date of the article upon which this action was brought."

Exhibit 9 was objected to on the ground that it was "incompetent, irrelevant, and immaterial: being a publication subsequent to the publication of the article on which this action was brought, and having no reference to it in any way whatsoever, and not responsive to any of the issues of the case." To the introduction of Exhibit 10 objection was made that it was "incompetent, irrelevant, and immaterial, and that it was a publication made approximately ten months after the publication upon which the action was brought."

While the point as to remoteness of time was included in some of the objections, it is apparent from the foregoing that the specific objection as to dissimilarity of subject-matter now urged was not in terms made at the trial. We think, however, that the general objection of incompetency, irrelevancy, and immateriality which was made in each instance was sufficient to reserve for review the specific point of "dissimilarity of import." It has been held that the general objection, if properly made, is sufficient in all cases in which the specific grounds of objection, if stated, could not be obviated. In *Nightingale v. Scannell*, 18 Cal. 315, it was said, referring to *Merritt v. Seaman*, 6 N. Y. 168:

"A general objection had been taken to the introduction of evidence, and it was held that, as the difficulty could not be obviated, such an objection was all that was necessary. The same point precisely is presented in this case, and we think there is nothing in reason or propriety calling for a different determination. The evidence, say the defendants, was not admissible for any purpose; and, if that be correct, the difficulty could not have been obviated, and the objection was sufficient."

See, also, *Brumley v. Flint*, 87 Cal. 471, 25 Pac. 683; *Wise v. Wakefield*, 118 Cal. 107, 50 Pac. 310.

[2] I. Appellant urges that the court erred in admitting libelous articles not similar in import to the one sued upon for the reason that—

"Such evidence, if admitted, would lead to the investigation of collateral issues to the confusion of the jury, would take the defendant by unfair surprise, and would unjustly enhance the damages by leading to double or multiple damages, according to the number of libels received in evidence."

[3] It is well established that in actions for civil libel where the plaintiff seeks to

recover punitive or exemplary damages, or where the defendant alleges that the publication was justified on the ground that it was privileged, actual malice or malice in fact becomes an issue. As we have pointed out, the issue of actual malice was raised in this case both by the demand of the plaintiff for punitive damages and by the allegation of the defendant that the publication was privileged. "The record thus presents the question," to quote from appellant's brief, "whether or no express malice on the part of the defendant in publishing an article on February 6, 1915, reporting that plaintiff had been charged with improper conduct in a divorce case, can be shown by introducing other articles, remote in time, that charge insincerity and hypocrisy in the acceptance of a retainer to defend a group of labor union dynamiters, malevolence and hypocrisy in the course pursued by him as a member of the board of education; and pettifoggery arguments made to the jury in other cases against this defendant, and also charge incompetence in the 'L. A. Investment Case.' Or, in other words, in order to show malice in fact, are libels, other than the one complained of and not of similar import and published at remote times, competent, material or relevant?" Appellant continues:

"The question is not difficult of answer, because it is settled by authority, both in this jurisdiction and in practically all other jurisdictions, that while libels of similar import are admissible, because they tend to show that the publication in suit was deliberately made, yet libels not of similar import are not admissible, and remoteness of time of publication only adds to the vice of such evidence."

It is proper at this time to point out that "remoteness in time of publication" goes to the weight of the evidence only and not to its admissibility. *Wigmore on Evidence*, par. 404; *Evening Journ. Ass'n v. McDermott*, 44 N. J. Law, 430, 43 Am. Rep. 392; *Gribble v. Pioneer Press Co.*, 34 Minn. 342, 25 N. W. 710; *Julian v. Kansas City Star Co.*, 209 Mo. 35, 107 S. W. 496. This, apparently, has been accepted by counsel for appellant as the law on this point, for it is said in their reply brief: "This point, being unimportant will not be further noticed."

[4, 5] In support of the contention that "libels not of similar import are not admissible," appellant has cited the following cases from this jurisdiction: *Chamberlin v. Vance*, 51 Cal. 75; *Stern v. Loewenthal*, 77 Cal. 340, 19 Pac. 579; *Harris v. Zanone*, 93 Cal. 59, 28 Pac. 345; *Westerfield v. Scripps*, 119 Cal. 607, 51 Pac. 958; *Hearne v. De Young*, 119 Cal. 670, 52 Pac. 150, 449. Of these appellant relies chiefly on *Stern v. Loewenthal*. The action there was for slander. The slander complained of consisted of two statements, "He is a thief," and, "He is

doing business on my money." The trial court had admitted in evidence and refused to strike out another statement made by defendant "that he would break Mr. Stern (plaintiff) up in business." On this point it was said:

"Upon that question the opinions of courts have been discordant. Against the admissibility of such evidence, the opinion of Bronson, J., in *Root v. Lowndes*, 6 Hill (N. Y.) 518, 41 Am. Dec. 762, is characteristically clear and vigorous. Townshend, after referring to some conflicting opinions upon this point, says: 'But the better opinion appears to be that evidence of a charge of a different nature, and at a different time from that alleged in the declaration, is inadmissible to prove malice, or for any purpose. This is in effect only another form of the rule that actionable words not counted upon cannot be given in evidence unless suit upon them is barred by the statute of limitations, and their admission where the statute has run is opposed to principle, as it, in effect, restores a cause of action which has been taken away by the law.' Townshend on Libel and Slander, § 392. In that view of the question we concur, and think the court erred in denying the motion of the defendant to strike out."

The Loewenthal Case was heard in bank. However, only four justices participated in the decision, and only three of these concurred on this point. Chief Justice Searls concurred on one point only, and expressly reserved opinion upon the other—the question of alleged error in the admission of other slanderous statements. Since the concurrence of four members of the court is necessary to a decision in bank (Const. art. 6, § 2; *Del Mar Water, etc., Co. v. Eshleman*, 167 Cal. 666, 140 Pac. 591, 948; *Pacific Wharf, etc., Co. v. County of Los Angeles*, 179 Pac. 398), it is plain that the language quoted above is not a decision of this court upon the point there considered. Moreover, the case of *Harris v. Zanone*, supra, cited by appellant, contains language directly opposed to that relied on in the Loewenthal Case. In that case the slander charged was that the defendant had said that the plaintiff was "a damned thief." One of the questions there presented was as to the admissibility, for the purpose of showing malice in fact, of certain threats made by defendant that he would ruin plaintiff's reputation. As affording evidence of malice in fact, we can see no distinction between threats to break plaintiff up in business, the admission of which was said to be error in the Loewenthal Case, and threats to ruin plaintiff's reputation, which were held admissible in the *Harris* Case. In deciding the point in the *Harris* Case, the court said:

"Evidence was offered in behalf of the plaintiff that the defendant had repeated the defamatory words to others upon different occasions, and there was other evidence before the jury tending to establish the falsity of the charge, and

also that the defendant had expressed a purpose to injure her reputation. If the jury believed this evidence, they were authorized to find therefrom that the defendant was actuated by express malice in the utterance of the words of Lohseide, and therefore was not entitled to the immunity of a privileged communication." (*Italics ours.*)

Chamberlin v. Vance, supra, which was a case where actual malice was sought to be proved, holds that slanderous words of similar import spoken of the defendant after the commencement of the action are admissible in evidence on the question of malice. The question here involved—the admissibility of words of "dissimilar import"—was not before the court in that case and was not there discussed. Likewise *Westerfield v. Scripps*, supra, goes no further than to declare that—

"If language relates to the same subject-matter and is of a character from which a malicious purpose may be inferred, it is admissible."

Nor was the point here presented discussed in *Hearne v. De Young*, supra. It was there held that the publication objected to was not of a different nature from the one sued upon, and that therefore it was admissible.

In view of the state of our own decisions, it will serve no useful purpose to set out or discuss the numerous authorities from other jurisdictions cited by appellant on this point. Some of them may be distinguished because the statutes under which the decisions were made are different from ours, and in others no distinction is drawn between implied malice and malice in fact. And in several of the authorities the proof of other publications is received or rejected according to whether they have been barred by the statute of limitations, which is touched upon in the Loewenthal Case, the reasoning being that if not so barred the evidence should be rejected because it would tend to aggravate the damages for the particular libel and at the same time permit in the future a possible recovery for the contributing libel. If this reasoning be sound, it would seem to apply with equal force to all libels, whether similar or dissimilar in import. As we have indicated, the appellant has attempted to differentiate them, and argues that articles of similar import are admissible, but that those of dissimilar import are not. But whatever those authorities may decide, or their underlying reasoning may be, they are clearly not binding as authorities in this jurisdiction.

The rule governing the admission of evidence to prove malice in fact has been clearly laid down by this court, speaking through Mr. Justice Henshaw, in the decision of *Davis v. Hearst*, 160 Cal. 143, 116 Pac. 530:

"As to the nature of the evidence, as has been said, it may be direct (or express, as the Code names it), going to declarations, acts, and conduct of the defendant, showing personal ill will toward the plaintiff, but it will more usually be *indirect or inferred* (the implied malice in fact of the Code definition), *and to this end of proving the malice inferentially all legitimate evidence is admissible bearing upon the general course of conduct of the defendant toward the plaintiff*, the internal evidence furnished by the character of the libel, and any other specific facts and circumstances not in direct proof of the malice, but from which the existence may be logically inferred, herein including the circumstance, if it be found to exist, of wanton recklessness and heedlessness of plaintiff's rights." (Italics ours.)

One of the questions presented by the pleadings is whether the publication of the article of February 6, 1915, was inspired by actual malice. This is essentially and purely a question of fact. Therefore, any evidence which would logically tend to solve the question, and which is not otherwise objectionable, is admissible. The test to be applied to evidence offered for this purpose is: Does it tend to prove the state of mind of the party responsible for the publication? If the evidence has such logical import, and is not otherwise incompetent, it must be received, and it is for the triers of the fact to determine the weight to be given to such evidence. The fact that it may also tend to establish the publication of other distinct libels, published either before or after the one constituting the cause of action, is to be regarded as merely incidental and as not furnishing ground for the exclusion of the evidence. Nor is it material that other actions may thus be shown to exist against the party. Hence, where punitive or exemplary damages are sought in an action for civil libel any evidence (which in no other respect is objectionable), having a logical tendency to prove that the publication was prompted by actual malice, is material, competent, and relevant. This is the plain meaning of *Davis v. Hearst*, supra, and if there was any question about the state of our law on the subject prior to that decision there is none now. It is inconceivable that since the law provides for recovery upon publications made with actual malice the existence of the fact may not be established by the very best evidence—namely, evidence of other libels tending to show a malicious and vindictive attitude of mind toward the injured party. To hold otherwise would be to recognize a right in the party defamed but deny to him a full opportunity to establish and enforce it.

The true rule has been well stated by Odgers and Newell in their respective works on Libel and Slander:

"1. Extrinsic Evidence of Malice.

"Malice may be proved by extrinsic evidence showing that the defendant bore a long-standing grudge against the plaintiff, that there were former disputes between them, that defendant

had formerly been in the plaintiff's employ, and was dismissed for misconduct. Any previous quarrel, rivalry or ill feeling between plaintiff and defendant—in short, almost everything defendant has ever said or done with reference to the plaintiff—may be urged as evidence of malice. The plaintiff has to show what was in the defendant's mind at the time of the publication, and of that no doubt the defendant's acts and words on that occasion are the best evidence. But if plaintiff can prove that at any other time, before or after, defendant had any ill feeling against him, that is some evidence that the ill feeling existed also at the date of publication; therefore, all defendant's acts and deeds that point to the existence of such ill feeling at any date are evidence admissible for what they are worth. * * *

"In fact, whenever the state of a person's mind on a particular occasion is in issue, everything that can throw any light on the state of his mind then is admissible, although it happened on some other occasion. * * *

"* * * The more the evidence approaches proof of a systematic practice of libeling or slandering the plaintiff the more convincing it will be." Odgers on Libel and Slander (5th Ed.) pp. 348, 349.

"Any other words written or spoken by the defendant of the plaintiff, either before or after those sued on, or even after the commencement of the action, are admissible to show the animus of the defendant; and for this purpose it makes no difference whether the words tendered in evidence be themselves actionable or not, or whether they be addressed to the same party as the words sued on or to some one else. Such other words need not be connected with or refer to the defamatory matter sued on, provided they in any way tend to show malice in defendant's mind at the time of publication. And not only are such other words admissible in evidence, but also circumstances attending the publication, the mode and extent of their repetition. The more the evidence approaches proof of a systematic practice of libeling or slandering the plaintiff, the more convincing it will be." Newell on Slander and Libel (3d Ed.) p. 405.

The rule thus expressed is supported by the following cases: *Julian v. Kansas City Star Co.*, 209 Mo. 35, 107 S. W. 496; *Register Newspaper Co. v. Worthen*, 111 S. W. 69; 33 Ky. Law Rep. 840; *Meriwether v. Publishers*, 211 Mo. 199, 109 S. W. 750, 16 L. R. A. (N. S.) 953; *Evening Journal Association v. McDermott*, 44 N. J. Law, 430, 43 Am. Rep. 392; *Williams Printing Co. v. Saunders*, 113 Va. 156, 73 S. E. 472, Ann. Cas. 1918E, 693; *Stearns v. Cox*, 17 Ohio, 590; *Van Derveer v. Sutphin*, 5 Ohio St. 294; *Botsford v. Chase*, 108 Mich. 432, 66 N. W. 325; *Selp v. Deshler*, 170 Pa. 334, 32 Atl. 1032; *Knapp v. Fuller*, 55 Vt. 311, 45 Am. Rep. 618; *Severance v. Hilton*, 32 N. H. 289; *Williams v. Hicks Printing Co.*, 159 Wis. 90, 150 N. W. 183; *Downs v. Cassidy*, 47 Mont. 471, 133 Pac. 106, Ann. Cas. 1915B, 1155; *Smith v. Brown*, 97 S. C. 238, 81 S. E. 633; *Vial v. Larson*, 132 Iowa, 208, 109 N. W. 1007; *Hintz v. Graupner*, 138 Ill. 158, 27 N. E. 935; *Grace v. McArthur*, 76 Wis. 641, 45 N. W. 518; *Casey*

v. Hulan, 118 Ind. 590, 21 N. E. 322; Beshlers v. Allen, 46 Okl. 331, 148 Pac. 141, L. R. A. 1915E, 413; Brittain v. Allen, 13 N. C. 120.

[6, 7] II. Appellant contends that the judgment should be reversed because the "verdict is so grossly excessive that it shocks the conscience because: (a) the award of \$7,500 actual damages is not supported by the evidence; (b) the evidence does not show malice on the part of the corporation in making the publication; or, if malice be shown, it is totally disproportionate to the award." Appellant's position is that there is no evidence whatever presented here justifying the recovery of any damages, either compensatory or punitive, and because respondent did not prove specific pecuniary loss caused by the libel he is not entitled to any compensation whatever. With this position we cannot agree.

The evidence introduced for the purpose of proving damages and upon which the jury made the award tended to show that the publication caused the plaintiff mental anguish. On this point he testified:

"I was very indignant. I felt that a great injustice had been done to me, to my office, and to my reputation. I felt it was degrading before my fellow members of the bar and before the community. It hurts yet. I believe it and I know it to be wholly untrue. I would say, so far as the statements of my office were concerned, it reflected on my office." That the plaintiff was born in England, where he was educated and matriculated in the University of London. That he came to this country while still a young man, and for a time was professor of rhetoric and English literature in a college in Western New York. That he was admitted to practice his profession in this state, and in 1894 opened an office in Los Angeles, where he has been engaged in practice ever since. That he had a general practice, including considerable probate business, trial and jury work, with an occasional criminal case, and only a limited corporation practice. That at the time of the publication of the libel complained of he employed six lawyers and a number of stenographers in his office, his office expenses, including salaries, amounting to about \$1,500 a month, and his gross income about \$40,000 a year. That his practice had been built up from a modest beginning, it appearing that when he started he lived and had his office in the same room. That plaintiff's practice extended to the various counties of the state, and to a large extent in Arizona. That he is admitted to practice in the United States Supreme Court and other federal courts. That plaintiff was married in 1898, and at the time of the trial his family consisted of his wife and seven children. That he commanded the confidence of the people of Los Angeles, having been a member of the board of education in that city continuously from 1904 to 1915, and was five times elected president of the board. That in addition he was for ten years director and in 1910 president of the Los Angeles chamber of commerce; director of the Equitable Savings Bank and of the Los Angeles Investment Com-

pany of the same city. That he is a member of several clubs and of the county, state, and American bar associations. That the value of the defendant's property is about \$2,000,000. That the average daily circulation of the Los Angeles Times was about 80,000 and the Sunday edition about 102,000, the paper circulating throughout California and Arizona and elsewhere.

It is alleged in the complaint that—

"At all times prior to the 6th day of February, 1915, [the plaintiff] did enjoy a good name and reputation as an attorney at law."

This allegation not having been denied, the plaintiff's good name and reputation must be presumed.

The respondent is not required to prove, and in the nature of things cannot prove, the extent to which he has been damaged by this libel, or of what legal fees he has been deprived through its circulation, or what clients he has lost because of it. It is well settled that in such cases as this a jury may consider as a basis for its award of actual damages all of such matters as those set out above, including the wide publicity given to the libel, plaintiff's prominence in the community where he lives, his professional standing, his good name and reputation, his injured feelings, and his mental sufferings. Cahill v. Murphy, 94 Cal. 29, 30 Pac. 195, 28 Am. St. Rep. 88; Turner v. Hearst, 115 Cal. 395, 47 Pac. 129; Davis v. Hearst, 160 Cal. 143, 185, 116 Pac. 530.

[8] Appellant's motion for a new trial was made on the ground, among others, that the award of actual damages was excessive. The motion was denied. The amount of such damages, therefore, stands approved by the trial court, and, under the well-established rule, the question of the excessiveness of the verdict being primarily addressed to the discretion of the trial court, we cannot disturb it unless it appears that such award is the result of passion or prejudice. In Swain v. Fourteenth St. R. R. Co., 93 Cal. 179, 28 Pac. 829, it was said:

"The amount of the verdict in this case is large, but we cannot say that it is suggestive of either passion or prejudice on the part of the jury. In fixing damages in this class of cases, which is left to the discretion of the jury, and when the verdict has been approved by the trial court, this court is not authorized to grant a new trial upon the ground of excessive damages, except in a case where it is plain that the verdict was not the result of the fair and honest judgment of the jury."

See, also, Gomez v. Scanlan, 155 Cal. 528, 102 Pac. 12; Dunn v. Hearst, 189 Cal. 239, 73 Pac. 138; Aldrich v. Palmer, 24 Cal. 516; Meyer v. Great Western Ins. Co., 104 Cal. 381, 38 Pac. 82; Hickey v. Coschina, 133 Cal. 81, 65 Pac. 813. In the latter case it was said:

"The court below had the power to, and no doubt did, carefully weigh and consider the evidence for the purpose of determining whether or not the verdict was the correct conclusion from all the testimony in the case. It had the power to set aside the verdict, even though the evidence was conflicting, if convinced that it was unjust, or not in accord with the weight of the evidence. Here we have no such power. The presumptions are all in favor of the correctness of the verdict. To this presumption is added the sanction of the court below in denying the motion for a new trial."

[8] In *Wilson v. Fitch*, 41 Cal. 386, where there was no proof of actual malice, and, as was held by the court, not a case for punitive damages, it was said in answer to the claim that the damages awarded were excessive:

"The court will not interfere in such cases unless the amount awarded is so grossly excessive as to shock the moral sense, and raise a reasonable presumption that the jury was under the influence of passion or prejudice. In this case, whilst the sum awarded appears to be much larger than the facts demanded, the amount cannot be said to be so grossly excessive as to be reasonably imputed only to passion or prejudice in the jury. In such cases there is no accurate standard by which to compute the injury, and the jury must, necessarily, be left to the exercise of a wide discretion; to be restricted by the court only when the sum awarded is so large that the verdict shocks the moral sense, and raises a presumption that it must have proceeded from passion or prejudice."

In the matter of punitive damages it is clear from the authorities that juries have a wider discretion in this regard than they have in the matter of compensatory damages. *Voltz v. Blackmar*, 64 N. Y. 440; *Day v. Woodworth*, 13 How. 363, 14 L. Ed. 181; *Bennett v. Hyde*, 6 Conn. 24; *Hayner v. Cowden*, 27 Ohio St. 292, 22 Am. Rep. 303; *McConnell v. Hampton*, 12 Johns. (N. Y.) 234.

[10] In *Luther v. Shaw*, 157 Wis. 234, 147 N. W. 18, the court in affirming the award of punitive damages said:

"Where the jury are properly given such broad discretion with reference to exemplary damages, as indicated by the code of instructions whereby they were told they might assess against the defendant a sum which they deemed just and proper, and best calculated to be an example to him and to others, such jury are entitled to accept these instructions in good faith as meaning just what they say. How, then, can it be said that their verdict is perverse? They disregarded no evidence and violated no instructions in fixing these exemplary damages. Their estimate of what would be sufficient as a punishment and a deterrent and an example was very high as compared with the actual damages assessed and high from any point of view, but it would hardly be candid to invite them, in the language of this instruction, to fix such sum which expressed their judgment in such matter and then charge them with bias or perversity because the measure of their abhorrence of defendant's conduct and

their judgment of what would be a sufficient punishment and deterrent was represented by a larger sum of money than that which some other man or men would have allowed."

We cannot say upon the record before us that the damages awarded by the jury, either actual or punitive, have been given under the influence of passion or prejudice, and hence the award cannot be disturbed.

[11] III. Appellant has called attention to the alleged misconduct of the plaintiff before the jury. In some of the instances referred to objection was made, but in others no objection was interposed, and this group includes the principal claim of misconduct wherein the plaintiff in his argument to the jury, referring to the defendant, said: "The rottenest corporation I know of in California to-day is this same corporation." In no case was the court requested to instruct the jury that the conduct objected to was improper and that it was to be disregarded by them. Where the action of the trial court is not thus invoked, the alleged misconduct will not be considered on appeal, if an admonition to the jury would remove the effect thereof. *People v. Shears*, 133 Cal. 154, 65 Pac. 295; *People v. Babcock*, 160 Cal. 537, 117 Pac. 549; *Grossetti v. Sweasey*, 176 Cal. 793, 169 Pac. 687. From an examination of the record on this point we are of the opinion that, even if the plaintiff had been guilty of misconduct, an admonition from the court would have removed the effect thereof in every instance.

[12] Under the heading, "Other Errors in the Admission of Evidence," appellant mentions, first, the testimony of Mr. Ritter and of Mr. Roach regarding the interview between Mrs. Hillman and several reporters, including a representative of the *Los Angeles Times*, which took place in the office of the respondent the day before the publication of the libel complained of in this action. A motion was made at the trial to strike out certain portions of this testimony on the ground that it was immaterial and irrelevant, which motion was denied by the court. Appellant assigns this ruling as error. There is no merit to this objection. The testimony was clearly relevant and material as bearing upon the good faith of the defendant in publishing the article in suit, and also upon the question of actual malice.

[13] IV. A further assignment of error under this head is the admission in evidence of the verified complaint in the *Hillman Case*, it being contended that the subject-matter of the complaint was beside the issue, and that acts of cruelty therein detailed may have given the jury the impression that the respondent was "a veritable St. George." This evidence was offered for the purpose of "establishing the motives of the attorney filing the complaint." The court in admitting this

evidence stated to the jury that the "facts and allegations therein are not to be deemed to be taken by you conclusively as true, but they are evidence of what was told Mr. Scott at the time of filing the complaint." Now, it is not strictly true that this is evidence of what was told Mr. Scott at the time of filing the complaint, because the record shows that Mr. Scott did not personally interview Mrs. Hillman regarding the subject-matter of the complaint. The fact is that the verified complaint was handed to Mr. Scott by his subordinate, who drew it, and was signed and filed by Mr. Scott. In other words, the verified complaint constituted the representations on which he as an attorney acted in the case by subscribing thereto and filing it. We think that the argument of respondent in his brief presents the correct reason for holding the complaint admissible:

"The gist of the statements attributed to Hillman and his fourteen year old son, in the article upon which this action is based, was that Mrs. Hillman had no cause for divorce, and that the suit was the result of respondent's meddling and attempt to ruin Hillman and 'break up his home to fill his own pocket.' The respondent has the right to show these statements were false, and the complaint sworn to by Mrs. Hillman and signed by respondent as her attorney was competent to show that if her allegations were true she did have a well-grounded cause for divorce, and the suit was not filed by her as a result of being 'wrought up' by respondent, pursuant to a conspiracy to ruin the defendant and break up his home."

The complaint was admissible for the purpose of showing the nature and character of the charges made by Mrs. Hillman against her husband under oath, and the fact that the plaintiff by filing said complaint acted upon such representations.

[14] In addition to the foregoing, it is urged that the court erred in allowing the respondent to give a "biographical sketch of himself." This contention cannot be supported. It has been held that in an action for libel it is proper for the plaintiff to testify as to his early life and training, as well as to show that he has children, that when he settled in the town of his residence his resources were limited, and that by his own industry he has built up a successful business. *Smith v. Hubbell*, 142 Mich. 637, 106 N. W. 547; *Cyrowsky v. Polish American Publishing Co.*, 196 Mich. 648, 163 N. W. 58.

[15] V. It is next urged by appellant that—

"The court erred in allowing plaintiff, who was represented by an attorney at law, to appear as his own attorney, and in permitting him to argue the case to the jury."

In support of this contention, appellant quotes from *Boca, etc., R. R. Co. v. Superior Court*, 150 Cal. 153, 88 Pac. 718, as follows:

"It is, however, the settled law of this state that, while a party to an action may appear in his own proper person or by attorney, he cannot do both, and that as long as he has an attorney of record in an action the court cannot recognize any other as having management or control of the action, and the party can act only through his attorney."

It is to be noted, however, that an entirely different situation from the one before us was there presented. The plaintiff corporation in that case had through its attorney of record moved to dismiss a certain action instituted by it. While this motion was still pending, a written request or notice of dismissal was sent to the clerk of the court by the manager of the plaintiff corporation. It was held that the order of the court ignoring this notice was properly made; the court pointing out further that until an attorney has been removed or substituted "the client cannot assume control of the case." While this case correctly states the law on the issues there involved, it does not apply here.

A situation practically identical to the one in this case was presented in *Conroy v. Waters*, 133 Cal. 211, 65 Pac. 387. It was there said:

"Appellant further objects that plaintiff, who is an attorney at law, licensed to practice before all the courts of this state, was represented on the trial by Lucian Earle, his attorney of record, and that upon motion of Lucian Earle, plaintiff * * * was by order of the court 'associated' with said Earle as attorney in the case. It was contended that his was a special privilege conferred upon the plaintiff whereby he was allowed not only to appear by attorney, but at the same time to appear in person. Whatever irregularity may be detected in this order of the court, we think it sufficient to say that it was clearly an irregularity without injury, and that no reversal of the case should be had for the assigned reason."

[16] VI. Appellant complains of the action of the trial court in refusing to give instructions 2 and 3 requested by the defendant. Instruction 2 reads, in part:

"It is the duty of an attorney at law to take care and to ascertain what the facts in regard to his client's case are before advising the client as to his or her legal rights and the legal steps to be taken to obtain relief."

Appellant does not point out the applicability of the instruction to the facts. It is probably addressed to the claim of appellant that the Hillman divorce action was brought prematurely by the plaintiff. In any event, we do not think the failure to give the instruction in any way prejudiced the rights of the defendant. Moreover, instruction No. 22 which was given contains this language:

"A lawyer whose services are sought by husband or wife with a view of commencing an action for divorce is not justified, through hope

of gain or other advantage to himself, to take any action to prevent such reconciliation."

[17] Defendant's instruction 8, which was refused by the court, reads, in part:

"It is not sufficient on the issue of malice for the plaintiff to prove that the defendant had malice against him, but plaintiff must go further and prove that the publication complained of was made by defendant because of the malice complained of."

It is a sufficient answer to this objection to state that the substance of this instruction was given, among others, in instructions Nos. 8, 9, 12, 28, 35, and 36. For instance, the latter instruction declares, in part:

"You can consider the articles published in the newspaper of the defendant prior and subsequent to the publication of the article complained of only as bearing on the question as to whether the article complained of was published by the defendant with actual malice. * * *"

[18] The action of the trial court in refusing defendant's instructions Nos. 5, 7, 8, and 9 is also assigned as error. But the objections are merely stated without any citation of authority or any argument beyond the bare statement that "the court also erred in refusing to give defendant's requested instructions." We do not feel called upon to consider points so presented. *Gray v. Walker*, 157 Cal. 381, 108 Pac. 278; *Born v. Castle*, 175 Cal. 680, 167 Pac. 138; *Dore v. Southern Pacific Co.*, 163 Cal. 182, 124 Pac. 817.

The judgment is affirmed.

We concur: ANGELLOTTI, C. J.; SHAW, J.; WILBUR, J.; LENNON, J.; OLNEY, J.; MELVIN, J.

(181 Cal. 406)

TODD et al. v. SUPERIOR COURT OF CALIFORNIA IN AND FOR CITY AND COUNTY OF SAN FRANCISCO et al.
(S. F. 9072.)

(Supreme Court of California. Oct. 9, 1919.)

1. MANDAMUS §167—MATTERS CONSIDERED ON APPLICATION FOR SUBSTITUTION OF ATTORNEYS.

On application for a writ of mandate to require the superior court to grant a motion for substitution of attorneys, letters, affidavits, and consent of the petitioners, which were attached to and made a part of the motion, may be considered, though the motion was made on the ground that the appearance of the attorney was unauthorized by petitioners.

2. ATTORNEY AND CLIENT §75(1)—RIGHT OF CLIENT TO CHANGE ATTORNEY.

A client has the right to change his attorney at any time, except where the attorney has an interest in the subject-matter of the suit, and this right of discharge exists even

though a contingent fee has been agreed upon, or an irrevocable power of attorney given, and notwithstanding the attorney may have rendered valuable services or the client be indebted to him.

3. PRINCIPAL AND AGENT §43(2)—INTEREST PROTECTING POWER OF ATTORNEY AFTER DEATH OF MAKER.

The interest which can protect a power of attorney after death of the person who creates it must be an interest in the thing itself, a power coupled with an interest being a power which accompanies or which is connected with an interest.

4. PRINCIPAL AND AGENT §34 — INTEREST MUST COEXIST TO MAKE POWER OF ATTORNEY IRREVOCABLE.

To impart an irrevocable quality to a power of attorney in the absence of an express stipulation, and as the result of legal principles alone, there must coexist with the power an interest in the thing or estate to be disposed of or managed under the power.

5. PRINCIPAL AND AGENT §37—WHEN POWER OF ATTORNEY IRREVOCABLE IN TERMS OR AT LAW.

While, as a general rule, a power of attorney may at any time be revoked by the party conferring it, yet, where a power of attorney forms a part of a contract and is security for money or for the performance of an act which is deemed valuable, it is generally made irrevocable in terms, or, if not so, is deemed irrevocable in law.

6. PRINCIPAL AND AGENT §37—WHEN POWERS OF ATTORNEY REVOCABLE.

Though a power of attorney is made in terms irrevocable, that fact will not prevent revocation by the constituent where the power is not at the same time coupled with an interest or given as security for the payment of money, or for the performance of an act deemed of value.

7. CONTRACTS §162 — WRITTEN CONTRACT WITH REPUGNANT CLAUSES CONSTRUED ACCORDING TO ITS INTENT.

Where there is an inconsistency between two clauses in a written contract, the repugnancy must be reconciled so as to give effect to the repugnant clauses, in keeping with the general intent or predominant purpose of the instrument.

8. PRINCIPAL AND AGENT §37—REVOCATION OF POWER OF ATTORNEY TO COLLECT LEGACIES.

A power of attorney given by legatees to one to collect their legacies held to create an interest in favor of the donee of the power only to the extent of reimbursement and compensation, and hence, though the power declared that it was irrevocable, the legatees might revoke the power, and, where the attorney in fact had procured an attorney at law, the legatees may have another attorney substituted for him.

9. PRINCIPAL AND AGENT §37—REVOCATION OF POWER OF ATTORNEY NOT AFFECTING COMPENSATION.

Where legatees gave a power of attorney to one to collect their legacies, held, that revoca-

tion of the power would not deprive the attorney in fact of any right to reimbursement for moneys expended or compensation for services rendered.

In Bank.

Application by Sophia Todd and another for writ of mandate to be directed against the Superior Court of the State of California in and for the City and County of San Francisco, and John T. Nourse, Judge thereof. Writ granted.

T. E. K. Cormac and Wal J. Tuska, both of San Francisco, for petitioners.

Shelton & Levy, of San Francisco, for respondents.

LAWLOR, J. Application for a writ of mandate. On April 28, 1919, the petitioners herein filed an application for a writ of mandate to be directed against the respondents, the court having refused to grant a motion made by the petitioners for the substitution of attorneys in the matter of the estate of Christine Sharbach, deceased. On May 1, 1919, an alternative writ of mandate was issued by this court, and on June 2, 1919, the respondents interposed a demurrer to the petition on the ground that it does not state facts sufficient to constitute a cause of action for a writ of mandate. At the same time the respondents filed an answer to the petition. The matter was thereupon orally heard and submitted for decision.

Petitioners, Sophia Todd and Louise Weber, residents of England, were named as legatees in the will of Christine Sharbach, who died in San Francisco on November 21, 1917. On January 3, 1918, each of the petitioners executed a separate power of attorney to L. O. Thieme of Chicago, Ill.; the powers being identical except as to the name of the constituent. That of Louise Weber reads as follows:

"Power of Attorney.

"Know all men by these presents: That I, Louise Weber, of 46 Carlton street, West Harlepool in the county of Durham, England, spinster, being of lawful age, do hereby make, constitute and appoint L. O. Thieme of Chicago, Illinois, to be my true and lawful attorney in fact with full power and authority to collect, receipt for, and sue for my distributive share, legacy or claim of any kind, nature or description, which I may have against or may now or at any future date be entitled to from the estate of Christine Sharbach, deceased, and to take possession of any personal property disbursed in kind by the personal representative of said estate; also to collect any policies of insurance, or death benefits in which I may be named as beneficiary; to take charge of and manage any real estate in which I may have an interest, to collect rents, pay taxes and to institute and conduct any proceedings for the partition or sale of any such real estate, and to institute, conduct or defend all suits at law or in equity which may concern the subject-matter of this

instrument, to retain and discharge counsel, to execute refunding bonds, statutory bonds, or bonds of any kind, nature or description, to enter my appearance and waive notice in the matter of any final accounting, to indorse checks and other papers of whatsoever kind, to compromise claims, to execute releases and to execute all other suitable instruments in writing, to carry into effect the various powers herein granted, and to do and perform all other acts as fully and effectually as I might do or perform if personally present, with full power to appoint and discharge substitutes, hereby revoking all powers of attorney heretofore executed by me.

"And for and in consideration of the sum of one dollar to me in hand paid, the receipt of which is hereby acknowledged, and in further consideration of services rendered and to be rendered and moneys to be advanced for court cost and other necessary expenses in this behalf by my said attorney in fact, I do hereby assign, transfer and set over unto my said attorney in fact all of the subject-matter of this power of attorney, that is to say, of all property, real or personal, to which I may be entitled out of the estate of Christine Sharbach, deceased, or which arise out of the death of said deceased in any manner whatsoever, it being my intention that this power of attorney shall be construed as a power of attorney, coupled with an interest in the subject-matter thereof.

"After deducting the interest herein assigned, and his expenses and outlays in and about performing his duties, said attorney in fact shall remit the balance of the funds on hand to me thru his corresponding bank.

"In witness whereof I have hereunto set my hand and seal this third day of January, A. D. 1918."

On January 22, 1918, L. O. Thieme executed a power of substitution in favor of Eugene W. Levy, an attorney at law of San Francisco, as follows:

"Know all men by these presents: That I, the undersigned, L. O. Thieme, of the city of Chicago, state of Illinois, by virtue of the power and authority to me given in and by the letters of attorney dated January 3, 1918, of Sophia Todd and January 3, 1918, of Louise Weber do hereby substitute and appoint Eugene W. Levy attorney at law of the city of San Francisco, in the county of San Francisco, and state of California as the true and lawful attorney and substitute of myself and the said constituents named in the said letters of attorney, to do, execute and perform all and every act and thing requisite and necessary to be done, as fully to all intents and purposes as the said constituents or I myself could do if personally present, hereby ratifying and confirming all that the said attorney and substitute hereby made, shall do in the premises by virtue hereof and of the said letters of attorney."

Pursuant to the foregoing substitution, Mr. Levy, on January 30, 1918, filed a notice of appearance in the proceedings in the estate of Christine Sharbach, deceased, as attorney for the petitioners herein; the will of the de-

ceased having been admitted to probate on December 21, 1917. The estate consists entirely of stocks and bonds, and there is no litigation in connection with these legacies; the administration of the estate being purely formal. On November 11, 1918, notice was served upon Mr. Levy that petitioners would, on November 18th, following, apply to the superior court of the city and county of San Francisco for an order substituting T. E. K. Cormac, Esq., "as attorney for the said Sophia Todd and Louise Weber, respectively, in all proceedings in the matter of the estate of Christine Sharbach, deceased, in the place of the said Eugene W. Levy, Esq." The motion, which was heard and denied on April 21, 1919, after a number of continuances granted at the request of Mr. Levy, was "made on the ground that the appearance of the said Eugene W. Levy as attorney for the said Sophia Todd was unauthorized by the said Sophia Todd; and that the same is in furtherance of justice, and will be heard upon letters, affidavits, and consent of the said Sophia Todd, copies of which papers are hereto annexed, and other oral and documentary evidence." The notice of Louise Weber was in identical terms.

The letters and affidavits here referred to show that the petitioners on April 5, 1918, three months after executing the power of attorney to L. O. Thieme, and two months after Mr. Levy had filed an appearance, executed a power of attorney in favor of T. E. K. Cormac, Esq., of San Francisco, "by which he is empowered to represent us in California, and elsewhere in America, for all purposes connected with estates of said decedent, and by which we expressly canceled, withdrew and revoked the power of attorney we had formerly given to L. O. Thieme & Co. * * * and under which they or any substitutes or agents of theirs might be claiming to represent us in California or elsewhere." (Italics ours.)

Petitioners contend that under section 284 of the Code of Civil Procedure they "have the absolute right to change their attorney at any stage of the proceedings," and that the motion for substitution of attorneys made to the court below, supported by the letters and affidavits showing that the power of attorney held by Mr. Levy had been revoked by petitioners, should have been granted. Section 284 reads:

"The attorney in an action or special proceeding may be changed at any time before or after judgment or final determination, as follows:

"(1) Upon consent of both client and attorney, filed with the clerk, or entered upon the minutes;

"(2) Upon the order of the court, upon the application of either client or attorney, after notice from one to the other."

It is evident that the motion herein was made under subdivision 2.

It is urged on behalf of respondents that, since the motion for substitution specified particularly that petitioners' present attorney was not authorized to represent them, they are confined to that ground here, and that if it be found that the allegation was not well taken the order denying the motion must be upheld and the writ denied. In other words, respondents argue that if it be found that Mr. Levy was at any time authorized to represent the petitioners the writ must be denied without going into the question whether that authority has been revoked. In support of this contention respondents cite *Rundberg v. Belcher*, 118 Cal. 589, 50 Pac. 670. In that case application was made for a writ of mandate for the substitution of attorneys, which was denied on the ground that the petition did not state facts authorizing the granting of the writ, namely, it did not appear from the record that notice, as required by subdivision 2, § 284, Code of Civil Procedure, and section 1005, Id., had been given to the attorney there sought to be substituted out of the case. The court said:

"While mandate will lie to compel judicial action, and in some instances even specific action (*Wood v. Strother*, 78 Cal. 545, 18 Pac. 766, 9 Am. St. Rep. 249), and is an appropriate remedy in a proper case to obtain the relief here sought (*People v. Norton*, 16 Cal. 436), it may not be invoked to require a judicial officer to act in a particular way, except it appear by necessary legal deduction from the facts stated that the aggrieved party has been denied a right which it was the plain legal duty of the officer to grant, and without his proper discretion to refuse."

[1] While it is true, as we have pointed out, that the motion herein was made on the ground "that the appearance of the said Eugene W. Levy as the attorney" for the petitioners "was unauthorized" by them, it is also true that the motion was made "upon letters, affidavits and consent" of the petitioners, which documents were attached to and made a part of the motion. These, therefore, became a part of the facts which, under the plain terms of the decision in *Rundberg v. Belcher*, supra, are to be considered by this court in making the "legal deduction" as to whether "the aggrieved party has been denied a right which it was the plain legal duty of the officer to grant, and without his proper discretion to refuse." As we have seen, the import of these documents is that the present attorney was not authorized by the petitioners to represent them in the probate proceedings, and, further, that the power of attorney under which he claimed authority to act had been revoked by them.

Respondents contend that the power of attorney which Mr. Levy holds as the substitute of Mr. Thieme is irrevocable; that it is made so by the language:

"I do hereby assign, transfer and set over unto my said attorney in fact all of the said

subject-matter of this power of attorney, that is to say, of all property, real or personal, to which I may be entitled out of the estate of Christine Sharbach, deceased, or which arise out of the death of said deceased in any manner whatsoever, it being my intention that this power of attorney shall be construed as a power of attorney coupled with an interest in the subject-matter thereof."

[2] It is well settled that a client has a right to change his attorney at any time, except where the attorney has an interest in the subject-matter of the suit. In 6 Corpus Juris, at page 677, it is said:

"This right of discharge exists even though a contingent fee has been agreed upon, or an irrevocable power of attorney has been given (Carver v. U. S., 7 Ct. Cl. 499; People v. Norton, 16 Cal. 436; Crosby v. Hatch, 155 Iowa, 312, 816, 135 N. W. 1079), or the attorney has rendered valuable services under his employment (Gage v. Atwater, 136 Cal. 170 [68 Pac. 581]), or the client is indebted to him therefor, or for moneys advanced in the prosecution or defense of the action (Gage v. Atwater, supra). There is an exception, however, where the attorney has acquired an interest in the property. Louque v. Dejan, 129 La. 519, 56 So. 427, 38 L. R. A. (N. S.) 389; Gulf, etc., v. Miller, 21 Tex. Civ. App. 609, 53 S. W. 709; Wylie v. Cox, 15 How. 415, 14 L. Ed. 753."

It is said in 2 R. C. L. 957:

"The right of a client to change his attorney at will is based on necessity in view both of the delicate and confidential nature of the relation between them, and of the evil engendered by friction or distrust. According to some decisions, an exception to the general rule as to the power of the client to discharge his attorney at will seems to exist where the power of the attorney is coupled with an interest in the cause of action. Louque v. Dejan, 129 La. 519, 56 So. 427, 38 L. R. A. (N. S.) 389."

[3, 4] It becomes necessary, therefore, to consider what constitutes a power coupled with an interest and whether the interest here given is such as to render the power irrevocable. What constitutes a power of attorney coupled with an interest has been considered in numerous decisions. The leading case on the subject, however, is the decision rendered by Chief Justice Marshall in Hunt v. Rousmanier, 8 Wheat. 174, 5 L. Ed. 589. In that case the owner of an interest in a certain vessel, then at sea, to secure a loan of money, executed to the lender contemporaneously with the loan a power of attorney authorizing him to sell the borrower's interest in the vessel, which power, by its terms, was to become void on payment of the loan. The borrower died before payment, and the question was presented whether his death operated to revoke the power. It was decided that the power was revoked by the death of the grantor. The general doctrine that a power must be exercised in the name of the

principal, and does not survive his death, was held to be applicable. But the court, in the decision of the question, proceeded to consider the exception to the rule in cases where the power was coupled with an interest, and to define the meaning of that phrase. In a luminous statement the chief justice confined the scope of the exception to cases where, together with the power, there was vested in the donee an estate, right, or interest in the subject of the power, as distinguished from an interest in the proceeds of the power when exercised. In the former case he declared that the power would not be extinguished by the death of the creator of the power, because it attached to the estate of the donee in the subject thereof, and was capable of execution in his own name after the death of the principal, unlike cases where the power was unconnected with any interest in the thing itself, and the only interest was in the execution of the power. The learned Chief Justice said:

"It becomes necessary to inquire, what is meant by the expression 'a power coupled with an interest'? Is it an interest in the subject on which the power is to be exercised? Or is it an interest in that which is produced by the exercise of the power? We hold it to be clear that the interest which can protect a power after the death of the person who creates it must be an interest in the thing itself. In other words, the power must be ingrafted on an estate in the thing. The words themselves seem to import this meaning. 'A power coupled with an interest' is a power which accompanies or is connected with an interest. The power and the interest are united in the same person. But if we are to understand by the word interest an interest in that which is to be produced by the exercise of the power, then they are never united. The power, to produce the interest, must be exercised, and by its exercise, is extinguished. The power ceases when the interest commences, and therefore cannot, in accurate law language, be said to be 'coupled' with it."

The doctrine thus enunciated has been adhered to in the following well-reasoned cases: Barr v. Schroeder, 32 Cal. 617; Frink v. Roe, 70 Cal. 296, 11 Pac. 820; Hammond v. Allen, 11 Fed. Cas. 382; Nicks' Heirs v. Rector, 4 Ark. 251, 280; Schaubert v. Jackson, 2 Wend. 1, 54; Terwilliger v. Ontario, 149 N. Y. 86, 92, 43 N. E. 432, 434; Frederick's Appeal, 52 Pa. 338, 342, 91 Am. Dec. 162; Flagstaff Co. v. Patrick, 2 Utah, 313; Alworth v. Seymour, 42 Minn. 526, 44 N. W. 1030; Louque v. Dejan, 129 La. 519, 56 South. 427, 38 L. R. A. (N. S.) 389; Gulf, etc., v. Miller, 21 Tex. Civ. App. 609, 53 S. W. 709; Wylie v. Cox, 15 How. 415, 14 L. Ed. 753; Mansfield v. Mansfield, 6 Conn. 559, 16 Am. Dec. 76; Hartley & Minor's Appeal, 53 Pa. 212, 91 Am. Dec. 207.

In Hartley & Minor's Appeal a situation quite similar to the one in the present case was presented, the chief difference being that

there the constituent did not assign her legacy to the attorneys in fact. In that case Hannah Gallion made to Hartley and Minor a power of attorney to collect and receive all money and property coming to her as heir of John Douglass, deceased, with power to convey her interest in the real estate of the decedent, "the said Hartley and Minor to receive as compensation for their services herein one-half of the net proceeds of my interest in said estate which may be collected or received by them as my attorneys, after paying all costs and expenses, they to receive no further compensation for any services they may render or expenses they may incur or pay as my attorneys." Subsequently she gave another power of attorney to one Howland for the same purpose, and in it revoked that to Hartley and Minor. The latter, as attorneys of Hannah Gallion, petitioned the court for a citation to the administrator of Douglass' estate to settle his account. This was objected to because of the power of attorney to Howland. On this ground the court refused to grant the citation, and dismissed the petition. Hartley and Minor appealed from this decree. The appellate court said:

"There was no error committed by the court below in holding the power of attorney of Hannah Gallion to the appellants to be revocable. It was an ordinary agency, constituted by letter of attorney, to act for her to enforce a settlement of his accounts by the administrator of her father's estate, in which she was interested, and to collect any moneys or property that might belong, or be coming, to her. For these services the attorneys were to have one-half of the net proceeds of what they might receive or recover for her. The plaintiffs in error suppose that this clause rendered the power irrevocable by their principal, under the idea that it was a power coupled with an interest. This was a mistake, as all the authorities show. To impart an irrevocable quality to a power of attorney in the absence of an express stipulation, and as the result of legal principles alone, *there must coexist with the power an interest in the thing or estate to be disposed of or managed under the power.* An instance of frequent occurrence in practice may be given of the assignment of vessels at sea, with a power to sell for the benefit of the holder of the power, or of anybody else who may have advanced money and who it was agreed should be secured in that way. * * *

"In the case in hand the power and the interest could not coexist. The interest the appellants would have would be in the net proceeds collected under the power, and the exercise of the power to collect the proceeds would *ipso facto* extinguish it entirely, or so far as exercised. Hence the appellants' interest would properly begin when the power ended." (Italics ours.)

[5] But there are powers which the constituent cannot revoke, although they do not come within Chief Justice Marshall's definition of a power coupled with an interest. This is clearly recognized by him in *Hunt v.*

Rousmanier, supra. After stating the general rule that a power may at any time be revoked by the party conferring it, he says:

"But this general rule, which results from the nature of the act, has sustained some modification. Where a letter of attorney forms part of a contract, and is security for money, or for the performance of an act which is deemed valuable, it is generally made irrevocable in terms, or, if not so, is deemed irrevocable in law."

An instance of a letter of attorney given as security for money is presented in *Norton v. Whitehead*, 84 Cal. 264, 24 Pac. 154, 18 Am. St. Rep. 172. In that case a contractor borrowed from the plaintiff, his foreman on the work, various sums of money to enable him to carry on the contract. Afterwards he executed to the plaintiff an assignment of all moneys due or to become due "for any work I may perform, the assignment to remain good and in full force until all notes due, or which are to become due * * * from me are paid." Later he gave plaintiff a power of attorney reciting that "whereas I am now desirous that all moneys that have become or may become due to me by reason of my performance of said contract shall be paid" to plaintiff, and giving him power to collect such moneys. These instruments were deposited with the other parties to the contract. The contractor died and the work was completed by his administrator. It was held that the plaintiff had such an interest in the moneys due on the contract as to prevent a revocation of the power on the contractor's death, and that the plaintiff was entitled to collect it as against the administrator.

[6] But it has been held that, even though the power of attorney is made in terms irrevocable, that fact will not prevent revocation by the constituent, where the power is not at the same time coupled with an interest or given as security for the payment of money, or for the performance of an act deemed of value. *Blackstone v. Buttermore*, 53 Pa. 266; *Bonney v. Smith*, 17 Ill. 531; *Kilpatrick v. Wiley*, 197 Mo. 123, 95 S. W. 213; *Martin v. Lamkin*, 188 Ill. App. 431, 437; *McKellop v. Dewitz*, 42 Okl. 220, 140 Pac. 1161, 52 L. R. A. (N. S.) 255; 6 C. J. 677. In *Blackstone v. Buttermore*, supra, it was said:

"A mere power, like a will, is in its very nature revocable when it concerns the interest of the principal alone, and in such case even an express declaration of irrevocability will not prevent revocation. An interest in the proceeds to arise as mere compensation for service of executing the power will not make the power irrevocable."

It is well settled, therefore, that in order to constitute an irrevocable power of attorney there must coexist with the power a beneficial interest in the subject thereof which is enforceable in the name of the attorney in fact and will survive the constitu-

ent; or the power must be given as security for the payment of a sum of money other than that which arises as compensation through the exercise of the power; or as security for the performance of some act of value.

It now remains for us to examine in the light of the foregoing authorities the power of attorney in the instant case, and to determine whether or not it is coupled with such an interest, or given as security, either for the payment of money or the performance of an act, so as to make it irrevocable. As we have seen, the power of attorney in this case forms a part of a contract which in express terms purports to assign to the attorney in fact all of the petitioners' interest in the estate, and at the same time expressly stating that it is the intention of the constituents that it shall be a power of attorney coupled with an interest. The letter then goes on to say:

"After deducting the interest herein assigned, and his expenses and outlays in and about performing his duties, said attorney in fact shall remit the balance of the funds on hand to me through his corresponding bank."

[7-8] Respondents in their answer on this point have this to say:

"There is an inconsistency between this clause and the preceding assignment of the entire interest of the legatee, because if such assigned interest were deducted, there would be nothing left to remit. If the two clauses were deemed irreconcilable, the instrument would be interpreted most strongly against the petitioner, the promisor. Civ. Code, § 1654. Consequently the assignment would be upheld. The inconsistency cannot be permitted to defeat the plain terms of assignment and the paramount provision of the instrument.

"But the inconsistency is apparent and not real. When aided by the settled rule of construction that repugnancy must be reconciled so as to give effect to the repugnant clauses, subordinate to the general intent and purpose (Civ. Code, § 1653), the meaning of the power of attorney becomes plain. The predominant purpose to create a power coupled with an interest and thus an irrevocable agency is expressly declared. To insure this result the entire interest is transferred. But the assignment is not intended to be absolute so as to divest the petitioner of all further claim to her legacy. The transfer is really one in trust pursuant to which the attorney in fact takes the legal title with a corresponding duty to account. He himself has a beneficial interest sufficient at least to pay for his services and outlays."

That there is an inconsistency between the two clauses is clear. Nor do we question respondents' statement of the rule of construction that under such circumstances the repugnancy must be reconciled so as to give effect to the repugnant clauses in keeping with the general intent or predominant purpose of the instrument. But we cannot agree

with respondents in their statement of what is the "predominant purpose" or "paramount provision" of the instrument. It is clear to us that the chief purpose of the constituents here was not, as respondents contend, "to create a power coupled with an interest and thus an irrevocable agency," but rather to make an assignment in trust to the attorney in fact in order to facilitate the collection of the legacies, and to insure the reimbursement of the attorney in fact for his outlays, and for compensation for his services. Now, since the reimbursements and compensations were to be taken from the legacies, it may be conceded that they are to that extent an interest in the subject of the power, and that the interest arose when the assignment was made; that is to say, the power and the interest concurred. The assignment, in other words, created a present interest in the legacies, but only in the sense we have indicated—to the extent of reimbursements and compensation. But this does not render the power irrevocable. The mere expression, "a power coupled with an interest," does not necessarily render the power irrevocable. It is plain from the foregoing authorities that the interest which the attorney in fact must have in the subject of the power in order to render the power irrevocable is such a beneficial interest in the thing itself, apart from the proceeds, that if the power were revoked he would be deprived of a substantial right. In other words, the relation of the attorney in fact to the subject-matter must be such that a revocation of the power would be inequitable. Such is not the case here. The interest in the proceeds of what may be collected is not, strictly speaking, a beneficial interest in the legacies. The interest is nothing more than an assurance that the attorney in fact will be reimbursed and compensated out of the legacies when collected. A revocation of the power would in no way deprive the attorney in fact of any right, for the reason that he is entitled to be reimbursed for any sums expended by him and to be compensated out of the legacies for any services rendered under the power up to the time of revocation. Nor can the creation of a trust, which has placed the bare legal title in the attorney in fact, with a corresponding duty to account, be considered upon any theory as conferring upon the attorney in fact such a beneficial interest as to render the power irrevocable. Fairly considered, the contract herein creates a trust with a corresponding duty to account. It has no meaning other than this. The case would be quite different if, in addition to providing for reimbursements and compensation, the contract vested in the attorney in fact a definite share in the ownership of the legacies. In such an event, the power would be "ingrafted upon an estate in the thing," and under such a contract to permit the revocation of the power and substitute the attorney in fact

out of the case would be to prevent him from exercising the right of property.

Petitioners urge that the power of attorney is unconscionable and should not, therefore, be recognized in equity, since it professes to assign all of petitioners' legacy without consideration. It is likewise contended that the power of attorney was secured through fraud and misrepresentation. It is sufficient to say that such questions have no proper place in the determination of this proceeding. The order of substitution should have been made.

Let a peremptory writ of mandate issue.

We concur: ANGELLOTTI, C. J.; SHAW, J.; OLNEY, J.; LENNON, J.; WILBUR, J.; MELVIN, J.

(42 Cal. App. 684)

PAGE v. MINTZER et al. (Civ. 2895; S. F. 8887.)

(District Court of Appeal, First District, Division 2, California. Aug. 15, 1919. Opinion of Supreme Court Denying Rehearing, Oct. 13, 1919.)

INFANTS — 7—MUNICIPAL CORPORATIONS — 147—MINOR IN CHARGE OF OFFICE OF SUPERINTENDENT OF STREETS DE FACTO OFFICER.

An unbonded minor, in charge of the office of superintendent of streets, who was performing the duties of the office, designating himself assistant, the superintendent himself being on leave of absence, was a de facto officer, as far as landowners were concerned, and they could not claim that a contract signed by him in the name of the superintendent, followed by his name as "assistant," was not valid; the work having been done satisfactorily at prices fixed by the council in its acceptance of the bid of the contractor.

Appeal from Superior Court, Contra Costa County; R. H. Latimer, Judge.

Proceeding by L. L. Page against Lucio M. Mintzer and others. Judgment for plaintiff, and defendants appeal. Affirmed by the District Court of Appeal, and rehearing denied by the Supreme Court.

John F. Cassell, of San Francisco, for appellants.

Johnson & Shaw, of Oakland, for respondents.

BRITTAİN, J. The defendant property owners appeal from a judgment foreclosing the lien of a street assessment in the city of Richmond. The only question is as to the validity of certain acts performed by the assistant superintendent of streets.

There is no question regarding the proceedings by which the city council acquired jurisdiction to order the work to be done. Upon

proper advertisement the plaintiff's bid for the work was properly accepted. It is not suggested that the work was not well done, within reasonable time, in entire accord with the specifications, and for the agreed price. There is no question of the regularity or fairness of the distribution of the cost upon the property. It is not suggested that the defendants' property was not directly benefited by the work, nor that the assessment on defendants' lots was not in proportion to the benefits received.

The work was done under the Vrooman Act (St. 1885, p. 147), which requires that after the award has been made the superintendent of streets shall enter into a contract with the successful bidder, and in the contract fix the time for the commencement and completion of the work, which time may be extended under certain conditions by the superintendent of streets. From the record in the present case it appears that long prior to the institution of the proceedings involved, one Blankenship, who was the superintendent of streets, appointed an assistant, W. D. Boswell, whose appointment was approved by a resolution of the city council. About the time the bid of the plaintiff was accepted, by another resolution of the council, Blankenship, the superintendent of streets, was granted a leave of absence for two weeks. The contract, which in neither form nor substance is objected to by the defendants, was signed by the contractor on December 30, 1908. At that time Blankenship was absent from the city of Richmond. He returned on January 2, 1909. When the contractor signed the contract, Boswell was in entire charge of the business office of the superintendent of streets. During the absence of Blankenship he transacted all the business of the superintendent of streets with members of the city government, contractors, employees of the street department, and others. When the contractor signed the contract, he paid to Boswell, for the city, \$400 required to cover preliminary expenses, whereupon Boswell, with a rubber stamp, appended to the contract the name of "N. M. Blankenship, Superintendent of Streets of the City of Richmond," and wrote beneath it, "By W. D. Boswell, Assistant Superintendent of Streets." The contract was then attested: "Signed, sealed, and delivered in the presence of H. H. Turley, City Clerk." In the contract the time of commencement and completion of the work was fixed. Subsequently Blankenship was succeeded in office by R. L. Fernald, and Boswell continued as assistant superintendent of streets. The city council granted certain extensions of time for the completion of the work. The Vrooman Act provides that the superintendent of streets may extend the time under the direction of the city council. One of the

extensions was under the incumbency of Blankenship, and one during that of Fernald. Both times the name of the superintendent of streets was signed by Boswell, who in one instance added, after his name, "Ass't Supt. of Sta.," and in the other, "Ass't." Boswell never took oath of office, he filed no bond, and when the contract was signed he was but 19 years old.

It is maintained by the appellants that there was no contract signed by the superintendent of streets; that because the superintendent of streets was absent at the time the purported contract was signed, he did not exercise the discretion vested in him in fixing the time of commencement and completion of the work; and that in no case did the superintendent of streets extend the time in accordance with the provisions of the statute. It is argued that Boswell did not pretend to act independently as a *de facto* officer, because he signed the contract in the name of the superintendent of streets; that there was no *de jure* office of assistant superintendent of streets, and therefore there could not be a *de facto* holder of the non-existent office; that he was not a deputy superintendent of streets, because the utmost that he could have claimed was that he acted under the resolution approving his appointment, and all he did claim was that he was assistant superintendent of streets; that the superintendent of streets did not and could not delegate to Boswell the performance of the functions imposed by the Vrooman Act on the superintendent of streets; and that the contractor in dealing with the public official was charged with notice of the extent and limitations of his authority.

The learned judge of the trial court showed himself to be one of those to whom Mr. Justice Oliver Wendell Holmes referred in his classic on the Common Law (page 36) when he said: "The law is administered by able and experienced men, who know too much to sacrifice common sense to a syllogism." He properly decided that under the facts the property owner should pay for the work which had been done. The Supreme Court of the United States exercised the same common sense in a case in which it denied the jurisdiction of the Circuit Court to try a Cherokee Indian for the murder of a white man. The Cherokee Nation claimed jurisdiction over the defendants upon the theory that the murdered man was an Indian by adoption, by reason of his having married a Cherokee woman. At the time the marriage license was issued one Triplett was the clerk, and R. M. Dennenberg, his deputy. Both the clerk and his deputy were absent, and the name of the deputy was signed to the license by his son. Substantially the same contentions were made in that case as here concerning the validity of the document in question. In holding the

marriage license to be valid, the Supreme Court said:

"It is true that the younger Dennenberg, who signed the marriage license, was neither clerk nor deputy, but he was an officer *de facto*, if not *de jure*. He was permitted by the clerk and the deputy to sign their names; he was the only person in charge of the office; he transacted the business of the office, and his acts in their behalf and in the discharge of the duties of the office were recognized by them and also by the Cherokee Nation as valid. Under those circumstances his acts must be taken as official acts, and the license which he issued as of full legal force. As to third parties, at least he was an officer *de facto*; and if an officer *de facto*, the same validity and the same presumptions attached to his actions as to those of an officer *de jure*." *Nofire v. United States*, 164 U. S. 657, 17 Sup. Ct. 212, 41 L. Ed. 588.

The fact that Boswell was a minor does not militate against the rule declared in the *Nofire* Case. *Wimberly v. Boland*, 72 Miss. 241, 16 South. 905; *People v. Dean*, 3 Wend. (N. Y.) 438; *Hooper v. Goodwin*, 43 Me. 79-80.

In the *Nofire* Case the deputy's name was signed by his son without the addition of the son's name. In this case the name of the superintendent of streets was signed with addition of the name of the assistant. No reason appears to exist for holding either the contract or any extension of time invalid because Boswell signed his name, when, under the rule in the *Nofire* Case, they would have been held valid if he had failed to sign his name.

While there is some difference in the facts of the two cases, the reasoning of the court in *Oakland v. Donovan*, 19 Cal. App. 488, 126 Pac. 388, in holding valid a contract signed by an acting superintendent of streets, applies to this case. When one is in charge of the physical office of a public official and is performing the duties of the office he is, as to third persons dealing with him in good faith, the *de facto* officer.

The Vrooman Act provides for appeals, and section 11 (Stats. 1885, p. 157) expressly provides that no assessment shall be held invalid except upon appeal to the city council for any error, informality, or any defect in any of the proceedings prior to the assessment, where jurisdiction to order the work to be done has been established by publication of the resolution of intention. In the present case there is no record of any appeal having been made by the property owner to the council. As has been stated, the work was done satisfactorily and at the prices fixed by the council in its acceptance of the bid of the respondent, and under such circumstances it cannot be held that there was any error in the trial of the case which resulted in a miscarriage of justice. Const. Cal. art. 6, § 4½. The case appears to be within the rules of *Chase v. Trout*, 146 Cal.

350, 80 Pac. 81, and Farley v. Reindollar, 174 Cal. 707, 185 Pac. 19.

The judgment is affirmed.

We concur: LANGDON, P. J.; HAVEN, J.

Opinion of Supreme Court, in Bank, Denying Rehearing.

PER CURIAM. The application for hearing in this court after decision by the district court of appeal of the first appellate district, division two, is denied.

In denying such hearing we are not to be understood as assenting to any view that if there was no valid contract for the doing of the work the judgment could nevertheless be affirmed for the reason that there was no appeal by the property owner to the council. We say this for the reason that the opinion may possibly be open to some such construction.

All concur except OLNEY, J., not participating.

(43 Cal. App. 80)

AMERICAN IMPROVEMENT CO. v. LILIENTHAL et al. (Civ. 2929.)

(District Court of Appeal, First District, Division 1, California. Aug. 30, 1919. Rehearing Denied by Supreme Court Oct. 28, 1919.)

1. BANKRUPTCY — 376 — "COMPOSITION" DENIED.

A "composition" is a proceeding under which a bankrupt may settle with his creditors, if the majority agree, by the payment of a lump sum, to be distributed ratably among the general creditors, and such sum as may be necessary to pay priority claims and costs of the proceedings.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Composition.]

2. BANKRUPTCY — 387 — CONFIRMATION OF COMPOSITION IN EFFECT A DISCHARGE.

Under Federal Bankr. Act, §§ 14c, 70b (U. S. Comp. St. §§ 9598, 9654), confirmation of a composition in bankruptcy is in effect a discharge, superseding the bankruptcy proceedings and reinvesting the bankrupt with all his property free from the claims of creditors.

3. BANKRUPTCY — 387 — COMPOSITION RESTORES BANKRUPT TO POSSESSION OF PROPERTY.

While a bankrupt is reinvested with all his property by a composition, the effect is no more than to place it back in his hands as it was before the insolvency proceedings were instituted, and, no adjudication having been made, the debtor is never divested of his property.

4. BANKRUPTCY — 387, 418(1) — EFFECT OF COMPOSITION AND DISCHARGE ON PROCEEDINGS TO ENFORCE DEBTS.

A composition in bankruptcy has no more effect than a discharge would have under the same circumstances, both releasing the bankrupt

from all his provable debts, except those specified in federal Bankr. Act, § 17 (U. S. Comp. St. § 9601), a discharge not being a payment or extinguishment of the debts, but simply a bar to all future proceedings for enforcement, except such as are by way of enforcement of a lien therefor not in itself invalid; the discharge having merely destroyed the remedy.

5. BANKRUPTCY — 433(1) — EFFECT OF DISCHARGE ON VALID LIEN.

A valid lien created on the property of a bankrupt more than 4 months before filing of the petition is not affected by his discharge, which does not operate to cast off a valid lien given or acquired for the debt, either a lien by contract or by legal proceedings, and does not operate to prevent its enforcement, being purely personal to the bankrupt.

6. BANKRUPTCY — 387 — EFFECT OF COMPOSITION ON LIEN SECURED BY FILING TRANSCRIPT OF JUDGMENT.

A composition with his creditors confirmed by the bankruptcy court released the debtor from further personal liability to pay a judgment obtained against him, but did not affect the security of lien obtained by the judgment creditor by filing transcript in the county recorder's office of a county, in which the debtor owned property not exempt from execution, more than 4 months before institution of the proceeding.

Appeal from Superior Court, City and County of San Francisco; James M. Troutt, Judge.

Action by the American Improvement Company against E. R. Lillenthal, Leon Sloss, W. P. Hammon, and others, resulting in final judgment for plaintiff. From a special order after such judgment denying the motions of defendant Hammon to stay and recall executions and to discharge the judgment of record, he appeals. Cause remanded, with instructions to quash execution. Order otherwise affirmed.

Charles W. Slack, of San Francisco, for appellant.

Wm. P. Hubbard, of San Francisco, for respondent.

WASTE, P. J. This is an appeal by W. P. Hammon, one of the defendants in an action commenced in the superior court of the city and county of San Francisco by the American Improvement Company against E. R. Lillenthal and others, from a special order, made after final judgment in the action, denying the motions of the defendant Hammon to stay and recall executions on the judgment and to discharge the judgment of record.

Judgment for the sum of \$5,813.72 was recovered on October 19, 1916, against the defendants as guarantors of the payment of a promissory note executed by Northern Electric Railway Company and delivered to the plaintiff. Judgment was docketed on October 20, 1916, and a certified copy of the tran-

script of the docket was filed in the office of the county recorder of the county of Santa Barbara on November 8, 1916, at which latter date the defendant Hammon was the owner of certain real property, not exempt from execution, situated in that county. On the same date a transcript of the judgment was filed in the office of the county recorder of Placer county. The judgment is final, no part of it has been paid, and it has never been satisfied, unless by the composition in the bankruptcy proceedings, hereinafter referred to.

An involuntary petition in bankruptcy was filed against the defendant Hammon on September 27, 1917, in the District Court of the United States for the Northern District of California, Southern Division. Thereafter Hammon filed in the bankruptcy proceedings an offer to pay the sum of \$250,000 in satisfaction of his liabilities. On August 31, 1918, the District Court made an order confirming the composition, the offer having been accepted by a majority, in number and amount, of the creditors. No order of adjudication of bankruptcy has ever been made in the proceedings. The plaintiff was included in the schedule filed by Hammon, in the bankruptcy proceedings, as one of the secured creditors. It has had full knowledge and notice of the proceedings, and of the composition, and the proceedings in relation thereto. It never filed any claim in the bankruptcy proceedings, nor participated therein in any respect whatsoever. It received no money upon its judgment, under the composition or otherwise, and took no part in the composition.

An execution on the judgment was issued on September 19, 1918, directed to the sheriff of the county of Santa Barbara, and under it certain real property was advertised for sale. The property had been conveyed by Hammon to the Oilfields Syndicate on September 6, 1917, less than one month prior to the filing of the petition in bankruptcy, and 10 months after plaintiff's judgment lien attached. It was not included in the list of assets of the defendant scheduled therein. Executions on the judgment, directed to the sheriffs of Placer, Monterey, Fresno, and Alameda counties, and of the city and county of San Francisco, were also issued on September 19, 1918, but no levies appear to have been made thereunder.

Motions were made by the defendant Hammon, previous to the time appointed for the sale of the real property, to stay and recall the executions and to discharge the judgment of record on the ground that the judgment had been satisfied and discharged by the composition effected by Hammon with his creditors in the bankruptcy proceedings, and the lien of the judgment extinguished thereby. The motions were denied, and from the order denying the motions this appeal is taken.

One proposition is presented for consideration on this appeal: Is a judgment lien, obtained by filing a transcript of the judgment in the county recorder's office of the county in which the bankrupt owns property not exempt from execution, destroyed by involuntary bankruptcy proceedings commenced more than 4 months after such filing, when a composition between the bankrupt and his creditors was reached and confirmed by the court?

Concisely stated, it is the contention of appellant that the effect of the order of confirmation, made in the bankruptcy proceedings, was to discharge the bankrupt, Hammon, from his indebtedness to the plaintiff, and to revest in the bankrupt the title to his property; that the order of confirmation, being in effect a discharge, the bankrupt was released thereby from liability on the judgment, the lien of which was avoided, although obtained more than four months prior to the filing of the petition in bankruptcy.

[1] A composition is a proceeding under which a bankrupt may settle with his creditors, if the majority so agree, by the payment of a lump sum to be distributed ratably among the general creditors, and such sum as may be necessary to pay priority claims and costs of the proceedings. The proposed composition is presented to the court, and, after notice and hearing, if approved by the court, an order is made confirming the same.

[2] Confirmation is in effect a discharge. 2 Remington on Bankruptcy, § 2349; Cumberland Glass Mfg. Co. v. De Witt, 237 U. S. 447, 35 Sup. Ct. 636, 59 L. Ed. 1042, 34 Am. Bankr. Rep. 723; United States ex rel. Adler v. Hammond, 104 Fed. 862, 44 C. C. A. 229, 4 Am. Bankr. Rep. 736; In re Friend, 134 Fed. 778, 67 C. C. A. 500, 13 Am. Bankr. Rep. 597. Its effect is to supersede the bankruptcy proceedings, and reinvest the bankrupt with all his property free from the claims of his creditors. In re Rider (D. C.) 96 Fed. 808, 8 Am. Bankr. Rep. 179; section 70f of the Bankrupt Act (Act July 1, 1898, c. 541 30 Stat. 565 [U. S. Comp. St. § 9654]).

Section 14c (section 959b) of the Bankrupt Act provides:

"The confirmation of a composition shall discharge the bankrupt from his debts, other than those agreed to be paid by the terms of the composition, and those not affected by a discharge."

[3-6] While the bankrupt is reinvested with all his property by the composition its effect in that regard is no more than to place it back in his hands as it was before the insolvency proceedings were instituted. Strictly speaking, no adjudication of bankruptcy having been made, defendant was never divested of his property. Houston v. Shear (Tex. Civ. App.) 210 S. W. 976, 43 Am. Bankr. Rep. 462, 469. The composition has no more effect than a discharge would have

under the same circumstances. Both a discharge and a composition releases the bankrupt from all his provable debts, except those specified in section 17 (section 9601) of the act. A discharge, however, is not a payment or an extinguishment of the debts; it is simply a bar to all future legal proceedings for the enforcement of the debts or obligations discharged, except such as are by way of enforcement of a lien therefor, not in itself invalid. The discharge has merely destroyed the remedy, but not the indebtedness. *Zavelo v. Reeves*, 227 U. S. 629, 33 Sup. Ct. 365, 57 L. Ed. 676, Ann. Cas. 1914D, 664; 2 *Remington on Bankruptcy*, 2668, 2672. A valid lien, created on the property of the bankrupt more than 4 months before the filing of the petition in bankruptcy, is not affected by his discharge. *Evans v. Rounsaville*, 115 Ga. 684, 42 S. E. 100, 8 Am. Bankr. Rep. 236. The discharge does not operate to cast off good and valid liens, given or acquired for the debt, either a lien by contract or by legal proceedings, nor to prevent their enforcement. It is purely personal to the bankrupt. *Evans v. Staalle*, 88 Minn. 253, 92 N. W. 951, 11 Am. Bankr. Rep. 184; *Powers Dry Goods Co. v. Nelson*, 10 N. D. 580, 88 N. W. 703, 58 L. R. A. 770, 7 Am. Bankr. Rep. 510; *Paxton v. Scott*, 66 Neb. 385, 92 N. W. 611, 10 Am. Bankr. Rep. 80. Undoubtedly, the composition released Hammon from further personal liability to pay the judgment obtained against him in the action, but it did not affect the security afforded by his lien. *Bassett v. Thackara*, 72 N. J. Law, 81, 60 Atl. 39, 16 Am. Bankr. Rep. 786.

Appellant contends that the judgment against him was satisfied by the composition; that as the Bankruptcy Act makes no provision concerning the existence of the lien of the judgment, after the judgment itself has been discharged by composition, the lien was itself released and discharged thereby and ceased to exist. The cases already cited by us refute that contention. A discharge is not a payment or extinguishment of the debt. Only the remedy, not the indebtedness, has been destroyed—the debt can no longer be enforced as a personal obligation. *Zavelo v. Reeves*, *supra*. Section 67c (section 9651) of the Bankruptcy Act provides the condition under which a lien, created by or obtained in any suit or proceeding in law or equity begun against a person within 4 months before the filing of a petition in bankruptcy, by or against such person, shall be dissolved by the adjudication of such person to be a bankrupt. Section 67f of the act provides that—

"All levies, judgments, attachments, or other liens, obtained through legal proceedings against a person who is insolvent, at any time within four months prior to filing of a petition in bankruptcy against him, shall be deemed null and void in case he is adjudged a bankrupt, and the property affected by the levy, judgment, attach-

ment, or other lien shall be deemed wholly discharged and released from the same, and shall pass to the trustee as a part of the estate of the bankrupt, unless the court" shall otherwise order.

It will be noted that these provisions apply only to liens obtained within four months prior to the filing of the petition in bankruptcy, and only then, in the event that an adjudication in bankruptcy shall result. Nothing in the act to which our attention has been called makes any such provision as to judgments or liens obtained more than four months prior to the filing of the petition. To the contrary, the courts have held that, as to such lien another rule is applicable.

Referring to section 67f, the United States Supreme Court has said:

"In our opinion the conclusion to be drawn from this language is that it is the lien created by a levy, or a judgment, or an attachment, or otherwise, that is invalidated, and that where the lien is obtained more than 4 months prior to filing the petition, it is not only not to be deemed to be null and void on adjudication, but its validity is recognized. When it is obtained within 4 months the property is discharged therefrom, but not otherwise. A judgment or decree in enforcement of an otherwise valid pre-existing lien is not the judgment denounced by the statute, which is plainly confined to judgments creating liens. If this were not so the date of the acquisition of a lien by attachment or creditor's bill would be entirely immaterial." *Metcalf v. Barker*, 187 U. S. 165, 174, 23 Sup. Ct. 67, 71 (47 L. Ed. 122).

See, also, *In re Snell* (D. C.) 125 Fed. 154; *In re English* (D. C.) 122 Fed. 113; *Oilfields Syndicate v. American Improvement Co.*, 256 Fed. 979, in the District Court of the United States for the Southern District of California, February 27, 1919.

It would seem, therefore, that the lien of plaintiff, having been obtained more than four months prior to the petition in bankruptcy filed against defendant, if otherwise valid, was not affected by the composition reached by defendant and his creditors in the bankruptcy proceedings.

That the lien attached by filing the transcript of judgment in Santa Barbara county is not open to dispute. It continued for two years from and after the date of filing (Code Civ. Proc. § 674) and had been in force for over 11 months when the petition in bankruptcy was filed.

Appellant and respondent have devoted much time to a consideration of the question whether or not plaintiff was a secured creditor of defendant. Whether plaintiff is or is not a secured creditor would not, in our opinion, alter the relation of the parties toward each other in connection with plaintiff's right, under the present facts, to proceed to realize on its lien, which was preserved to it by the composition. No authorities have been cited

to us holding that if it were a secured creditor it would be compelled, upon composition, to surrender its security to defendant. Such would be the practical result if plaintiff were not now allowed to enforce its lien. We are not here dealing with the right of a secured creditor to stand upon his right to a certain portion of the assets of the estate by virtue of some security upon property of the bankrupt, but with the right of a judgment lienor to enforce his lien, acquired by legal process, after he has been cut off from all further legal proceedings for the collection of his debt.

When counsel for the appellant admits in his brief that "there is also no doubt that if a lien is acquired in legal proceedings without the 4-month period, the lien is not discharged by an adjudication of and a discharge of the lien debtor in bankruptcy, there being no composition," he concedes the respondent's case. As we have before pointed out, the effect of a composition and a discharge is the same.

No liens were acquired by plaintiff in the counties of Fresno, Monterey, or Alameda, or in the city and county of San Francisco; the transcript of the judgment not having been recorded in either. The cause is remanded to the lower court, with instructions to recall and quash the execution issued to the sheriffs of Fresno, Monterey, and Alameda counties, and to the sheriff of the city and county of San Francisco. Otherwise the order of the lower court refusing to recall and quash the execution is affirmed.

We concur: RICHARDS, J.; KERRIGAN, J.

(43 Cal. App. 1)

KEYES v. NIMS. (Civ. 1981.)

(District Court of Appeal, Third District, California. Aug. 25, 1919. On Petition for Rehearing, Sept. 24, 1919.)

1. APPEAL AND ERROR §989 — REVIEW OF FINDINGS OF FACT.

On appeal, in determining whether the findings of fact of the trial court are supported, only the testimony presented by the prevailing party need be considered, and any adverse showing made by the other party may be disregarded.

2. PARTNERSHIP §14—"JOINT ADVENTURE" DISTINGUISHED.

One of the features which distinguishes a "partnership" from a "joint adventure" is the element of principal and agent which inheres in the partnership relation, each partner embracing the character both of principal and agent, being the former when he acts for himself in the partnership, while in a joint adventure no one of the parties can bind the joint adventure.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Joint Adventure; Partnership.]

3. JOINT ADVENTURES §4(1) — RIGHTS BETWEEN MEMBERS.

The resemblance between a partnership and a joint adventure is so close that the rights as between adventurers are governed practically by the same rules that govern partnerships.

4. JOINT ADVENTURES §5(1)—RIGHT OF MEMBER TO SUE FOR ACCOUNTING.

A joint adventurer, as a partner in a partnership may do, may sue in equity for an accounting of the profits flowing from the joint adventure, even where the adventure has been closed and a party thereto is entitled to a sum certain as his share; such right not being precluded by his right to sue at law.

5. JOINT ADVENTURES §5(1)—RIGHT OF MEMBER TO BRING ACTION AT LAW.

One party in a joint adventure may sue the other at law for a breach of the contract, or a share of the profits or losses, or a contribution for advances made in excess of his share, as where the adventure has been closed and a party thereto is entitled to a sum certain as his share of the adventure.

6. JOINT ADVENTURES §5(2)—RELIEF GRANTED THOUGH PLEADING ALLEGED PARTNERSHIP.

In an action by joint adventurer for an accounting and termination of the relation, a decree adjudging an accounting and termination of the relation will be sustained, where the facts pleaded and the evidence warrant the decree, although the complaint alleged that the relation was a partnership.

7. PARTNERSHIP §285—EFFECT OF CONTRACT WITH THIRD PARTY.

Where a partnership agreement was entered into, and a third party, with the consent of both parties to the partnership agreement, was given a one-sixth interest in the partnership by each of such parties, the purpose of the partnership not being changed, the taking of such third person into the partnership did not constitute the making of such an agreement as would operate to supersede and abrogate the original agreement between the original members, although the terms were more definitely specified.

On Petition for Rehearing.

8. APPEAL AND ERROR §832(1)—OVERSIGHT CORRECTED WITHOUT REHEARING.

A rehearing need not be granted because the District Court of Appeal by oversight failed to consider the question of interest allowed in a judgment, and such matter may be considered and disposed of on an application for rehearing without ordering a rehearing.

9. JOINT ADVENTURES §5(1)—IN ACCOUNTING INTEREST ALLOWED ON PLAINTIFF'S SHARE.

In an action by a member of a joint adventure for an accounting, court did not err in allowing interest on the share that plaintiff was entitled to on defendant's sale of a royalty contract belonging to the adventure, although the defendant maintained that there was no joint adventure and that plaintiff had no interest whatever, and plaintiff maintained that he had a half interest, and it appeared from the

evidence that he was only entitled to a third interest; matter of arriving at the amount after determining plaintiff's interest being a matter of simple computation.

10. JUDGMENT \S 250—CONTRACT SUED ON IN CONFORMITY TO PLEADING.

In an action by a joint adventurer for an accounting, where plaintiff sued on an alleged partnership agreement between him and the defendant for one-half the profits, fact that the evidence showed that, after plaintiff and defendant had entered into the agreement, they took in a third member and each gave him a one-sixth interest, and that defendant had purchased the interest of the third party, who thereupon ceased to be a member of the partnership, a judgment in favor of plaintiff for one-third of the profits of the joint adventure was not based upon a contract other than that alleged in the complaint; the plaintiff being under the impression that the third party had dropped out of the adventure and abandoned his rights rather than to furnish money required, being ignorant of the transfer of such third party's share to defendant.

Appeal from Superior Court, San Joaquin County; George F. Buck, Judge.

Action by A. V. Keyes against F. B. Nims. From judgment for plaintiff, defendant appeals. Affirmed.

Clary & Louttit, of Stockton, for appellant.

Lafayette J. Smallpage and Scott Rex, both of Stockton, for respondent.

HART, J. The action was brought to secure the dissolution of an alleged partnership between the parties and for an accounting. A trial was had before the court sitting without a jury, and judgment was entered dissolving the partnership and awarding plaintiff damages with interest and costs, amounting in the aggregate to \$8,960. The appeal is by defendant from said judgment.

Appellant contends that the evidence is insufficient to support several of the findings of the court, the first finding attacked being numbered 1, which stated that the parties hereto "formed a partnership."

The finding that the relation existing between the parties was that of a partnership was based upon a written instrument (hereinafter to be called the "Keyes-Nims contract") which is in the following language:

"Stockton, Cal., September 26, 1916.

"It is hereby agreed between F. B. Nims of Stockton, California, and A. V. Keyes of Stockton, California, that all dealings and contracts entered into with the Samson Sieve-Grip Tractor Company of Stockton, California, after the 27th day of September, 1916, that each shall have an equal interest, that is, share and share alike.

F. B. Nims.
"A. V. Keyes."

It is argued by appellant that the above agreement did not contain the essential elements of a partnership agreement, and that

the parties, at the time of the signing thereof, did not intend to become partners. It is also contended by appellant that the said Keyes-Nims contract was never acted upon so as to "launch" a partnership. The above propositions will be considered in their order.

The consideration of the points thus relied upon by appellant will be clarified by first presenting a brief statement of the facts leading up to the execution of the said instrument and of the subsequent dealings between the parties.

The plaintiff testified that he had been engaged for about ten years in the business of selling investment securities, and that, in 1916, he secured a contract from the Samson Sieve-Grip Tractor Company (hereinafter called the Samson Company) under the terms of which he was to endeavor to sell \$150,000 worth of the capital stock of the company on a 10 per cent. commission basis. On September 20, 1916, plaintiff presented to defendant a "form" letter of introduction from J. M. Kroyer, president of the Samson Company, and endeavored to interest defendant in the purchase of stock. Plaintiff had previously suggested to Mr. Kroyer the advisability of establishing a manufacturing plant in the Middle West. In the course of the conversation with defendant, plaintiff mentioned the matter of building a factory in the Middle West. Defendant said that he had just returned from Michigan and that he had a friend there who was desirous of entering into a contract for the agency of some tractor company. Plaintiff testified:

"I told Mr. Nims at this time, 'Mr. Nims, I feel that I can get a contract from the Samson Company if I had some man with me who was financially responsible,' that I knew that the Samson Company would not give me a contract because I did not have the means to carry out the idea that I had, and asked him if he was, * * * and he said that he was, that he would go as strong as \$40,000."

Plaintiff said that defendant requested him to take the matter up with the Samson people, which he did, with the result that on September 26, 1916, the Samson Company addressed to plaintiff a letter in which it was stated that at a directors' meeting it was decided to enter into such an agreement if satisfactory arrangements could be made. The letter also made tentative proposals for the execution of a contract. Plaintiff immediately submitted this letter to defendant, its terms were discussed, and defendant suggested that plaintiff write a counter proposal, which he did. During this conversation, plaintiff said:

"Mr. Nims, would you mind signing some kind of a simple agreement that in case anything happened to us, you having the contract in your name as we have discussed it, I will have something to show that I have an interest therein?"

Defendant replied: "Certainly." Plaintiff prepared the Keyes-Nims contract and it was signed by defendant. The witness testified that in several conversations he had with defendant they had talked generally about how the matter should be financed. He testified:

"I stated to Mr. Nims that I didn't have money enough at that time hardly to pay the expenses incurred in the sale of this stock, and that I would have to wait before I could put in any money until such time as I had sold that stock and derived the commissions therefrom."

Plaintiff showed defendant a copy of his commission contract with the Samson Company, and witness stated that defendant said:

"That he was willing to finance me until such time as I got in returns from the sale of this stock."

A contract between the Samson Company and defendant was drawn up, and plaintiff said he had four or five interviews with defendant in which its terms were discussed by them. The contract was executed on October 23, 1916. By its terms defendant was given the right to erect one or more plants and to sell tractors in certain designated territory in the United States and Canada. Certain payments by defendant to the company were specified, the first being \$2,500 to be paid upon the signing of the contract.

Plaintiff testified that, about the 15th of October, 1916, defendant said to him that he (defendant) had a friend, of the name of Mr. Clarke, whom he had taken the liberty to invite into the proposition. Two or three days later a meeting was held at the Hotel Stockton at which were present plaintiff, defendant, and C. D. Clarke. As to what then occurred plaintiff testified:

"There was a general discussion regarding different methods that we should finance this company in the Middle West, and Mr. Nims told Mr. Clarke, in so many words, that I would receive from the sale of the stock of the Samson Company something over \$10,000; * * * I had a 10 per cent. contract to sell \$150,000 worth of stock. I replied that was true, and followed that up by stating that I would be perfectly willing, when that stock was sold and I would receive my money from it, to put in any amount that would be agreed upon by us gentlemen at a later date, five or ten thousand dollars. * * * Mr. Nims stated to Mr. Clarke that he had to take care of me until such time as I sold the stock * * * Mr. Clarke suggested that he would come in with us and put up his third and send a check in a few days. Mr. Nims said, 'Well, boys, I am going through with it anyway.' Mr. Clarke says, 'Be assured in a few days I am going to come in.' * * * During this conversation no mention was made of the contract between Mr. Nims and myself."

It further appears, and the court found, that on or about October 17, 1916, and prior to the obtaining of the royalty contract from

the Samson Sledge-Grip Tractor Company, the plaintiff and defendant, by mutual consent, both offered to C. D. Clarke one-sixth of their respective interests, that said Clarke accepted said offer, and that thereupon the interests of said partnership and its assets of said Clarke, plaintiff and defendant were equal, each acquiring a one-third thereof; "that, during the month of January, 1917, defendant, without the knowledge or consent of plaintiff, agreed to return to said Clarke all moneys which he had theretofore advanced towards the aforesaid partnership business, and in return therefor the said Clarke agreed without the knowledge or consent of plaintiff to assign to defendant his one-third interest in and to said partnership and its assets;" that during the month of April, 1917, the said agreement between said Clarke and the defendant was consummated in accordance with the terms thereof; and that thereupon the said Clarke ceased to have any interest in said partnership or its assets.

On or about April 8, 1917, defendant sold to the Samson Company his royalty contract with the company and received the sum of \$22,500. When plaintiff learned of this fact, he asked defendant what he was "to get out of it," to which defendant replied, "You don't get a thing."

Upon an accounting, subsequent to the trial, it was stipulated that defendant received \$22,500; he was credited with \$2,500, the payment made by him on account of the contract, and \$574.20, disbursements made by him, leaving net proceeds in his hands of \$19,425.80. Plaintiff waived all claims for expenses and disbursements made by him, and the judgment in his favor was for one-third of said \$19,425.80.

It is proper to say and briefly to show herein that the defendant's version of the transaction between him and the plaintiff was, in material particulars, wholly at variance with that of the latter. The defendant testified: That, at the time of the conference at the Hotel Stockton, it was understood that he and plaintiff owned the contract jointly. "I guess," he continued, "there is no question as to Mr. Keyes being a partner up to that time. Mr. Clarke understood it so; so did I." Referring to conversations leading up to the execution of the Keyes-Nims contract, witness said plaintiff told him "that he had a contract with the Samson Company by which he would make \$15,000, and, outside of a thousand he wanted to pay on his house, he could put the entire balance into the business"; that as the expenses accrued each was to put in his share of the money. The witness said that he told plaintiff that Mr. Clarke was desirous of coming into the business; that plaintiff consented to Clarke coming in and "said we would divide it three ways, that we would each put up \$833.33, which would have to be paid to the Samson Company within two or three days." As

to the meeting at the Hotel Stockton, which defendant said was on October 17th, he testified:

"It was discussed that we would raise a fund of either five or ten thousand dollars each as a nucleus upon which to start our new plant. Mr. Clarke said, 'Mr. Keyes, are you ready to put up this money?' Mr. Keyes says, 'Yes, I will put up my money right off, right away.' * * * I said, 'Whether either one of you go in or not, I have decided I am going to take on this contract.' Mr. Clarke said, 'Any one who doesn't put up his money doesn't get in.' Mr. Keyes said that was agreeable to him. He sanctioned that."

Clarke and defendant each paid \$1,250 of the first payment of \$2,500 to the Samson Company.

C. D. Clarke testified, regarding the meeting at the Hotel Stockton, as follows:

"We discussed the financing of the contract with the Samson Company. I said: 'Boys, I am going to pay this money anyhow; I am going to take care of the contract.' And we each agreed to pay our share at once; that is to say, I agreed and Mr. Keyes agreed. I said, 'I will take one-third of it.' Mr. Keyes said he would pay one-third of it. The matter of failure to pay was brought up, and I said, 'Who fails drops out.' Mr. Keyes said, 'That is O. K.'"

The witness said that defendant did not say at the meeting that he would carry plaintiff for his share of the money that was to be paid upon the Samson Company contract.

[1] But, in determining whether the findings of the court are supported, we are required only to look to the testimony presented by the plaintiff, and, if sufficient, we may disregard, in such consideration, any adverse showing made by the defendant. It cannot be doubted that the testimony of the plaintiff amply supports all the vital findings made by the trial court; hence, the following must be regarded and accepted as the established facts of the case: That the Keyes-Nims agreement, as given above, was made and entered into by and between the plaintiff and the defendant; that the intention of the parties, as expressed or contemplated by said agreement, was, according to an admission by the defendant, to enter into copartnership with respect to all dealings and contracts which they might have or enter into with the Samson Sledge-Grip Tractor Company, and that they were each to have an equal interest in such dealings and contracts; that, after the said agreement had been made, one Clarke was invited to enter as a third party into the agreement, and upon the consent of the plaintiff as well as that of the defendant did join the two latter in the proposed arrangement as a party thereto; that Clarke and the defendant advanced their respective proportions of the aggregate amount of money required to carry out the agreement; and

that the defendant agreed to advance the plaintiff's part thereof upon the agreement and understanding that the plaintiff, upon receiving certain moneys he had in prospect, would repay the defendant the money so advanced for plaintiff.

The theory of the respondent, and the complaint proceeds upon that theory, is that the relation between the plaintiff and the defendant as produced by the agreement was that of a partnership; and the court below so decided. Counsel further contends, however, that if, strictly, the relation so produced was not that of a partnership, it certainly was that of a joint adventure.

[2] It is obvious that the agreement, as originally formed, contemplated that there should be a division between the plaintiff and the defendant of the profits derived from the business or enterprise in which they agreed to jointly engage, and to this extent the relation created between them by the agreement bears the earmarks of a partnership, which, as defined by our Code, is "the association of two or more persons, for the purpose of carrying on business together, and dividing its profits between them." Civ. Code, § 2395. On the other hand, the agreement related to a single transaction, viz., the procurement of a contract from the Samson Company whereby the plaintiff and defendant would be permitted and authorized to erect one or more plants and to sell said company's tractors in certain designated territory in the United States and Canada; the plaintiff and the defendant, as seen, to share equally in said contract and the profits accruing therefrom. It is said by the authorities that one of the distinctions differentiating a partnership from a joint adventure lies in the fact that, while a partnership is ordinarily formed for the transaction of a general business of a particular kind, a joint adventure relates to a single transaction, although the latter may comprehend a business to be continued for a period of years. It is also said that another feature distinguishing a partnership from a joint adventure is the fact that a corporation incapable of becoming a partner may bind itself by contract for a joint adventure, the purposes of which are within those of the corporation. 23 Cyc. p. 453. There are other features which differentiate the two relations, among which may be mentioned the element of principal and agent which inheres in the partnership relation, each partner embracing the character both of a principal and agent, being the former when he acts for himself in the partnership. Story on Partnership, § 1; Jackson v. Hooper, 76 N. J. Eq. 185, 74 Atl. 130, 135. In a joint adventure, no one of the parties thereto can bind the joint adventure.

[3-5] But there is a considerable amount of law upon this subject, the discussion of

which here may well be regarded as academic, since it is a matter of absolutely no consequence, so far as the decision of this case is concerned, whether the relation created between the parties to this action is that of a partnership or a joint adventure, or a limited partnership, which we are inclined to believe it to be; for it is held by the cases that the resemblance between a partnership and a joint adventure is so close that the rights as between adventurers are governed practically by the same rules that govern partnerships. 15 Rul. Case Law, p. 500. Accordingly, a joint adventurer, as a partner in a partnership may do, may sue in equity for an accounting of the profits flowing from the joint adventure. It is true that one party in a joint adventure may sue the other at law for a breach of the contract or a share of the profits or losses or a contribution for advances made in excess of his share, as where the adventure has been closed and a party thereto is entitled to a sum certain as his share of the adventure; but the right thus to sue at law does not preclude a suit in equity for an accounting. Rul. Case Law, p. 507.

[6] The complaint here proceeds, as we have stated, upon the theory that the agreement between the parties involved the establishment of a partnership relation, and the court's decision was according to that theory, the interlocutory judgment decreeing a dissolution of "said partnership" that plaintiff is entitled to one-third of the net profits realized from "said partnership business," and that plaintiff have an accounting of said "partnership business" to determine the amount of said net profits, etc. Conceding that it is difficult to determine with accuracy from the pleaded facts and the evidence, or the agreement itself, whether the relation created by said agreement was a partnership or a joint adventure relation, still it is, of course, plain that either one or the other of those relations is thus disclosed, and, since the enforcement of the rights of the parties may be accomplished by or through the agency of remedies applicable and pertinent alike to both relations, it is, as above suggested, a matter of no consequence here whether the relation between the parties be that of a partnership or that of a joint adventure. An accounting and a termination of the relation in either case may be had in a proceeding appropriate to such relief in a court of equity (*Jackson v. Hooper*, supra), and therefore, if we assume that the relation between the parties was that of a joint adventure rather than that of a partnership, the decree herein comes as clearly within the issues made by the pleadings as though the complaint had specifically alleged that the agreement was a joint adventure. It follows that, whether the relation between the parties was that of a part-

nership or that of a joint adventure, the evidence, is, upon its face, sufficient to have warranted the court below in finding and adjudging, as it did find and adjudge, that the plaintiff was entitled to one-third of the profits realized from the joint enterprise which was the subject of the agreement between him and the defendant and to an accounting for the purpose of determining the extent or amount of such profits.

The second point made by the appellant is that the original partnership, if such it was, whereby the plaintiff and the defendant associated themselves together for the purpose of securing the contract referred to in their written agreement, was never "launched"—that is, the partnership as then formed at no time proceeded to or did carry out the purposes for which it was organized.

The position of appellant with respect to that proposition may perhaps the better be stated in the language of his brief, viz.:

"In the case at bar, the terms of the two contracts were inconsistent. There were two parties to the Keyes-Nims agreement. There were three parties to the Clarke agreement. Nothing was said in the Keyes-Nims agreement as to what amount of money each of the parties was to advance, or when. A condition precedent to obtaining an interest in the Clarke agreement was the payment of \$833.33 forthwith by each party who desired to 'come in.' Everything done by appellant in protecting the Samson contract, and subsequently disposing of said contract, was in pursuance of the Clarke agreement. After giving Keyes a reasonable time within which to advance his \$833.33, as stipulated in the Clarke agreement, he no longer considered that Keyes had an interest in the project. If Keyes had intended to rely on the original Keyes-Nims agreement, he should have declined to accept the three-cornered proposition made at the conference at the Hotel Stockton on October 17, 1916."

This position involves an attack upon the findings that the interests of plaintiff and defendant in "such partnership, as originally formed," were equal, each being entitled to three-sixths interest, and that on or about October 17, 1916, and prior to the procurement of the royalty contract from the Samson Company, "plaintiff and defendant, by mutual consent, both offered to C. D. Clarke one-sixth of their respective interests"; that Clarke accepted said offer; and that thereupon each of the parties to the agreement, plaintiff, defendant, and Clarke, owned a one-third interest "in said partnership" and its assets. It also involves the question whether there is a variance between the plaintiff's pleading and the proof; that is to say, whether the agreement declared upon by plaintiff is the agreement proved.

It is argued that, when Clarke was admitted into the partnership or association, upon the terms then agreed upon, viz. that each should contribute an equal amount to

finance the concern, an entirely new contract was made which superseded and abrogated the original agreement between plaintiff and defendant; that, Keyes having failed to pay his proportion of the amount which it was then agreed would be necessary to carry out the purpose of the association, he forfeited whatever rights he might have acquired in the new arrangement or agreement.

As has been shown, the plaintiff testified and the court found that when the agreement between him and the defendant was entered into it was agreed that he was to share equally in the profits and that the defendant promised and agreed to advance for plaintiff his share of the expenses of the venture or partnership and also any other sums of money which might become due from plaintiff to the partnership, "until such time as plaintiff would be financially able to reimburse defendant for such advances." The plaintiff testified, as seen, that such was also the understanding and agreement between him and defendant at the time Clarke was brought into the arrangement or agreement.

[7] It is clear that, so far as plaintiff's right to a share of the profits realized from the enterprise is concerned, it is immaterial whether it be true or not that the circumstance of admitting Clarke into the association or partnership worked a new agreement which superseded and abrogated the original agreement between Keyes and Nims. The original agreement by Nims that he would advance whatever sums of money that might become due to the partnership from Keyes was reaffirmed by him at the time Clarke entered into the agreement as a party thereto. Moreover, Clarke was admitted into the partnership, if such it was, upon the consent and agreement of the plaintiff as well as that of the defendant; hence, if it was a new agreement, it was one which was made by all the parties, including the plaintiff. But, if the effect of the original agreement was to create a partnership relation between Keyes and Nims, as we believe it was, the fact of the taking of Clarke into such partnership did not constitute the making of such an agreement as would operate to supersede and abrogate the original agreement between Keyes and Nims. The situation, upon Clarke entering the partnership, was simply this: That Keyes and Nims had entered into an agreement of partnership for carrying on a certain designated business, and, before carrying out the purpose of the agreement, took into the partnership, already so established and formed, another party as a partner therein. There was nothing in the terms of the so-called "new agreement" different from those of the agreement between Keyes and Nims, except that said parties disposed of certain of their interests to the new partner and entered into an un-

derstanding that each of the three should contribute equally to the financing of the enterprise, should share equally in the profits accruing therefrom, and bear equally the burdens thereof. In fact, no more can be said of the effect of taking Clarke into the partnership than that it was either a qualification of the original agreement, to which Keyes as well as Nims actually subscribed, whereby another partner was taken in and the terms more definitely specified, or that it was merely an agreement subsidiary or ancillary to the original.

The cases cited by appellant are not in point here because the facts thereof are materially variant from those of this case. For instance, in the case of *Black v. Hunter*, 169 Cal. 632, 147 Pac. 463, cited by appellant, the original agreement, which involved a combination or association of the parties thereto for the purpose of effectuating a sale of particular tracts of land to the county of Los Angeles, to be used by the county for the erection thereon of a hall of records, had been entirely abandoned by the parties after a futile effort by them to make a sale of the properties. It appears that the parties to said agreement were one Hunter and the appellant Black, who, having learned that Rowan & Co., real estate brokers, had other lands which they were trying to sell to the county, to be used for the same purpose, took said Rowan & Co. in with them and made them parties to their agreement; the purpose being to put an end to the rival proposition of said brokers. It was this agreement that was abandoned because of a failure to make the sale. Subsequently Hunter and Rowan & Co. entered into a contract whereby they agreed between themselves to secure the right to sell the same lands to the county and, if successful, to divide equally between themselves the commissions realized from the sale. The sale was effected by them, and they received the stipulated commissions, whereupon Black, who was not a party to the second agreement, brought suit to recover a share of the commissions, claiming:

That "the first contract was one of copartnership; that the second was not a substitute for it, but merely took Rowan & Co. into the transaction as an agent of the copartnership; and therefore the cancellation of the second contract (and appellants admit that it is no longer in existence) did not abrogate the original agreement of copartnership."

The Supreme Court, through Mr. Justice Melvin, held that the finding that the tripartite agreement had been terminated by the parties themselves and said agreement abandoned was fully sustained by the evidence. And even if, as the appellant in that case contended, the original agreement had not been abrogated by the subsequent or tripar-

tite agreement but was a part of the latter, the abandonment and cancellation of the tripartite agreement by all three parties thereto would necessarily have involved the abandonment and cancellation by said parties of the original agreement.

But be that as it may, in this case there was not an abandonment of the original agreement, by the acts of the parties themselves, as was true in the case above considered, nor was there any evidence or pretense that the agreement to which Clarke became a party was independent of any and all consideration of the original contract. Keyes had conceived and proposed the scheme to Nims, who, in writing, agreed with the former to enter upon its consummation with him upon the understanding that they should share equally in the profits resulting from it. Nims suggested to Keyes the advisability of "taking in Clarke" because the latter was able to assist in financing the proposed enterprise, and in taking him in, both Keyes and Nims acted with reference to and in view of the agreement between them as originally formed. They, in other words, merely brought Clarke into their agreement, as originally formed, as a party thereto with themselves. Indeed, there was nothing to take Clarke in on but the agreement, for the business itself to which the agreement related had not been started or even the facilities for its operation obtained at that time.

The other cases cited by the appellant in their facts bear no nearer analogy to the instant case than does the case of *Black v. Hunter*, above considered. The principles discussed in those cases are therein soundly applied, but the facts to which they are therein applied are entirely different from those with which we are here confronted.

The judgment is affirmed.

We concur: CHIPMAN, P. J.; BURNETT, J.

On Petition for Rehearing.

HART, J. [§] In his petition for a rehearing the appellant calls our attention to the fact that, in our original opinion, we overlooked the proposition urged by him in the briefs that the court below erred in allowing the plaintiff interest on the latter's share of the amount for which the defendant sold the royalty contract with the Samson Company. The failure to consider the question of interest was purely an oversight, and, as it is an important question herein, it should have been considered; but we do not see the necessity of granting a rehearing for that purpose, and we will therefore consider and dispose of the point on this application without ordering a rehearing.

Counsel for appellant take the position that the demand declared upon by the plaintiff was uncertain or unliquidated, and that

therefore it was error to include in the judgment against appellant interest on the amount awarded the plaintiff from the date of the sale and the payment of the money to appellant, which was April 3, 1917. In support of this position there are cited many California cases, of which the leading ones are: *Cox v. McLaughlin*, 76 Cal. 60, 18 Pac. 100, 9 Am. St. Rep. 164; *Easterbrook v. Farquharson*, 110 Cal. 311, 42 Pac. 811; and *Edwards v. Arp*, 173 Cal. 476, 160 Pac. 551.

The reason for the denial of interest on unliquidated demands is said to be "that the person liable does not know what sum he owes, and therefore can be in no default for not paying." *Cox v. McLaughlin*, supra. But it is further said in that case:

"We are not prepared to say, in general terms, that no interest in any case can be recovered in an action upon contract for an unliquidated demand. *Mix v. Miller*, 57 Cal. 356, decided since the adoption of the Code, and *McFadden v. Crawford* [39 Cal. 862], decided previously, attest the doctrine that in this state interest is allowable on such demands under some circumstances. These were cases in which the contract had been fully performed by the creditors, the fruits thereof accepted by the debtors without objection and they were clearly in default and in the latter case the only question was as to value." (Italics ours.)

This language is approvingly adopted into the opinion in *Easterbrook v. Farquharson*, 110 Cal. 317, 42 Pac. 811, supra.

In the case of *Robinson v. American Fish Co.*, 17 Cal. App. 212, 220, 119 Pac. 388, 391, the defendant had agreed with the plaintiff and a number of assignees of the latter to purchase fish from them, to be delivered to the defendant in the city of San Francisco. Action was brought by plaintiff to recover the aggregate sum of \$815.60, which amount represented the demands of the plaintiff and his several assignees for fish delivered by them to defendant. The court awarded judgment to plaintiff in the total sum sued for, together with interest thereon at the legal rate of 7 per cent. per annum from the date of the delivery of the fish. In that case, on appeal, it was strenuously insisted that the demands declared upon were unliquidated, and that the trial court therefore erred in allowing interest from the date of the delivery of the fish. There was a dispute therein as to whether the price agreed upon for the fish was a cent and a half or two cents per pound. This court, disposing of the question of interest in that case, said:

"There is no merit in the contention that the plaintiff was not entitled to interest on the several pleaded claims from the 23d day of October, 1910—the day on which the fish mentioned in the complaint were sold and delivered to appellant. The quantity of fish sold to and received by appellant and the price to be paid therefor were definitely fixed and known to appellant. It was not necessary, in other words, to resort to evidence in court or to an accounting or by

an accord between the parties to establish the amount due. To the contrary, the amount was susceptible of ascertainment by simple computation. *Cox v. McLaughlin*, 76 Cal. 60, 9 Am. St. Rep. 164, 18 Pac. 100, and cases therein cited; *Easterbrook v. Farquharson*, 110 Cal. 311, 317, 42 Pac. 811; *Courtney v. Standard Box Co.*, 16 Cal. App. 600, 117 Pac. 778. Indeed, there seems to have been no dispute as to the quantity of fish delivered to appellant by Meng, and while there was some controversy involving the price per pound which Junta agreed to pay therefor—that is, whether the price agreed upon was a cent and a half or two cents per pound—still the total amount due at either price was capable of ready ascertainment by mere computation, and therefore required no accounting to reach the precise sum due. As is said in *Courtney v. Standard Box Co.*, 16 Cal. App. 600, 117 Pac. 778, so it is true here: "Whether interest has been allowed upon the theory that compensation is thus awarded plaintiff for the use of his money, past due (section 1917, Civ. Code), or as damages for defendant's (appellant's) wrongful withholding of said money from plaintiff (section 3287, Civ. Code), in either case the allowance was perfectly proper."

(We also call special attention to the *Courtney Case*, cited above in the *Robinson Case*.) It should be stated that a petition for a hearing of the *Robinson Case* by the Supreme Court after judgment by this court was denied.

The comparatively recent case of *Howard v. Hobson Co.*, 176 Pac. 715, was an action by one broker against another to recover one-half of the amount in excess of that for which certain real estate was to be sold for the owner; an agreement having been entered into by and between the brokers whereby they were to divide equally between themselves such excess amount. Judgment went for the plaintiff, with legal interest from the date of the sale of the property by the other broker. The evidence disclosed that the expenses incident to the negotiation and consummation of the sale of the property were to be deducted from the amount which the brokers were to receive as their compensation for effecting the sale. The contention on appeal in that case as to interest was, among other objections urged against the allowance of interest, that the demand sued on was unliquidated, and that, consequently, interest was not allowable prior to the date of the entry of judgment. That contention was rejected, and, among other things, this court said:

"As above stated, the moment that the sale of the ranch was fully effected and completed by the defendant, that moment the latter became indebted to the plaintiff in an amount equal to one-half of the net sum received by the defendant over and above that paid for the property to the owner of the ranch; and at that moment of time the amount due the plaintiff became certain and definite or capable of becoming readily so by the simplest of arithmetical calculation by the defendant of the difference between the 'ex-

cess amount' and the amount of the expense which it was necessary for it to incur to negotiate and consummate the sale. The defendant, of course, knew precisely what the expense of selling the ranch amounted to, and, of course, knew the 'excess amount' received by him from the sale over the purchase price. The amount due the plaintiff, therefore, constituted, within the meaning of the law, a liquidated demand."

The Supreme Court, it should be remarked, denied a hearing in that case after judgment in this court.

[9] In the present case the defendant, according to the findings, which are sufficiently supported, became indebted to the plaintiff in the sum to which the latter was entitled as a partner the moment that he (defendant) sold the royalty contract and received the money therefor. The plaintiff, it is true, sued for one-half of the amount received by the defendant for the royalty contract, while the court awarded him one-third of the amount only. But this did not make the demand uncertain or unliquidated. The defendant, it appears, at all times had control and management of the enterprise. He knew whether Clarke had or had not paid over his share of the amount agreed upon as the necessary total amount to launch the enterprise. The plaintiff appears to have had very little knowledge of what was going on in the prosecution of the ends of the copartnership, and it is probable, having heard that Clarke had withdrawn from the concern, that he sued on the theory that Clarke had never paid over his share of the working capital of the firm, and was therefore, as a matter of fact, never a partner, and hence conceived that he was entitled to one-half of the profits of the enterprise, or of the amount for which the defendant sold the royalty contract. But whether the defendant was entitled to one-half of the amount received for the royalty contract or to one-third only is entirely immaterial, so far as the question of interest is concerned. The defendant knew, as we may assume from the findings, that the plaintiff had an interest in the partnership. What that interest was was a disputed question between them, but it was either a one-half or a one-third interest. As to this, then, the only question to be determined was as to the extent of the plaintiff's interest. Whether it was found to be one-half or only one-third, in either case the demand was certain, definite, and liquidated.

The cases holding that interest is not allowable are where the demand is based upon a quantum valebat or a quantum meruit, in which it must be determined upon the evidence what the amount is, or where the amount of the demand must be determined by an accounting or by an examination of numerous accounts and counterclaims. This is not such a case, as we have shown. As stated, the amount of the demand here was

ascertainable by a mere determination of the question whether the plaintiff's interest was one-half or only one-third in the partnership, and the defendant himself, if he knew the plaintiff had any interest at all, knew whether it was the one or the other. Therefore, when we consider the reason upon which is founded the rule that, generally speaking, interest will not be allowed on an unliquidated demand prior to the date of the entry of judgment therefor, viz., "that the person liable does not know what sum he owes, and therefore can be in no default for not paying," we readily perceive that the demand sued on here does not come within that rule; that is, that it is not unliquidated in the sense that interest is not payable upon it from the date the money was received by defendant.

The case of *Easterbrook v. Farquharson*, supra, cited by the appellant, was where the plaintiff leased to the defendant's assignor certain real property, upon which the lessor was to and did erect a building, under an agreement that on the last day of the term of the lease the lessor would pay the lessee two-thirds of the appraised value of the building, to be ascertained by three appraisers, one of whom was to be selected by the lessor, one by the lessee, and the third by the two so selected. The two appraisers appointed by the parties failed to select a third, and themselves failed to agree upon the value of the building. Some six months thereafter, nothing further having been done in the matter of the appraisement of the value of the building, although the lessor and lessee in the meantime had considerable negotiations looking to an adjustment of the matter, the lessor brought suit, setting forth the facts and the impracticability of securing an appraisement by the scheme agreed upon by him and the lessee, averring his readiness at all times to pay the defendant (lessee) two-thirds of the cash value of the building, and asking the court to determine the value of the building at the date of the termination of the lease, and so fix the amount due from him to defendant. The trial court found the value of the building, and, while in its findings it did not fix upon the plaintiff or his appraiser the responsibility for failure to agree upon an appraisement, nevertheless allowed interest on the amount found to represent the value of the building from the date of the termination of the lease. The Supreme Court held that the allowance of interest from the date of the termination of the lease was erroneous, and said:

"To entitle respondent to interest as damages he must bring himself within the terms of section 3287 of the Civil Code. That section awards interest to every person who is entitled to recover damages, certain, or capable of being made certain, by calculation, where the right of recovery is vested in him upon a particular day. But damages are the compensation for the unlawful act or omission of another (Civ. Code, § 3281), and, as has been said, appellant had been guilty of no wrong. He went into court asking a settlement of his account with respondent, and under section 1917 of the Civil Code the sum bore interest only from the day of its judicial ascertainment."

It is plainly manifest that the above case is not in point here, and is no authority against the allowance of interest in the present case from the date the right of recovery was vested in the plaintiff, which was the time when the defendant received the money for the royalty contract.

It is not necessary to review the case of *Edwards v. Arp*, 173 Cal. 476, 160 Pac. 551, supra, also cited by appellant in the petition; it being only necessary to say that in its facts it presents an entirely different situation upon the question of interest from that we find here.

[10] The appellant further asks in his petition that the case be reopened for a further review of questions considered in the original opinion. We are satisfied with the views expressed and the conclusion announced in the former opinion as to the legal nature of the agreement between the parties hereto and the effect of making Clarke a party to said contract. We may repeat, though, what we have already said, that we do not consider that the contract sued on is at variance with the one proved. The fact merely is, according to the result reached by the trial court from the proofs, that the plaintiff sued upon the theory that he had a larger interest in a partnership than he in fact was entitled to. Thus the situation is the same as where a party sues for a certain sum alleged to be due under a contract with the defendant, but the proof shows that he is entitled to judgment for a less sum than that demanded by his complaint. Such a result, of course, does not mean that the plaintiff sued on one contract and proved and recovered on another.

The petition for a rehearing is denied.

We concur: CHIPMAN, P. J.; BURNETT, J.

(43 Cal. App. 118)

MORGAN et al. v. DIBBLE et al. (Civ. 2987.)

(District Court of Appeal, First District, Division 1, California. Sept. 2, 1919.)

1. TRIAL ¶398—INCONSISTENT FINDINGS IN SPECIFIC PERFORMANCE SUIT.

In action for specific performance of contract for sale of land, a finding that the purchase price was excessive, and the contract inequitable, was fatally inconsistent with a finding that purchasers had received adequate consideration for agreement, and that agreement was just and reasonable.

2. SPECIFIC PERFORMANCE ¶49(2)—UNREASONABLENESS OF CONTRACT BECAUSE OF EXCESSIVE PURCHASE PRICE.

Under Civ. Code, § 3391, contract for sale of land providing for an excessive purchase price, and being therefore inequitable, will not be specifically enforced; since specific performance will not be granted unless contract was just and reasonable and the consideration adequate.

3. SPECIFIC PERFORMANCE ¶128(1)—GRANT OF DAMAGES UPON DENYING PERFORMANCE.

Where contract for sale of land was valid but inequitable, equity in refusing to grant specific performance, because contract was not just and reasonable and the consideration adequate, cannot grant vendor damages for expenses incurred in order to fulfill their part of contract; since equity has no right to afford relief unless case is one for equitable interposition.

4. VENDOR AND PURCHASER ¶380—EXPENSES NOT RECOVERABLE FOR BREACH OF CONTRACT BY VENDEE.

Under Civ. Code, § 8307, expenses incurred by vendors in order to perform their part of the contract are not recoverable items of damages for breach of contract by vendee.

5. SPECIFIC PERFORMANCE ¶28(2) — DENIAL WARRANTED BY UNCERTAINTY OF CONTRACT.

Contract for sale of land providing for assumption by purchaser of mortgages on land, but being uncertain as to the property included in the mortgages, the parties to whom and by whom executed, whether already executed or to be executed, the terms of the notes or other evidence of indebtedness to be given, if any, the matter of partial payments, and whether mortgages did actually or were to date from the date of their execution, or from the date of the contract, *held* so uncertain as to warrant denial of specific performance.

6. COVENANTS ¶3—UNCERTAINTY OF PROVISION AS TO RIGHT OF WAY.

Provision of land contract that vendors shall "give a right of way for a pipe line from Fifth street over the eastern boundary of five-acre lot 3" *held* so indefinite as to amount to no covenant at all.

7. VENDOR AND PURCHASER ¶50—ESCROW INSTRUCTIONS NOT PART OF ORIGINAL LAND CONTRACT.

Instrument prepared by title company with whom deeds were to be left in escrow, consisting of instructions to the company and not

signed by vendor until after expiration of period within which the contract could be consummated, and after vendors had withdrawn their deed and certificate of title from the escrow, was not a separate agreement of sale or a supplemental part of the first agreement.

8. SPECIFIC PERFORMANCE ¶94—FINDING OF COURT AS TO ABILITY OF VENDORS TO PERFORM ERRONEOUS.

Where mortgage on land was not for term provided in agreement, and where land was subject to public easements, which could not be removed, and where vendors executed a lease on the property extending beyond the time when the property was to be exchanged for that of purchasers, court was not warranted in finding, in vendor's action for specific performance, that vendors had performed, or were in a position to perform, all the terms of the contract.

9. VENDOR AND PURCHASER ¶143—PURCHASER'S KNOWLEDGE OF EASEMENTS ON LAND NOT A WAIVER.

Where land contract required vendors to furnish good title, except as to specified incumbrances, as a condition of the sale, even actual knowledge by purchasers of public easements upon land, which could not be removed, would not be deemed, while contract remained executory, to imply a waiver of substantial fulfillment of the condition of title.

10. VENDOR AND PURCHASER ¶119—PURCHASER'S RIGHT TO RESCIND ON INABILITY TO FURNISH GOOD TITLE.

Where vendors agreed to furnish good title as a condition of the sale, but could not comply therewith because of public servitudes upon land, which could not be removed, purchasers were entitled to rescind contract at any time; the title being incurably defective by reason of the public servitudes.

Appeal from Superior Court, San Diego County; W. A. Sloane, Judge.

Action by Joseph B. Morgan and others against Horace P. Dibble and others. Judgment for plaintiffs, and defendants appeal. Reversed.

Leroy A. Wright and Thomas D. McLean, both of San Diego, for appellants.

Henry A. Hunter, of Long Beach, for respondents.

WASTE, P. J. This is an action to revise and specifically perform an agreement for the sale and purchase, or, more properly speaking, an exchange, of real estate, and for damages, in the event specific performance cannot be had. Plaintiffs, so they allege, agreed to sell, and the defendants agreed to buy, a tract of land in Imperial county, and certain shares of stock of Imperial Water Company, No. 1, located on said land and appurtenant thereto, for the sum of \$30,700. As part payment of the purchase price the defendants agreed to convey to plaintiffs real property in San Diego county, which plaintiffs agreed to

accept at the mutually agreed price of \$3,000. As another part payment of the purchase price defendants agreed to assume a first mortgage of \$5,000, payable on or before August 1, 1914, with interest at the rate of 8 per cent. per annum, payable semiannually, which plaintiffs agreed to execute upon the Imperial county property. As the balance of the purchase price the defendants agreed to assume a second mortgage on the same property, made payable to Bert Morgan, one of the plaintiffs, in the sum of \$19,700, payable on or before 10 years from date, with interest at the rate of 7 per cent., payable semiannually.

The contract was to be performed within 60 days from its date.

The contract contained a stipulation that the Imperial valley ranch should be free and clear of all incumbrances, other than the two mortgages just noted, except the last installment of taxes for the fiscal year 1914-15. In this connection plaintiffs alleged in their complaint that, at the time of the execution of the contract, it was mutually agreed and understood that the Imperial county property should be conveyed by the plaintiffs subject to rights of way then existing thereon, but that, through inadvertence and mistake, the agreement failed to so express the true agreement of the parties.

The plaintiffs alleged their readiness and ability, at all times, and full performance on their part, but that defendants had refused to comply with the terms of the agreement; that the consideration for the agreement was adequate, and the same was, as to the defendants, just and reasonable. The defendants, answering, admitted the execution of the agreement, but denied that it constituted a valid contract of sale; denied that the right of way clause was the result of mistake or inadvertence; denied performance on the part of the plaintiffs; and denied that the consideration for the agreement as to them was adequate, or that the contract was reasonable or just. It was alleged in the answer that the minds of the parties never met, in the execution of the agreement; that it had been abrogated by other proposals and offers, never accepted by defendants; that plaintiffs by their acts had worked a rescission of the contract, which, it was further alleged, had been obtained by fraud, and misrepresentation, as to the value of the Imperial valley ranch, the character and nature of its surface, and of its soil, and its adaptability for irrigation and subdivision purposes.

The trial court found that the contract of sale was made, as alleged by plaintiffs, and that subsequently an agreement supplemental to and a part of the original contract, was entered into by the parties. In its findings it construed the two agreements together and thereafter refers to them as the "agreements." This supplemental agreement will be referred to hereafter as the "escrow instruc-

tions." The court made no finding on the issue raised by the pleadings as to the mistake alleged to have been made in the original contract relative to the rights of way, but did find that the assent of the defendants to the agreements was not obtained by the misrepresentation of the plaintiffs, nor under the influence of any mistake. It further found that the plaintiffs had performed, or offered to perform, all on their part to be done, and that they at all times had been ready, willing, and able to so do, but that defendants had on their part refused. The sufficiency of the evidence to support these findings will be considered later.

[1] Continuing, the court found that—

"Defendants herein have received an adequate consideration for said agreements, and that said agreements were, and now are, as to said defendants, just and reasonable."

After other declaration of facts, the court then finds:

"That the land agreed to be sold, and purchased by said defendants, under said agreements, was, and is, worth a sum less than the sum of \$30,000, as specified in said agreements, and that said price is excessive, and the contract inequitable, and that on account, and solely by reason thereof, specific performance should be denied to plaintiffs."

These findings are fatally inconsistent.

The court also found that plaintiffs, relying on the agreements entered into between themselves and defendants, had, "in order to fulfill their part of said contract, necessarily incurred certain expenses, as follows": certificate of title to their land, \$150; commission for obtaining the loan, covered by the first mortgage to be assumed by defendants, \$100; and for the agent's commission for making the sale, or exchange of the property, \$1,200—all to their damage in the sum of \$1,450. As conclusion of law the court found that plaintiffs were not entitled to specific performance, but were entitled to judgment against defendants, and each of them, for the sum of \$1,450, and costs of suit. Such judgment was thereupon entered, and defendants appeal. No appearance was made in this court on the part of respondents, and no brief has been filed in their behalf, although the transcript on appeal was filed February 1, 1917, and appellant's opening brief was filed within 30 days thereafter, as required. Such palpable neglect on the part of those supposedly interested, in the matter in litigation, leads us to assume that they have no faith in the righteousness of the judgment secured by them in the lower court. Our examination of the record lends confirmation to this conclusion.

[2-4] The trial court having found that the land agreed to be sold to defendants was worth less than the sum agreed to be paid, and that the price of \$30,000 was excessive,

and the contract therefore inequitable, was correct in denying plaintiffs a decree in specific performance. Such a decree cannot be supported in the absence of a finding that the contract was just and reasonable, and the consideration adequate. Civ. Code, § 3391; *Gibbons v. Yosemite Lumber Co.*, 172 Cal. 714, 716, 158 Pac. 196. Appellants contend that under the findings the court should not have awarded the plaintiffs damages. There are contracts, perfectly valid, which a court of equity will not set aside for any unfairness, but which are so unfair that specific performance will not be decreed. *White v. Sage*, 149 Cal. 613, 615, 87 Pac. 193. In such cases the party is left to his remedy at law. *Agard v. Valencia*, 39 Cal. 292, 302; *Prince v. Lamb*, 128 Cal. 128, 129, 60 Pac. 689. The right to pecuniary compensation in lieu of specific performance "assumes, of course, a sufficient contract, performance or an offer to perform by the plaintiff, and every other element requisite, on his part, to the cognizance of his case in chancery." *Milkman v. Ordway*, 106 Mass. 232, 254. There is no authority for holding that equity can grant damages unless some case of equitable relief is made out also, to which the damages would be applicable or subsidiary. *Bourget v. Monroe*, 53 Mich. 563, 566, 25 N. W. 814. An action to recover damages in lieu of specific performance lies not at law, but in equity, for the right to such damages depends upon the right to specific performance, and is not available until the latter is established. *Cooley v. Lobdell*, 153 N. Y. 596, 603, 47 N. E. 783. A court of equity will not grant pecuniary compensation, in lieu of specific performance, unless the case presented is one for equitable interposition. *Marks v. Gates*, 154 Fed. 481, 83 C. C. A. 321, 14 L. R. A. (N. S.) 317, 321, 12 Ann. Cas. 120. "In other words, the ancillary power to award compensatory damages can only be exercised in a case where the equitable relief prayed for might have been given." *Clark v. Rosario Mining & Milling Co.*, 176 Fed. 180, 189, 99 C. C. A. 534, 543. Judgment for damages therefore, should not have been entered against the defendants. Furthermore, the items of the damages, included in the court's findings, as the basis for the judgment, do not fall within the provisions of section 3307 of the Civil Code, which provides the measure of damages caused by breach of an agreement to purchase an estate in real property.

[5] The original agreement of sale falls short of the requirements necessary to support an action in specific performance, which can only be granted when the contract is definite and certain. *Meyer v. Lincoln Realty Co.*, 14 Cal. App. 756, 757, 113 Pac. 833; *Minturn v. Baylis*, 33 Cal. 129. It is not definite and certain in all its terms. The agreement provides that the defendants shall "assume a first mortgage of five thousand dollars due on or before five years from date, it being

further understood that no payment shall be made on the principal until at least one year shall have elapsed, and any payment shall be made on any regular interest pay day. Interest on said \$5,000 to be at the rate of 8 per cent. payable semiannually," and, further, the defendants shall "assume a second mortgage made payable to Bert Morgan of \$19,700, payable on or before ten years from date interest payable at 7 per cent. per annum payable semiannually." While, as was said in *Carr v. Howell*, 154 Cal. 372, 378, 97 Pac. 885, 888, "the fact that mortgages sometimes, or even usually, contain other terms and covenants than those here prescribed, does not render the contract uncertain," we are of the opinion that there is such a dearth of facts in the contract here under consideration, relative to the property, included in the mortgages, the parties to whom and by whom executed, whether already executed or to be executed, the terms of the notes or other evidence of indebtedness, to be given, if any, the matter of partial payments, and whether said mortgages did actually or were to date from the date of their execution, or from the date of the contract, as to render the contract uncertain in that particular.

[6] The provision in the contract that the plaintiffs shall "give a right of way for a pipe line from Fifth street over the eastern boundary of five-acre lot 3" is so indefinite as to amount to no covenant at all. The further stipulation that "this agreement includes an option by which" plaintiffs "may purchase lot 6 of block 145 during the next six months for the sum of four thousand dollars to be deducted from the second mortgage," is likewise uncertain.

[7] The document which the parties direct the abstract company to use "as your instructions for this exchange" cannot in our judgment be considered as a separate agreement of sale, or a supplemental part of the first agreement. The instructions were prepared by the title company, according to the evidence of plaintiff J. B. Morgan, "for the purpose of carrying out the contract," and in express terms "relate back to date of August 1st to correspond with a certain agreement of sale and purchase made and entered into on said last-mentioned date between the parties hereto." They were not signed by respondent Joseph B. Morgan until some time after the expiration of the 60-day period within which the contract of sale, or exchange, could be consummated, and after the respondents had withdrawn their deed and certificate of title from the escrow. The respondents and he had utterly failed to reach an agreement respecting a number of matters connected with the transaction, which they had made subject to treaty and further negotiation after the signing of the original agreement. His object in signing the instructions appears to have been the result of a belated attempt to

put defendants in default for failing, as plaintiffs at first contended, and alleged in their original complaint, to carry out the terms of the escrow instructions.

The plaintiffs abandoned all reliance on the escrow instructions, as a contract of sale, or exchange, very early in the case. In their amended complaint on which they went to trial they omitted all reference to it, and relied solely on the original agreement. During the trial they sought and secured its introduction in evidence in order "to show that the escrow instructions mention the rights of way, and that defendants had actual knowledge of their existence." It was not until the lower court intimated that it would grant the motion of defendants for a nonsuit, that plaintiffs asked and were granted permission, we think improperly, to set it up by an amendment to their complaint. From all the evidence the court should have granted the motion for the nonsuit.

[8] Appellants also contend that the finding of the lower court, that plaintiffs had performed, or were in position to perform, all the terms of the contract imposed on them, is not supported by the evidence, and that in fact plaintiffs could not perform, because of the following facts: That the first mortgage on the Imperial valley ranch executed by plaintiffs was not for the term provided in the agreement; that their land was subject to public easements which could not be removed; and that the plaintiffs executed a lease on the property extending beyond the time when the exchange was to be made. We think this contention of appellant must also be upheld.

After the respective parties had each visited and inspected the other's land, they met to discuss the details of the exchange. The agreement was there read and explained, "taking each line at a time." All parties being satisfied therewith, it was signed and deposited with an abstract company, together with certain escrow instructions, signed by all the parties, excepting Bert Morgan, one of the plaintiffs, who did not affix his signature thereto within the 60 days allowed for performance of the contract, and until long after a serious disagreement had arisen between the parties, and according to appellant, after there had been a mutual rescission of the contract. Plaintiffs also executed and deposited with the abstract company a first mortgage on their property for \$5,000 in favor of one George Birkett, but payable in three instead of five years, as required in the contract. The trial court found, and the evidence satisfies us, that this departure from the original stipulation was agreed to by defendants.

[9, 10] In the original contract, as before stated, the stipulation relating to title to plaintiffs' property is that it is to "be free and clear of all other incumbrances" than the two mortgages specified and taxes for the

fiscal year 1914-15. In the escrow agreement the stipulation is that it shall be free from all incumbrances other than taxes, and the mortgages provided for in the contract of sale except: "2. The rights of way for roads, ditches and canals now of record." About 10 acres of the land were shown by the evidence to be covered by rights of way for a railroad, a canal system, and county roads. Appellants contend that nowhere in the record does it appear that these rights of way were ever recorded. This appears to be so. Our examination and conclusion in this regard is confirmed by the statement of the lower court made during the trial. If the lower court, in deciding the case, was proceeding on the theory that the defendants had actual notice of these easements, it seems to have overlooked its own opinion, expressed during the trial, that such was not the case, particularly as to the railroad and parts of the county roads. Plaintiff Bert Morgan testified he did not call the attention of the defendants to these easements before the agreements were entered into. The evidence indicates that defendants did not know of the extent and location of these easements until about the time of the trial. Since the respondents were in express terms obliged to make good title (except as to incumbrances specified), as a condition of sale, even actual knowledge by the purchasers of the true status of the rights of way would not be deemed, while the contract remained executory, to imply a waiver of substantial fulfillment of the condition for title. *Snowden v. Derrick*, 14 Cal. App. 309, 314, 111 Pac. 757; *Prentice v. Erskine*, 164 Cal. 446, 450, 129 Pac. 585. At the time of the execution of the contract of sale, and when it should have been performed, the title to plaintiffs' land was incurably defective by reason of the public servitudes, a cloud which in the nature of things plaintiffs could not remove by ordinary methods of business negotiation. Defendants could have rescinded at any time. *Prentice v. Erskine*, *supra*, 164 Cal. 449, 129 Pac. 585.

This defect in the vendor's title made it impossible for the plaintiffs to perform.

Plaintiffs, after the agreements with defendants were entered into, also executed a lease of their land and delivered possession thereunder to third parties, who continued in such occupancy and were on the land at the time of the trial of the action. The time within which possession might be regained by plaintiff was a matter of some conjecture, depending upon the action of the lessees in possession.

Plaintiffs were therefore not in position to and were never able to perform their contract. The finding of the trial court to the contrary is not supported by the evidence.

The judgment is reversed.

We concur: RICHARDS, J.; KERRIGAN, J.

(25 N. M. 456)

BRADFORD v. ARMIJO. (No. 2390.)

(Supreme Court of New Mexico. Oct. 1, 1919.)

(Syllabus by the Court.)

APPEAL AND ERROR §1127—APPELLEE CANNOT FILE TRANSCRIPT AND OBTAIN ORDER DOCKETING AND AFFIRMING CASE UNTIL AFTER RETURN DAY.

Under section 22, c. 43, Laws 1917, the appellee or defendant in error is entitled to file three copies of a skeleton transcript of the record and proceedings and secure an order docketing and affirming the cause for failure of appellant or plaintiff in error to file a transcript of the record, only after the return day. While the statute requires the appellant or plaintiff in error to file a copy of the record and proceedings at least 10 days before the return day, it does not authorize the court to docket and affirm the case for such failure prior to the return day.

Appeal from District Court, Sandoval County; Raynolds, Judge.

Action by J. L. Bradford against Policarpio Armijo. Judgment for defendant, and plaintiff appeals. Motion by appellee to docket and affirm granted, and cause docketed and judgment of lower court affirmed, and on appellant's motion order set aside and appellant given 30 days to file briefs on the merits.

Catron & Catron, of Santa Fé, for appellant.

George S. Downer and W. A. Keleher, both of Albuquerque, for appellee.

ROBERTS, J. On the 23d day of April, 1919, appellant prayed for and was granted an appeal from a final judgment of the district court of Sandoval county. Appellant caused to be prepared and had settled and signed a bill of exceptions within 80 days thereafter. He failed to file in the office of the clerk of the Supreme Court, at least 10 days before return day, the transcript of record and proceedings in the cause, required by section 22, c. 43, Laws 1917. Appellant not having filed the transcript within such time, appellee filed three copies of a skeleton transcript and moved the court to docket and affirm the cause. The skeleton transcripts and motion to docket and affirm were filed after the eightieth day from the time the appeal was taken, but within less than 90 days after granting of such appeal. The court granted the motion, and the cause was docketed and the judgment of the lower court affirmed.

Thereafter appellant filed a motion to set aside such order upon several grounds, only one of which need be considered. This was that appellee, under the statute, had no right to an order docketing and affirming the cause because of his default in not filing his tran-

script within the time required until after the return day. Within 90 days, but after the eightieth day, appellant tendered for filing three copies of a typewritten transcript of the record and proceedings in the cause. Section 22, c. 43, Laws 1917, provides:

"The appellant in case of appeal and the plaintiff in error in cases of writs of error shall file in the office of the clerk of the Supreme Court at least ten (10) days before the return day of any writ of error or appeal, as perfect and complete a transcript of the record and proceedings in the cause as may be necessary to enable the court to properly review it."

Said section then proceeds:

"If he fails to do so the appellee or defendant in error may produce and file in the Supreme Court at any time after such return day, three copies of a written or printed transcript containing the judgment, order, decision or conviction appealed from, and the order allowing the appeal therefrom, and in case of a writ of error, a certificate showing the suing out of said writ of error, together with a certificate of the clerk of the Supreme Court, showing that no transcript has been filed by the appellant or plaintiff in error in said cause in the Supreme Court, and may move the court to docket said cause and affirm said judgment, order, decision or conviction; and if it appear from said transcript that a judgment, order, decision or conviction, within the provisions of sections one or two of this act, was entered in said cause, and that an appeal or writ of error has been taken or sued out therefrom, the court shall affirm such judgment, order, decision or conviction as the case may be, unless good cause be shown to the contrary."

Construing sections 27 and 36 of said act together, it would appear that the trial judge may settle and sign the bill of exceptions at any time within 10 days prior to the return day. Under section 21, the return day is fixed at not more than 90 days after the appeal is taken. The return day under this section may be shortened by the act of the appellant filing the transcript of record in less than 80 days after the appeal is taken; but, where such transcript is not filed within less than 80 days, the return day is 90 days after the taking of the appeal, unless the time is extended. It will be observed that, under the provisions of the statute above quoted, the appellee is authorized to file three copies of a skeleton transcript and move to docket and affirm only after the return day. While the statute requires the appellant or plaintiff in error to file the transcript at least 10 days before the return day, it does not confer upon the appellee or defendant in error the right to take advantage of a default in this regard until after the return day.

It has been held by the territorial Supreme Court in *Armijo v. Abeytia*, 5 N. M. 533, 25 Pac. 777, *Sacramento V. & I. Co. v. Lee*, 15

N. M. 567, 113 Pac. 834, Eagle M. & I. Co. v. Lund, 15 N. M. 696, 113 Pac. 840, and by this court in the case of Gauss-Laugenberg Hat Co. v. Raton National Bank, 17 N. M. 233, 124 Pac. 794, that a motion to dismiss a writ of error or appeal for failure to file a transcript or assignments of error within the time required by statute, not made until after the appellant or plaintiff in error has cured the default, will be denied, and the right of the appellant or plaintiff in error to file such transcript after the time fixed by the statute has expired has been uniformly sustained.

As the statute does not confer upon the appellee or defendant in error the right to secure the affirmance of the judgment of the lower court by filing three copies of the skeleton transcript of the record prior to the return day, it necessarily follows that such right to move within such time does not exist. Consequently, where an appellant or plaintiff in error fails to file a transcript of record and proceedings within 10 days before the return day, but does file such transcript before the return day, no right exists in the appellee or defendant in error to have the judgment of the lower court affirmed because of the failure to file such transcript at least 10 days before the return day.

It follows that the court should not have entered the order docketing the case and affirming the judgment of the lower court. Such order will therefore be set aside, and appellant will be given 30 days to file briefs on the merits, and it is so ordered.

PARKER, C. J., and MECHEM, District Judge, concur.

(38 Wyo. 332)

BACHMANN v. HURTT et al. (No. 912.)

(Supreme Court of Wyoming. Oct. 27, 1919.)

1. HOMESTEAD §87—RIGHT OF WIFE TO EXEMPTION IN HER SEPARATE PROPERTY.

Under Comp. St. 1910, § 4615, providing that, when a married woman is sued alone, judgment may be rendered and enforced as if she was unmarried, and her separate property shall be liable for the judgment against her, but she shall be entitled to the benefit of all exemptions to heads of families, such a woman, against whom personal judgment was rendered, though judgment was also against her husband, is entitled to homestead exemption in her separate property, on which she lived with her husband, though she was not head of a family, and as such entitled to the exemption under section 4755.

2. EVIDENCE §462—PAROL EVIDENCE OF PURPOSE OF MORTGAGE ADMISSIBLE.

Parol evidence of the purpose for which a mortgage was given is admissible; it not contradicting the writing.

3. MORTGAGES §305—RENEWAL AS EXTINGUISHMENT OF LIEN.

Substitution of one mortgage for another upon the same property, no money being paid, the acts being practically simultaneous and parts of the same transaction, with intent that the debt and security continue, is a renewal, and not an extinguishment, of the mortgage, and does not give priority to an intervening judgment, and this though there was a change of debtor.

Appeal from District Court, Sheridan County; E. C. Raymond, Judge.

Action by Theodore Bachmann against Nora L. Hurtt and others. From an adverse judgment, defendant Wyoming Loan & Trust Company appeals. Affirmed.

A. T. Clark and George P. Wolcott, both of Buffalo, for appellant.

H. Glenn Kinsley, of Sheridan, for respondent Bachmann.

Metz & Sackett, of Sheridan, for respondents Hurtt.

WINTER, District Judge. This is an action to foreclose a mortgage dated August 5, 1914. It secured a promissory note of the same date for \$1,600, bearing interest at 10 per cent. These instruments were signed by the defendants Nora L. Hurtt and John M. Hurtt. On February 24, 1914, the defendant Wyoming Loan & Trust Company duly obtained and docketed a judgment in the district court of Sheridan county for \$1,620.80 and costs against Ida M. Powers and her husband, E. E. Powers, at which time the said Ida M. Powers was the record owner of the real estate in question. On August 6, 1914, Ida M. Powers and her husband sold the premises, subject to a mortgage of \$1,600, to the defendant Nora L. Hurtt, and on November 4, 1914, the sale was consummated and possession transferred. In June, 1910, one Spracklen and wife, then the owners of the premises, gave a mortgage for \$1,600 to one Mary M. Kueny. Thereafter, and prior to the judgment of the defendant Wyoming Loan & Trust Company, the Kueny mortgage was assigned to plaintiff.

The defendants Nora L. Hurtt and John M. Hurtt filed an answer and cross-petition, in which they admitted the judgment of the trust company, but alleged that the said Ida M. Powers and E. E. Powers were, at the time said judgment was rendered, occupying said premises as a homestead, and that the mortgage in suit was given to take the place of the Kueny mortgage above mentioned, which had never been paid, and that at the time the property was purchased by them from Powers its value did not exceed \$2,400.

The case was then tried upon the theory that the former owner, Ida M. Powers, had a homestead interest in the real estate in question, which was exempt from levy and sale on execution under the trust company's

judgment; that the homestead interest amounted to \$1,500 (the then statutory limit of exemption); that the mortgage given in 1910 by Spracklen for \$1,600 to Kueny and assigned to Bachmann, the plaintiff, in 1911, was never paid; that there was a substitution in its place of the new note and mortgage, and its purpose was to continue the security of the old mortgage, and that the said homestead exemption and the new note and mortgage herein sued upon were superior to the judgment of the trust company; further, that the lien, if any, of the trust company's judgment, could be satisfied, if at all, only out of any equity there might be in this property, over and above \$3,100; that the property never at any time had a value equal to \$3,100, and that therefore the property passed from Powers to Hurtt free and clear of any lien of the trust company.

Upon the trial of the case, the district court, upon the law and the evidence, sustained this theory, made findings of fact and conclusions of law in conformity therewith, and rendered judgment for the plaintiff, denying the lien of the trust company. The defendant Wyoming Loan & Trust Company appeals.

[1] The first question in this case is: Was the former owner of the land, Ida M. Powers, entitled to a homestead interest or exemption in the premises? The provision of our Constitution was, and is, as follows:

Article 19 of the Constitution: "*Homesteads*. Section 1. *Exemption of*.—A homestead as provided by law shall be exempt from forced sale under any process of law, and shall not be alienated without the joint consent of husband and wife, when that relation exists; but no property shall be exempt from sale for taxes or for the payment of obligations contracted for the purchase of said premises, or for the erection of improvements thereon."

The statutory provisions regarding homesteads are sections 4615, 4755, 4756, 4757, 4760, 5610. Section 4755, Compiled Statutes 1910, in force at the time of the transactions herein involved, is as follows:

"Every householder in the state of Wyoming, being the head of a family, and every resident of the state who has reached the age of sixty years, whether the head of a family or otherwise, shall be entitled to a homestead not exceeding in value the sum of fifteen hundred dollars, exempt from execution and attachment arising from any debt, contract or civil obligation entered into or incurred."

The authorities and arguments of counsel for the parties hereto centered upon the above section as the positive act creating "a homestead as provided by law." The contentions of counsel were upon the meaning, scope, and limitations of the words "being the head of a family." Had this been the only section contained in our statutes bearing directly upon the question, it might be

contended, with considerable support from the authorities submitted and examined, that Ida M. Powers (the property being in her name), living upon the premises with her husband and family, the husband supporting and maintaining them, could not be considered as "the head of a family" within the meaning of the above section 4755. But we need not review the cases and the arguments upon this question, or determine what the law would be were it to rest on section 4755 alone, as the positive statute on the subject, as the matter is placed beyond controversy by section 4615, Compiled Statutes 1910, which is as follows:

"When a married woman sues or is sued alone, like proceedings shall be had, and judgment may be rendered and enforced, as if she were unmarried, and her separate property and estate shall be liable for the judgment against her; *but she shall be entitled to the benefit of all exemptions to heads of families.*"

The Ohio Code (section 5319, Revised Statutes of 1880) was identical with our section 4615. That section in the Ohio Code was amended in 1884 (81 Ohio Laws, p. 65), but without any change, except the omission of the word "alone," following the words "when a married woman sues or is sued," which change was made because of the amendment of another section of the Code in the same amendatory act, which provided that a married woman shall sue and be sued as if she were unmarried, and that her husband shall be joined with her only when the cause of action is in favor of or against both her and her husband. We do not regard that difference in the present Ohio statute as material, so as to create any distinction in construing the last clause of the section entitling the married woman against whom a personal judgment is rendered to the benefit of all exemptions to heads of families. Nor was it regarded as material in that respect by the courts in Ohio. Before as well as after the amendment the statute was construed as giving a married woman the exemptions aforesaid under a judgment rendered against her. Under the statute as it read in 1880, identical with our statute, it was held in *Patrick v. Littell*, 36 Ohio St. 79, 38 Am. Rep. 552, decided at the January term, 1880, wherein a married woman was sued jointly with her husband upon a contract for the payment of money, that the statute gave her such exemptions as are provided for heads of families, since, quoting from the opinion in that case, "she might have been sued alone." The court said:

"It is a contract or obligation upon which, under section 28 of the Code, as amended March 30, 1874, she might have been sued alone; and, being of that character, the statute requires the like judgment to be rendered and enforced, in all respects, as if she were unmarried. 71 Ohio Laws, 47. It was one of the objects of this section, as thus amended, to so

far modify the disabilities of coverture as to authorize a personal judgment to be rendered against a married woman, where such judgment would have been proper, had she remained unmarried. * * * Prior to the date at which a personal judgment was authorized, the decree, according to the English practice, and that of some of the states, was directed against the estate, declaring the separate estate vested in the wife at the date of the decree which it was within her power to dispose of, chargeable with the payment of the debt. * * * But under the statute as amended the same judgment is required, with the same process for its enforcement as would be awarded if the wife were sole; and, saving to her such exemptions as are provided for heads of families, her separate estate is made liable for any judgment rendered against her, to the same extent as would be the property or estate of her husband, for any judgment rendered against him."

In *Hill v. Myers*, 46 Ohio St. 183, 19 N. E. 593, decided at the January term, 1887, Dickman, J., referring to said section 5319, Ohio Revised Statutes, says:

"But in proceeding by way of execution against the wife's separate property, the law has in a liberal and humane spirit guarded all her rights of homestead. It is provided by section 5319, *supra*, that she shall be entitled to the benefit of all exemptions to heads of families. * * * With the changed remedy against a married woman, allowing a personal judgment followed by execution, goes *pari passu* the statutory protection of her homestead."

This position is further supported by *Kimmel et al. v. Paronto*, 52 Ohio St. 469, 43 N. E. 1040, and *Shaw v. Foley*, 62 Ohio St. 80, 56 N. E. 475. These cases, construing the Ohio provision, are conclusive, and on section 4615, together with sections 4755 and the other sections mentioned, which harmonize with this view, we hold that Ida M. Powers had a homestead interest in the premises, which was exempt, that the judgment of the appellant, Wyoming Loan & Trust Company, did not attach, and said company was not entitled to a judgment for a lien on the premises.

[2, 3] The second question to be determined is whether the discharge of the Spracklen-Kueny mortgage automatically made the judgment of the trust company a prior lien. The answer depends upon the facts as to whether the Hurtt-Bachmann mortgage was given for the purpose and with the intention of continuing the security of the old mortgage. It is urged by appellant that the trial court erred in admitting oral evidence to show this fact.

We think the evidence was admissible, as it did not tend to contradict the written evidence and the notes and mortgages, but was for the purpose of proving an extraneous fact or surrounding circumstance, to wit, the purpose and intention of the parties in making the transaction evidenced by the

writing. It is possibly in the nature of a separate oral agreement on a subject not included in or disclosed by the writings, and not inconsistent with their terms. 9 Ency. of Ev. p. 350, and cases cited. The evidence so admitted proved beyond question that such was the intention of all the parties thereto. This was not contradicted by the writings or any oral evidence. The evidence sustains the findings of fact of the trial court upon this point.

There was a substitution of one mortgage for another, without the payment of money, for the convenience of the parties, the acts being practically simultaneous and parts of the same transaction, with the intention that the debt and security should continue.

"Entering satisfaction of a mortgage and taking a new one, when designed by the parties to be merely a continuation of the first mortgage, and when the two acts are practically simultaneous or parts of the same transaction, is not an extinguishment of the mortgage, but a renewal thereof, and does not give priority to an intervening judgment or mortgage creditor of the mortgagor, especially where it is done in good faith, in ignorance of the existence of the intervening lien, and without any intention to release the lien of the mortgage." 27 Cyc. 1222, and cases cited; *Packard v. Kingman*, 11 Iowa, 219; *Pouder et al. v. Ritzinger et al.*, 102 Ind. 571, 1 N. E. 44; *Jones on Mortgages*, para. 924, 927; *Story Eq. pars. 1035c, 1035e*; *Swift v. Kraemer*, 13 Cal. 526, 73 Am. Dec. 603; *Childs v. Stoddard*, 180 Mass. 110.

"The taking of a new note in place of the one originally given does not operate as an extinguishment of the mortgage lien, unless that is shown to have been the actual and express intent of the parties." *First National Bank v. Citizens' State Bank*, 11 Wyo. 62, 70 Pac. 730, 100 Am. St. Rep. 925.

"A change in the form of the security, and the substitution of a new mortgage for the one given at the time of the purchase, does not affect the operation of the rule; * * * and the principle is not rendered inapplicable by the fact that the new or substituted mortgage is executed to a third party for money advanced or loaned for the purpose. * * * And so where the money is borrowed for the purpose of paying the original purchase-money mortgage upon the giving of a new mortgage to the lender to secure the amount, since the lender might have first taken an assignment of the first mortgage, and released it upon receiving a new mortgage in its place, the transaction may be regarded in equity as if that had been done, where the intention appears to have been to substitute the new for the old mortgage giving the new mortgagee the same lien." *Powers v. Pense*, 20 Wyo. 839, 123 Pac. 929, 40 L. R. A. (N. S.) 785, and cases cited; 20 Ency. L. (2d Ed.) 1063.

The appellant insists that the above authorities are inapplicable, because in this case there was a change of debtor, and not merely a renewal between the same parties. The rule is clearly applicable where there is a change of creditor. We see no reason why

the same rule should not apply where there is a change of debtor. There was no extinguishment of the debt. The intention of the parties as disclosed by the evidence was that the debt and the security should continue.

"The thing secured is the debt, rather than the note and other evidence thereof, and so long as the debt can be traced, whatever form it may assume, the security remains good as security for the debt." *First National Bank v. Citizens' State Bank*, 11 Wyo. 62, 70 Pac. 730, 100 Am. St. Rep. 925; 20 Ency. L. (2d Ed.) 959; 2 Jones on Mort. 924; *Simmons Hardware Co. v. Thomas*, 147 Ind. 313, 46 N. E. 645; *Bray v. First Avenue Coal Mining Co.*, 148 Ind. 599, 47 N. E. 1073; *McCaughrin v. Williams*, 15 S. C. 505.

In each of the cases cited by appellants the money was paid and the debt extinguished. Such were not the facts in the case at bar. We conclude, therefore, under the evidence in this case and the law applicable thereto, that the judgment of the trust company did not become a prior lien to the mortgage, and that, there being a homestead interest exempt, said judgment did not attach to or become a lien on the premises. The judgment of the district court is affirmed.

Affirmed.

POTTER, J., and MENTZER, District Judge, concur.

Hon. CHARLES E. WINTER and Hon. WILLIAM C. MENTZER, District Judges, were called in to sit in place of BEARD, C. J., and BLYDENBURGH, J., who were unable to sit by reason of illness.

POTTER, J. Judge WINTER, then judge of the Sixth Judicial District, having sat as a member of the court upon the submission of this cause, prepared the foregoing opinion prior to his recent retirement from the office of district judge, upon resigning that office, to be filed as the opinion of the court in the cause. But the absence of a majority of the sitting judges prevented an order disposing of the cause prior to Judge WINTER'S vacation of his office. The opinion expresses the conclusions of the court upon the questions submitted, and its reasons for disposing of the cause by affirming the judgment, and the same is now ordered filed as the opinion of the court in the cause. I deem it proper, however, to add something, in a concurring opinion, upon the question of the right of Ida M. Powers to a homestead exemption as against the appellant's judgment, under section 4615, Compiled Statutes 1910; that section not having been referred to by counsel in any of the briefs.

The appellant's judgment was obtained on February 24, 1914, and was against Ida M. Powers and her husband, E. E. Powers. At that time the property was incumbered by a recorded mortgage for \$1,600, given on June

27, 1910, by one Spracklen and wife, then the owner of the property, to Mary M. Kueny, which, prior to the date of said judgment, had been assigned to the plaintiff, Bachmann. Prior to the date of said judgment, also, through mesne conveyances and a sufficient deed to her, Ida M. Powers became the owner of the property, who then and thereafter resided thereon with her husband and their six children until some time in 1914, subsequent to the date of said judgment, when she sold and conveyed the property, her husband joining in the deed, to Nora L. Hurtt, one of the defendants in the court below and a respondent here; said grantee thereupon entering into possession and occupancy of the premises and residing thereon with her husband and children, and Mrs. Powers and her husband then entering into possession and occupancy of other land contemporaneously conveyed to her by Mrs. Hurtt as a part of the consideration for the sale and conveyance of the property in question, Mrs. Hurtt assuming the Bachmann mortgage, and Mrs. Powers, with her husband, executing a mortgage to Mrs. Hurtt upon the property conveyed to her for the amount of the Bachmann mortgage. No execution is shown to have been issued or levied upon the land under the appellant's judgment, but the appellant was joined as a defendant in the action to foreclose the Bachmann mortgage, executed by Mrs. Hurtt and her husband upon the land formerly owned by Mrs. Powers to take the place of the original mortgage executed by Spracklen and wife and assigned to Bachmann; and the appellant by answer alleged its judgment and that it constituted a valid and superior lien upon the premises.

The trial court found that the value of the property did not at any time during the period involved exceed in value the sum of \$2,500; that the mortgage indebtedness thereon was at all times during said period the sum of \$1,600, and at the date of the judgment in this cause amounted to \$1,824.66, exclusive of costs; and, as a conclusion of law, that as the mortgage lien and homestead exemption exceeded the value of the land the appellant was without any lien thereon at any time under its judgment.

Preliminary to a consideration of section 4615, under which Mrs. Powers is held by this court to have been entitled to a homestead exemption, it is well to call attention to certain other sections of the Code relating to homesteads and judgment liens. The section declaring a homestead exemption in force until 1915, when it was amended by increasing the exemption from \$1,500 to \$2,500 (Laws 1915, c. 104, §§ 2 and 9), provided that every householder being the head of a family, and every resident of the state who has reached the age of 60 years, whether the head of a family or otherwise, shall be entitled to a homestead not exceeding in value the sum of \$1,500, exempt from execution

and attachment arising from any debt, contract, or civil obligation entered into or incurred. Comp. Stat. 1910, § 4755. The succeeding section (4756) provides that such homestead shall only be exempt while occupied as such by the owner thereof, or the person entitled thereto, or his or her family, or while the owner is actually living within this state.

Section 4759 provides in substance that, when a creditor shall be of the opinion that any homestead is of greater value than \$1,500 (now \$2,500) on filing an affidavit of that fact with the clerk of the district court, he may proceed against such homestead as in ordinary cases, and if it shall sell for more than \$1,500 (now \$2,500) and costs, the excess shall be applied to the payment of the demand of such creditor, but in all cases the sum of \$1,500 (now \$2,500), free of charge or expense, shall be paid to the owner of the homestead; and if it shall not sell for more than \$1,500 (now \$2,500) and costs, the one instituting the proceedings shall pay all costs thereof, and they shall cease, without affecting or impairing the rights of the owner of the homestead.

The next succeeding section (4760) provides that, in case of sale of a homestead on execution or otherwise, the proceeds of sale, not exceeding the amount of the exemption, shall be exempt from attachment or levy on execution, and any subsequent homestead acquired by the proceeds thereof shall also be so exempt, and no judgment or other claim against the owner of such homestead shall be a lien against the same in the hands of a bona fide purchaser for a valuable consideration.

A judgment lien is provided for as follows:

Section 4683, Comp. Stat., declares that lands and tenements, including vested interests therein, and permanent leasehold estates, renewable forever, and goods and chattels, not exempt by law, shall be subject to the payment of all debts, and shall be liable to be taken on execution, and sold as thereafter provided. It is provided by section 4684 that "such lands and tenements," within the county where the judgment is entered, shall be bound for the satisfaction thereof from the first day of the term at which judgment is rendered; but judgments by confession, and judgments rendered at the same term at which the action is commenced, shall bind such lands only from the day on which such judgments are rendered; and all other lands shall be bound from the time they are seized in execution. Thus a judgment lien, without levy of execution, exists under the statute only upon lands and tenements "not exempt by law." So that to give appellant's judgment the standing of a lien upon the land in question, while owned and occupied by Mrs. Powers, it must not have been exempt by law, though upon filing an affidavit that the homestead was of greater value than the amount

of the exemption, it might have been proceeded against by the creditor under section 4759, subject to the conditions therein stated. The record does not show that any such proceeding was instituted by the appellant in this case. If the property was exempt, then, under the provision of the last clause of section 4760, the judgment would not be a lien against the land in the hands of Mrs. Hurtt, to whom it was conveyed by Mrs. Powers, for she was, without question, a bona fide purchaser thereof for a valuable consideration.

Appellant's only contention upon the question of a homestead exemption in the land in question is that Mrs. Powers was not the head of a family, and was not entitled to a homestead exemption for that reason, and that therefore the judgment of the appellant became a lien upon her property, subject only to the old Kueny mortgage which had been assigned to Bachmann; but that contention, as well as the argument presented in support thereof, entirely ignores the provisions of section 4615, which was adopted as a part of our Code of Civil Procedure enacted in 1886, following the language of original section 5319 of the Ohio Code as published in the Revised Statutes of that state of 1880, which section had been construed by the Supreme Court of Ohio in a case cited in the opinion by Judge WINTER. *Patrick v. Littell*, 86 Ohio St. 79, 88 Am. Rep. 552. That case was decided at the January term, 1880, and had reference to this provision of the Code, though it refers to it by citing the chapter of the Ohio Laws of 1874 (71 Ohio Laws, p. 47), by which, through amendment, it became a part of the Code, and as so construed it was held to save to the married woman against whom a judgment might be rendered and enforced thereunder as if she were unmarried, the same exemptions as are provided for heads of families.

The only question that could possibly arise under that section affecting the right to such exemption would be whether it applies where the wife sues or is sued jointly with her husband; but that was not deemed material in the Ohio case cited, for in that case the action was brought against both husband and wife for services rendered and money paid for them under a contract signed by both of them; and it is clear, we think, that it is immaterial whether the wife is the sole party plaintiff or defendant, or sues or is sued jointly with her husband or with any other person, if it is sought in the action to recover a personal judgment or enforce a personal liability against her. The word "alone," in the phrase "when a married woman sues or is sued alone," is evidently used in the sense of "feme sole," and it was intended to provide that, when a married woman sues or is sued as a feme sole, or as unmarried, "like proceedings shall be had," etc. It reads:

"When a married woman sues or is sued alone, like proceedings shall be had, and judgment may be rendered and enforced as if she were unmarried," etc.

The use of the word "unmarried" in that connection seems plainly to indicate that the section was intended to apply to any action brought by or against a married woman as feme sole. It was not unusual to speak of a married woman as suing or being sued alone, when expressing the thought that she might be sued as if unmarried. The manifest purpose of the provision was to authorize a personal judgment against a married woman in an action brought to enforce a personal liability on her part, and the enforcement of that judgment in the same manner as if she were unmarried; and certainly it could not have been intended that such purpose might be obviated by joining her husband or any other person with her as a party plaintiff or defendant, who might be also liable upon the same contract or for the same debt or obligation.

By amendment in 1884 of the section as it appeared in the Ohio Revised Statutes of 1880 the word "alone" was omitted. But in the act making that amendment a preceding section prohibited joining a husband with his wife in any action, except when the cause of action is in favor of or against both of them. That section amended section 4096 of the Ohio Code, and provided:

"A married woman shall sue and be sued as if she were unmarried, and her husband shall be joined with her only when the cause of action is in favor of or against both her and her husband."

The commission appointed to redraft our Code, and which reported the present Code to the Legislature of 1886, evidently took the section as it was found in the published revision of 1880 of the Ohio Statutes, without noticing the amendment of 1884, or deeming it immaterial. But, as explained in the foregoing and in this opinion, the decisions under the provision were the same in Ohio before and after the amendment. Our Code did not adopt section 4996 as found either in the Ohio Revised Statutes of 1880 or the Ohio amendatory act of 1884, but instead it was provided in our Code that it shall not be necessary to join a husband with his wife as a party, except in a case where it would be necessary to join him without reference to the fact of his marriage to such woman. Comp. Stat. 1910, § 4314.

Prior to the adoption of our Code in 1886, in view of the provision of the Code then in force, requiring that when a married woman is a party her husband shall be joined with her, except that, when the action concerns her separate property, she may sue alone, and when the action is between herself and husband she may sue or be sued alone, and

the several provisions of the act of December 4, 1869, with reference to married women (Comp. Laws 1876, c. 82), which authorized a married woman to sue and be sued, in relation to her property, person, or reputation, as if she were sole, and also to sue and be sued as if sole in regard to her trade, business, labor, services, and her earnings, the question was unsettled whether the said act of 1869 or the provision of the Code applied in suits brought by or against a married woman, even as to those cases provided for in said act of 1869. See *Granger v. Lewis Bros.*, 2 Wyo. 231. A dissenting opinion in that case held that the Married Woman's Act, in the respect indicated, was not repealed by implication by the Code of 1873 containing the provision aforesaid requiring a husband, except in the two cases mentioned, to be joined with his wife as a party. But the majority opinion held that it was unnecessary to determine the effect of said Married Woman's Act, holding, however, that the trial court erred in taking from the jury the issue as to the coverture of the defendant at the time of the transaction involved in the suit and the institution thereof.

Section 4615 aforesaid, granting to a married woman under a judgment rendered against her the benefit of all exemptions to heads of families, is in line with a provision of the debtor exemption statutes with respect to personal property which has been in force since 1871. Personal property of any kind or character to be selected by a debtor, being the head of a family and residing with the same, not to exceed the value of \$500, is declared to be exempt, and it is then provided:

"That in any case where the property before mentioned shall be the sole and separate property of the wife, it shall, to the same extent and for all purposes, be exempt for the debts of the wife." Comp. Laws 1876, c. 48, §§ 2, 3; Comp. Stat. 1910, §§ 4762, 4763.

Having concluded that the trial court properly found that Mrs. Powers was entitled to a homestead exemption in the premises under the provisions of section 4615, it is not necessary to consider whether she would be entitled, to such exemption under the provisions of the homestead statutes standing alone, or whether her husband would be entitled to such an exemption in the property held in her name. That property held in the wife's name might be a homestead, at least when conveyed to her by her husband, seems to have been the view of the court when deciding the case of *North Platte Milling Co. v. Price*, 4 Wyo. 293, 33 Pac. 664. In that case, where the property had been conveyed to the wife pursuant to an antenuptial contract, but after the husband had become indebted, and a creditor attacked the conveyance as fraudulent, the court, by Conaway, J., said:

"The property was and is a homestead and not subject to sale on execution in the ordinary way. To the amount of \$1,500.00 it is exempt."

See, also, *Arp v. Jacobs*, 3 Wyo. 489, 27 Pac. 800; 21 Cyc. 501, 507.

But it is not intended to decide the question in this case, nor is it clearly presented here by the findings or briefs. And of course but one homestead exemption in this property could be allowed.

The conclusion of the trial court that the amount of the prior mortgage lien should be first deducted from the value of the land in ascertaining the extent of the exemption, and that the exemption should be allowed as to the excess, is not questioned here; but that conclusion is amply supported by authority, and is, I think, in accord with the spirit and a reasonable construction of our homestead statutes. 21 Cyc. 492; 15 Am. & Eng. Ency. L. 692; *Kilmer v. Garlick*, 185 Ill. 406, 56 N. E. 1103; *Reames v. Morrow*, 193 Ill. App. 155; *Meyer v. Nickerson*, 101 Mo. 184, 14 S. W. 188; *Houf v. Brown*, 171 Mo. 207, 71 S. W. 125; *Hoy v. Anderson*, 39 Neb. 386, 58 N. W. 125, 42 Am. St. Rep. 591; *Prugh v. Portsmouth Sav. Bank*, 48 Neb. 414, 67 N. W. 309; *Morrill v. Skinner*, 57 Neb. 164, 77 N. W. 375; *Crosby v. Anderson*, 49 Utah, 167, 162 Pac. 75; *In re Barrett's Estate* (D. C.) 140 Fed. 569; *Hinson et al. v. Adrian et al.*, 92 N. C. 121; *White v. Fulghum*, 87 Tenn. 281, 10 S. W. 501; *White v. Horton*, 154 Cal. 103, 97 Pac. 70, 18 L. R. A. (N. S.) 490, and note, citing cases.

(105 Kan. 407)

STATE v. WEBB. (No. 22351.)

(Supreme Court of Kansas. Oct. 11, 1919.)

(Syllabus by the Court.)

CHATTEL MORTGAGES ¶230—UNLAWFUL DISPOSITION OF MORTGAGED PERSONALTY.

A title note (one evidencing the conditional sale of personal property and reserving the title thereto in the vendor until full payment of the purchase price) is not a chattel mortgage, within the meaning of that term as used in section 6513, General Statutes of 1915, punishing the unlawful disposition of mortgaged personal property.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Chattel Mortgage.]

Appeal from District Court, Pawnee County.

R. A. Webb was convicted under the statute penalizing the unlawful disposal of mortgaged personal property, and he appeals. Reversed and remanded, with directions to discharge the defendant.

H. S. Rogers, of Larned, for appellant.
Richard J. Hopkins, Atty. Gen., Roscoe E. Peterson, of Larned, and J. K. Rankin, of Topeka, for the State.

WEST, J. The defendant appeals from a judgment of conviction in a prosecution brought under the statute penalizing the unlawful disposal of mortgaged personal property. The information alleged that, with the purpose to defraud the mortgagee and without his written consent, he disposed of an automobile on which at the time there was a chattel mortgage, "of the form commonly known as a title note," to secure an indebtedness of \$350, and that the instrument was binding and properly of record in the office of the register of deeds. After his motion to quash was overruled, the defendant pleaded guilty, and later moved in arrest of judgment.

The sole question involved is whether the section under which the information was drawn (General Statutes of 1915, § 6513) includes a title note. One of these instruments, when properly recorded, is, in many respects, the same in effect as a chattel mortgage. It has been said that these contracts should be regarded on the same basis as a chattel mortgage; that there is a theoretical distinction, but no practical difference. *Christie v. Scott*, 77 Kan. 257, 261, 94 Pac. 214. In *Paul v. Lingenfelter*, 89 Kan. 871, 132 Pac. 1179, it was said:

"No reason can be suggested for regarding contracts of this character as any different in effect from chattel mortgages." 89 Kan. 873, 132 Pac. 1180.

It was there held that actual notice of unrecorded title notes does not affect the creditor any more than actual notice of an unrecorded chattel mortgage. It remains to be seen, however, whether the Legislature intended to make criminal the disposition of property covered by a title note. The present statute, providing for recording chattel mortgages (Gen. Stat. 1915, § 6495), was enacted in 1868. The provision for renewals was made at the same time, and amended by chapter 364 of the Laws of 1903; both the original statute and the amendment leaving the chattel mortgage void, unless renewed within a certain time. Not until 1889 was provision made for the recording of notes evidencing a conditional sale, title being reserved in the vendor until payment, when, by chapter 255, it was provided that such instruments (described in the title of the act as "title notes") might be deposited with the register of deeds, and should thereafter be "subject to the law applicable to the filing of chattel mortgages." This was amended by the Legislature of 1901 (Gen.

Stat. 1915, § 6508) by providing that these instruments—

"shall be entered upon the records the same as a chattel mortgage, and when so deposited shall remain in full force and effect until the amount of the same is fully paid, without renewal of the same by the vendor. * * *

This makes quite a material distinction between a title note and a chattel mortgage in respect to the continuation of the lien; the record of the latter requiring to be renewed biennially. Gen. Stat. 1915, § 6497. While the effect of title notes and chattel mortgages is in many respects the same, the former retain title in the seller, while the latter convey title to the lender. Chapter 104, Laws of 1901, made it a crime for a "mortgagee named in a chattel mortgage," to execute a release or satisfaction of such "chattel mortgage." It will be observed that in this act no mention is made of title notes, while chapter 255 of the Laws of 1889 speaks of "vendor" and "creditors of the vendee," and not of mortgagors and mortgagees.⁴

The recording act (section 6495) covers "every mortgage or conveyance intended to operate as a mortgage of personal property. * * * Not only was this broad language not deemed sufficient to include title notes (Sumner v. McFarlan, 15 Kan. 600), but when the act providing for recording those instruments was framed this phraseology was used:

"Any and all instruments in writing or promissory notes now in existence or hereafter executed evidencing the conditional sale of personal property, and that retains the title to the same in the vendor. * * * Chapter 255, Laws of 1889; Gen. Stat. 1915, § 6508.

The Legislature of 1874, by chapter 72, made it a crime to fraudulently dispose of property covered by chattel mortgage. This was amended by chapter 161 of the Laws of 1897, and again by chapter 226 of the Laws of 1911, which is section 6513, under which the information in this case was drawn. When the original statute was enacted, and for years thereafter, there was no provision for recording title notes, and it is impossible to believe that, when the Legislature used the phrase "mortgagor of personal property" (which words mark the beginning of the section in its present form), the giver of a title note was intended to be included. Both statutes have been amended, but no change has been made in the acts defining the crime to indicate any broadening of the language first used, so as to include title notes, which in fact and in strict legal contemplation are not chattel mortgages, but instruments which accomplish a similar purpose.

The exact wording of the document in question is not disclosed, and the prosecu-

tion argues that the allegation that it was a chattel mortgage makes the information good, even under the law as we have just declared it, notwithstanding the further averment that it was "in the form commonly known as a title note." Doubtless a contract might be written, employing some expressions appropriate to a title note, but upon the whole constituting in legal effect a chattel mortgage. The pleader did not here use language fairly suggesting that situation. His characterization of the instrument as a chattel mortgage, while stating that its form was that of a title note, must be regarded as the pleading of a conclusion of law; the qualification respecting its form being apparently inserted for the commendable purpose of enabling the vital legal question in the case to be determined upon the face of the papers.

The judgment is reversed, and the cause remanded, with directions to discharge the defendant.

All the Justices concurring.

(105 Kan. 383)

BAGBY et al. v. STRAUB et al. (No. 22223.)

(Supreme Court of Kansas. Oct. 11, 1919.)

(Syllabus by the Court.)

1. SALES §417—EVIDENCE TO SUSTAIN FINDING AS TO MARKET PRICE OF FUEL OIL.

The evidence held sufficient to support a finding of the market price of fuel oil during a certain period.

2. APPEAL AND ERROR §1174—REVERSAL OR AFFIRMANCE ON MISUNDERSTANDING OF MANDATE IN FORMER APPEAL.

In view of the possibility that the judgment appealed from was affected by a misunderstanding of the purpose of this court in a former remand, it will be set aside or allowed to stand according to whether or not it was influenced by a belief on the part of the trial judge that the mandate required the making of a certain finding irrespective of his own judgment of the truth and weight of the evidence on which it was based, the trial court to apply this ruling according to its knowledge of the fact in that regard.

3. SALES §418(1)—LIABILITY OF SELLER ON BREACH OF CONTRACT.

In an action against the seller for refusal to complete the performance of a contract to furnish at a stated price from 4,000 to 6,000 barrels of fuel oil per month for two years, a provision being added that the buyer must take the maximum amount if offered, the liability of the seller, where it is measured by the ordinary rule of the difference between the contract and market price, is based upon the non-delivery of the minimum amount only, although deliveries of an intermediate amount had been made, while the contract was being carried out.

⁴For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

4. NEW TRIAL ⇐105—REFUSAL FOR NEWLY DISCOVERED EVIDENCE NOT ERROR.

The overruling of a motion for a new trial on the ground of newly discovered evidence held not to have been erroneous.

Appeal from District Court, Allen County.

Action by H. F. Bagby and others against C. A. Straub and others. Judgment for plaintiffs, and defendants appeal. Remanded for a modification and judgment to be otherwise affirmed or further modified according to opinion.

Chas. H. Apt and Fred Apt, both of Iola, for appellants.

Gard & Gard and Baxter D. McClain, all of Iola, for appellees.

MASON, J. The defendants made a contract by which they agreed to furnish to the plaintiffs, for a period of two years beginning October 1, 1912, from 4,000 to 6,000 barrels of fuel oil at Moran, in Allen county, at 58 cents a barrel. They made deliveries upon the contract until February 14, 1913, when they refused to proceed further under it. The plaintiffs brought suit for breach of contract, and obtained a judgment for \$1,830.82, which was found to be the amount of the damages they had sustained up to May 2, 1913, at which time the only customer with whom they had had a contract for the disposal of the oil became bankrupt and ceased business. The plaintiffs appealed on the ground that they were entitled to recover an additional sum for damages accruing after that date, and the defendants in the same proceeding asked a reversal on the theory that they were not liable in any amount. This court approved the judgment so far as it established a liability of \$1,830.82 up to May 2, 1913, but reversed the case for further proceedings with reference to the plaintiff's claim for damages thereafter sustained. *Bagby v. Straub*, 101 Kan. 608, 168 Pac. 1098. In the opinion it was stated that, although other matters had been presented for consideration, the only material error found was the refusal to make additional findings with respect to the market price of the oil after May 2, 1913, and award the plaintiffs a further amount based thereon. This necessarily involved an approval of the orders of the trial court in other respects, including the findings and conclusions theretofore made. On the remand of the case the trial court gave the plaintiffs a judgment for the additional sum of \$11,294.71, and the defendants appeal.

The defendants seek to renew a contention made in the former appeal that their refusal to carry out the contract was justified by a breach of its conditions by the plaintiffs. That matter, however, together with other

challenges of the correctness of the original findings and conclusions, is set at rest by the decision then made, which left nothing to be determined excepting the liability of the defendants accruing subsequent to May 2, 1913. The question now to be considered is whether error was committed in fixing that liability at \$11,294.71. This estimate of the plaintiff's damages is based upon a finding substantially to the effect that the market price of the fuel oil between May 2, 1913, and October 1, 1914, averaged 73 cents, or 15 cents above the contract price. The defendants assert that this finding was not supported by the evidence, and that it did not result from an independent weighing of the testimony by the trial judge, but from the belief on his part that he was constrained thereto by the mandate of this court.

[1] 1. One of the original findings reads as follows:

"I further find that soon after the execution of contract between parties hereto fuel oil commenced and continued to advance in price, reaching its highest price in February, 1913, to wit, \$1.05 per barrel; that during the entire time covered by said contract there was a steady demand for fuel oil; the latter part of the year 1912 and the first one-half of year 1913, the demand for fuel oil was great and prices good; no fuel oil during such period could be purchased for as low a price as fifty-eight cents (58¢) per barrel f. o. b. cars at refinery in this section of the country."

The expression "such period" in the last clause quoted appears to refer to "the entire time covered by said contract." Possibly it may refer to "the latter part of the year 1912 and the first one-half of year 1913." In either event it recognizes a demand for the oil after May 2, 1913, and shows liability on the part of the defendants after that time unless on the theory that no definite amount could be arrived at from the evidence. No witness undertook to say in so many words that there was an established market price for fuel oil at Moran, or in that field, and none testified to a specific estimate of such market price. Nevertheless we think, as indicated in the former opinion, there was evidence from which the existence of a market price, and its amount, could readily be determined. The fuel oil referred to is a by-product of the refining of crude oil—it is the residuum after the gasoline and kerosene have been extracted. The manager of a refinery at Okanute testified that fuel oil had no general quoted or published market price, as crude oil had; that its price depended to some extent upon that of crude oil, and fluctuated accordingly, but not uniformly; that during the period in question there was an exceedingly good demand for it, a steady demand and a ready sale; that his company sold theirs to the best possible advantage, but usually the price

es received were about what other outputters charged; that there was usually not much change in prices; that they usually ran pretty uniform; that there was no reason why the market price should not be the same at Moran as at Chanute. He then gave the average price received by his company for each month from February, 1913, to March, 1914, ranging from 65 to 81 cents. Another operator of a refinery, who had bought and sold fuel oil for a number of years, testified that there was a ready market in that field; that the prices he received were practically the same as over the entire field. He then gave these prices by months, running from 71.5 to 89.46. Other evidence having a corroborative tendency is mentioned in the former opinion. This testimony would seem to indicate that while the market price of fuel oil was not standardized to the same extent as that of crude oil for instance, and could not be ascertained by merely turning to the quotations of a particular date, an estimate could be made, without much difficulty, which would be reasonably accurate. We think that the evidence was sufficient to support a finding that the average market price was 73 cents, the basis on which the amount of the judgment was arrived at.

[2] 2. The additional findings of the trial court were introduced by the statement that they were made "in the light of the mandate and opinion of the Supreme Court of the state of Kansas, and in accordance therewith." The finding with regard to market price read as follows:

"That fuel oil is a commodity having no regular quoted market price; however, under the evidence adduced upon the trial of the cause, in the light of the mandate and opinion of the Supreme Court, filed herein, and the observations made therein by said court concerning such evidence, the court now finds that during the whole period intervening between May 2, 1913, and October 1, 1914, a period of 16 months and 29 days, the plaintiffs could have realized a net profit of 15 cents per barrel had the defendants furnished same upon orders of plaintiffs under their contract before referred to at the contract price of 58 cents per barrel, f. o. b. cars at Moran, Kan."

The defendants maintain that the reference to the mandate and opinion of this court, especially in view of its repetition, shows that the trial judge believed that obedience thereto compelled the finding made, irrespective of his own judgment in the matter. The language used suggests the possibility of such an understanding. It is not necessary to incur any risk that the judgment finally established shall be affected by a misunderstanding by either the trial or appellate court of the language used by the other, inasmuch as any remote doubt on the subject can easily be set at rest, in accordance with a practice already adopted in a somewhat similar situation. *Butler v. Mil-*

ner, 101 Kan. 264, 166 Pac. 478. The purpose for which the former judgment in the present case was reversed, as stated in the order of reversal, was in order that the trial court might, from the evidence already adduced, make the additional findings of fact and conclusion of law requested by the plaintiffs, and for such further proceedings in accordance with the opinion as might be proper. What the plaintiffs had requested was that the findings should be made of the market price of the oil after May 2, 1913, and of the amount of their additional damages as measured thereby, and that the law should be applied to the facts so found. It was of course not the intention of this court to place any restraint upon the trial court in the exercise of its function of determining the credibility or weight of the evidence. It seems entirely clear that the trial judge could not have supposed that the mandate required him to find that the market price was 15 cents higher than the contract price, but there is a possibility that he may have interpreted it as imposing upon him the absolute duty of finding that it had some definite market value. As already indicated we regarded and still regard the evidence already referred to, if accepted as true, as affording a basis for such a finding, but we had no thought of imposing its acceptance upon the trial court. The cause is to be remanded to be modified in relation to another matter to be hereinafter discussed. The further order will be made that except for such modification the judgment will stand as rendered, if the finding referred to is the result of an independent consideration of the evidence by the trial court. If, however, that judgment was arrived at only by accepting the evidence on the subject as true, and as necessarily establishing a market price of 73 cents, under a supposed compulsion resulting from the language in which the former decision of this court was expressed, then the trial court is directed first to pass independently upon the truth and effect thereof, and render such judgment as shall be in accordance with the conclusion reached in that regard. Of the fact in this respect the trial court can of course be absolutely certain, from its own knowledge, while this court could only form a fallible judgment, based upon the interpretation of language not entirely free from ambiguity.

[3] 3. The portion of the contract relating to the quantity of oil to be furnished read:

"The seller agrees to sell to the purchaser from 4,000 to 6,000 barrels of fuel oil per month during the period of 24 months from October 1, 1912; the understanding being that the purchaser shall take under this contract up to the maximum amount, if it is required."

During the 4 months and 13 days that the defendants complied with the contract they furnished the plaintiffs an average of 4,438

barrels of oil a month. In the first judgment, which covered damages up to the time of the bankruptcy of the customer with whom the plaintiffs had a contract for placing the oil, the amount was based upon a default in delivering that amount each month. In rendering the additional judgment the court adopted the same basis in this respect. The defendants maintain, and we think rightly, that their liability should be limited to the minimum amount of oil named in the contract. The amount of damages covered by the first judgment was arrived at in view of the special and exceptional circumstances of the case. According to the findings, after the plaintiffs had contracted for the placing of the oil at a net profit of 15 cents, the defendants cut off their supply and furnished the oil direct to their customer at the same advance. With respect to this transaction the plaintiffs' damages were measured by the specific amount they had lost by being deprived of the fruits of the favorable arrangement they had made for the disposition of the oil. In that situation there was a reason for considering the amount of oil actually furnished which does not apply in estimating the plaintiffs' subsequent damages. As to these they are relegated to the ordinary rule that the measure of damages for the failure to deliver goods contracted for is the difference between the contract price and the market price. The amount of oil for the non-delivery of which we regard the defendants as liable under this rule is that shown on the face of the contract. The agreement being for the furnishing of from 4,000 to 6,000 barrels, and the buyer being expressly required to take the maximum if offered, the seller could, in our judgment, have satisfied his obligation by the delivery of the minimum. The additional judgment will be modified by deducting therefrom the sum by which the amount of recovery was increased by reason of the calculation being based on 4,438 barrels instead of an even 4,000.

[4] 4. One of the plaintiffs testified that the purchasing agent of the city of Kansas City had quoted him \$1.05 per barrel for a year's supply of fuel oil, which would have been equivalent to about 74 cents at Moran. In support of a motion for a new trial on the ground of newly discovered evidence the defendants introduced the affidavit of the purchasing agent to the effect that he had not made such an offer. The denial of the motion is assigned as error. In the phase of the case now under consideration the plaintiffs were entitled to recover upon showing the market price of the oil. It was not necessary that they should prove that they could have disposed of the oil to any particular customer. The evidence concerning the transaction with the Kansas City purchasing

agent was not of vital importance except as it might have discredited the witness who testified for the plaintiffs concerning it. We see no just ground for disturbing the ruling of the trial court in this regard.

The cause is remanded for a modification in regard to the amount of oil on which the recovery is to be based, the judgment to be otherwise affirmed or further modified according to the test already laid down, to be applied by the district court.

All the Justices concurring.

(105 Kan. 371)

HORNE v. CURTIS et al. (No. 22130.)

(Supreme Court of Kansas. Oct. 11, 1919.)

(Syllabus by the Court.)

1. LIMITATION OF ACTIONS §37(2)—ACTION FOR FRAUD BARRED IN TWO YEARS.

An action for damages on account of fraudulent misrepresentations is barred in two years.

2. RIGHT OF ACTION FOR FRAUD ACCRUES ON DISCOVERY.

The time for the bringing of an action for damages on account of fraudulent representations begins to run when the facts concerning the fraud are discovered.

3. LIMITATION OF ACTIONS §100(5, 12)—ACTION FOR FRAUD BARRED BY DELAY AFTER DISCOVERY.

The facts examined, and, assuming that they disclose fraud, the plaintiff was sufficiently apprised of them to have based his action thereon more than two years before it was begun, and consequently his action was barred by the statute of limitations. Code Civ. Proc. § 17, cl. 3 (Gen. St. 1915, § 6907).

Appeal from District Court, Wallace County.

Action by L. O. Horne against C. P. Curtis and another. Judgment for plaintiff, and defendants appeal. Reversed and remanded, with instructions to enter judgment for defendants.

Mahin & Mahin, of Smith Center, and Monroe, McClure & Monroe, of Topeka, for appellants.

DAWSON, J. The plaintiff brought this action against the defendants for damages on account of alleged fraudulent misrepresentations whereby he was induced to part with a quarter section of Wallace county land worth from \$500 to \$700. The consideration was an assignment of a bill of sale for 50 head of horses running at large in the forests and mountains of Coconino county, Ariz. The title to the horses was in the defendant Curtis, by successive assignments of this bill of sale. Curtis acquired the bill of

sale (for 100 head of horses) in exchange for 320 acres of Colorado land, worth \$1,000, and \$200 in cash. Curtis had never seen the horses. By private arrangement between Curtis and the defendant Duvall, Curtis permitted Duvall to trade the horses to plaintiff; Duvall giving Curtis a tract of land near Weskan, while plaintiff conveyed his land to Duvall.

Following this deal, the trio went to Flagstaff, Ariz., in January, 1914, to capture the horses. The plaintiff, in part, testified:

Duvall "said that he had never been there and had never seen the horses. * * * He said that he got 50 and wanted me to get the other 50.

"Q. Now, did he say that he had 50, or that the other fellow had 50 of them? A. Well, now, the way I understood it was that he had 50. These other 50, he wanted me to get them, so as we could both go gather them. * * *

"Q. Well, when the three of you went down there together, you knew at that time that Grant [Duvall] didn't hold any horses himself? A. Why, he said he didn't—I didn't suppose he did. * * *

The people told us it would cost more than it was worth to get the horses. The recorder [a public officer] said the horses were there; that some parties had been sold horses with these brands a while before, and had rounded up two carloads. He said they had got what their contracts called for. He didn't seem to think they were worth any more than it cost to get them. The man Black we talked to was called Bum Black. He was born and raised there and from his conversation he led me to believe that he knew about as much as anybody about it. Flagstaff is right in the mountains, and the pine trees are tolerably thick all over that country. * * *

It was snowing at the time; the snow was from 15 to 18 inches deep. * * * The fellows couldn't have done anything towards gathering horses then. It would be a big job to gather them. * * * They all told me at the time the best thing was to drop it. Black said that there were horses there, and that a man might gather up a few more than a hundred, but not many. He said it would be mighty hard to get them. * * * At the time we made the deal, Duvall said he really didn't know whether these horses were there or not; he hadn't been there. He said it might be rabbit tracks for all he knew, but he gave me the impression that he got 50 head of them.

"Q. Well, now, you wouldn't say that he absolutely told you that he had 50 of them? A. Well, I couldn't say that he absolutely told me that; but he told me something that he caused me to think he had them. Now, I don't just remember how he put it.

"Q. From his conversation you got the impression that he had 50 head? A. Yes, sir.

"Q. But he didn't tell you that? A. I couldn't say whether he told me right plain out that he had them, but he gave me that impression.

"Q. You don't undertake to say that he intentionally made you believe that he had them?

A. Well, I don't know whether he intentionally made me believe it or not; but he made me believe it. Now, he said I was going with him to get them; that he was going to get them all; I supposed the other 50 was his."

The jury's general verdict was in favor of plaintiff, and 14 special questions were answered, some of which will not require consideration:

"2. Did Grant Duvall make any false and fraudulent representations to the plaintiff at the time of making the trade? Ans. Yes.

"3. If you answer No. 2 'Yes,' state what such representations were. Ans. That he owned 50 head of said horses.

"4. If you answer No. 2 'Yes,' were such representations made for the purpose of inducing plaintiff to make the trade? Ans. Yes."

"7. If you answer No. 2 'Yes,' did Grant Duvall know that such representations were false? Ans. Yes."

[1-3] Defendant urges several errors; the first being that the evidence wholly failed to prove that Duvall had made any false or fraudulent misrepresentations. Passing that question for the moment, the fraud found by the jury was Duvall's representation that he owned 50 head of the horses. (Finding 3.) Assuming that this finding discloses fraud, the plaintiff's own testimony was that about the time of making the trade, and on the trip to Flagstaff, in January, 1914, Duvall told plaintiff that he himself owned none of the horses. Moreover, the bill of sale received by plaintiff was signed, "O. P. Curtis, by Grant Duvall, His Agent." This action was begun on August 29, 1917, some 3 years and 7 months after the fraud, if any, was perpetrated. An abortive effort was attempted in the trial court to show that the fraud was not discovered until 1917. Plaintiff testified that he read something in 1917 which led him "to think that the horses weren't there." All the evidence was in harmonious agreement that the horses existed, but that it would cost more to catch them than they were worth. The plaintiff learned that fact in January, 1914. If plaintiff ever had an action against these defendants, it should have been begun within 2 years after he was defrauded. Civil Code, § 17, third clause (Gen. St. 1915, § 6907). While the statutory time to commence such an action does not begin to run until the fraud is discovered, plaintiff's case against defendants discloses the discovery of nothing of consequence which came to light after January, 1914.

The judgment is reversed, and the cause remanded, with instruction to enter judgment for defendants.

All the Justices concurring.

(105 Kan. 353)

STATE v. KURENT. (No. 21814.)

(Supreme Court of Kansas. Oct. 11, 1919.)

*(Syllabus by the Court.)***1. INTOXICATING LIQUORS ⇐279—ON VIOLATION OF INJUNCTION AGAINST SALE AND MAINTENANCE OF NUISANCE, DEFENDANT PUNISHABLE FOR CONTEMPT.**

In a contempt proceeding for the violation of a decree enjoining the sale of intoxicating liquors, and the maintenance of a nuisance at a certain place, the defendant may be punished for sales of liquor and for acts done in maintaining a nuisance, although a criminal prosecution is pending against him for the same sales and acts.

2. CRIMINAL LAW ⇐163—DEFENDANT, PUNISHED FOR CRIME AND FOR CONTEMPT, NOT TWICE IN JEOPARDY.

He is not thereby put in jeopardy twice for the same offense, since in one case he is punished for a crime, and in the other for contempt of court.

3. STIPULATIONS ⇐14(8)—EVIDENCE ADMITTED BY STIPULATION.

The defendant had no reason to complain of the admission of testimony in the contempt proceeding, which had formerly been taken and transcribed in the criminal proceeding, as he had agreed and stipulated that the evidence might be so used.

4. INTOXICATING LIQUORS ⇐279—EVIDENCE SUSTAINING PUNISHMENT FOR CONTEMPT FOR VIOLATION OF INJUNCTION.

The evidence in the case examined, and held to be sufficient to sustain the findings and judgment of the trial court.

Appeal from District Court, Crawford County.

Adolph Kurent was convicted upon a charge of contempt, and he appeals. Affirmed.

See, also, 105 Kan. 13, 181 Pac. 603.

E. L. Burton, of Parsons, and Thomas W. Clark, of Pittsburg, for appellant.

Richard J. Hopkins, Atty. Gen., George F. Beezley, of Girard, A. B. Keller, of Pittsburg, and C. A. Burnett, of Girard, for the State.

JOHNSTON, C. J. This is an appeal from a conviction upon a charge of contempt. On May 6, 1913, the defendant was perpetually enjoined from maintaining a nuisance on certain premises in violation of the prohibitory liquor law, and the judgment was based on the written confession of the defendant. In September, 1917, he was prosecuted before a justice of the peace for various violations of the prohibitory liquor law, and found guilty upon all the counts charged in the complaint. An appeal was taken to the district court, and after a mistrial there the case was discontinued. Prior to the dismissal

another prosecution had been begun before a justice of the peace for like offenses and while this case was pending the defendant was tried upon the charge of contempt of the permanent injunction and was found guilty. The penalty imposed was imprisonment for six months, and a fine of \$100 and costs, including an attorney's fee of \$100.

[1] The first contention is that the court should not have required the defendant to go to trial on the contempt charge, while the facts out of which it grew were pending and undetermined in the criminal case. The charge of contempt was a step in a civil proceeding of injunction, and is independent of the criminal prosecutions. In one case he was prosecuted for crime, and in the other for disobedience of an order of the court in a civil proceeding. In *Cowdery v. State*, 71 Kan. 450, 451, 80 Pac. 953, it was said:

"Again, it is urged that the court erred in not dismissing, or at least not continuing, the trial of this case until a criminal case which was pending in the same court against the same defendant should be disposed of, and in which he was charged with a violation of the prohibitory liquor law, and, it is claimed, upon the same facts. Whether the charge in the criminal case was for illegal sales, or for maintaining a nuisance, the record here does not disclose. It matters not. The result of the criminal case could under no circumstances become *res judicata* as to any question of law or fact involved in the civil case."

[2] Nor is the order punishing the defendant for contempt an invasion of his constitutional rights. The injunction proceeding is in due course of law. (*Mugler v. Kansas*, 123 U. S. 623, 8 Sup. Ct. 273, 31 L. Ed. 205), and a conviction based on the criminal acts which furnish the foundation for the proceeding for contempt is not a bar to punishment for contempt. It cannot be said that he is put in jeopardy twice, for the reason that the violation of the civil order is not the offense charged in the criminal case. *State v. Roach*, 83 Kan. 606, 112 Pac. 150, 31 L. R. A. (N. S.) 670, 21 Ann. Cas. 1182; *Ex parte Allison*, 99 Tex. 455, 90 S. W. 870, note, 2 L. R. A. (N. S.) 1111, 122 Am. St. Rep. 653.

[3] The reception of testimony which had been given on the criminal trial is assigned as error. It appears from the record, however, that this evidence was admitted under an agreement of the defendant that it should be considered so far as it was competent, relevant, and material, and should be treated the same as though the witnesses were present in court and had been properly sworn and given their testimony. Under this stipulation the plaintiff will not be heard to object to the form in which the testimony was presented.

[4] There is a further contention that the evidence did not warrant the court in find-

⇐For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

ing the defendant guilty of contempt. It was found by the court:

"(3) That on or about September 13, 1917, the deputy sheriff and undersheriff found eleven (11) sacks of beer in a cellar or cave on said premises; that said cellar or cave had a cement floor; that said quantity of beer was found in a trench under the floor of said cellar or cave; that the said trench was covered with a cement slab, the top of which slab was flush with the top of the floor of the cave or cellar; that the said slab had a wire or metal handle on each end thereof; that said trench extended east and west along the north side of said cave or cellar; that immediately above said trench was a bench or table upon which some household provisions of some kind were placed; and

"(4) That on or about September 13, 1917, the deputy sheriff and undersheriff found on said premises, in an ice box in the kitchen or washroom, about three sacks of beer; and

"(5) That on or about September 13, 1917, in the house of said defendant on said premises, said deputy sheriff and undersheriff found one man with a bottle of beer in his hands, and two other men, each with a bottle of beer setting on the floor beside them; and

"(6) That on or about September 24, 1917, the deputy sheriff and undersheriff went to the said premises of said defendant, and then and there found two men sitting at a table; setting before one of the men was a whisky glass, with whisky in it, and setting before the other man was a whisky glass, empty; and that at said time and place, upon seeing the said deputy sheriff and undersheriff enter the house, the wife of said defendant ran into either the room where the said two men were sitting or into the kitchen, and picked up a jug and ran and threw it out into the yard; said jug containing a small amount of whisky when found by said officers in defendant's yard; and

"(7) That on said 24th day of September, 1917, on the said premises of the said defendant, said officers found about one-half ($\frac{1}{2}$) bushel of bottle caps, or bottle stoppers, in one heap or pile, out near defendant's barn, and at said time and on said premises, and near where said bottle caps were found, were two barrels, each containing some water, and in the water of each barrel was found by said officers some labels off of beer bottles; and

"(8) That on September 24, 1917, and on September 13, 1917, the said defendant kept, maintained, and operated, and permitted to be kept, maintained, and operated, in the buildings and places appurtenant thereto, situated on the premises heretofore described, a place where intoxicating liquors were sold, bartered, and given away in violation of law, and where persons were permitted to resort for the purpose of drinking intoxicating liquors as a beverage, and where intoxicating liquors were kept for sale, barter, and delivery, in violation of law."

The evidence abundantly sustains the findings of the trial court, and is so direct and full that a discussion of its sufficiency is not warranted.

Some question was raised as to the description of the defendant's premises, but an

amendment of the record answers this objection, and shows that the description given in the evidence corresponds with the pleading in that respect.

The judgment of the district court is affirmed.

All the Justices concurring.

(106 Kan. 406)

WEIGAND v. SHEPARD et al. (No. 22304.)

(Supreme Court of Kansas. Oct. 11, 1919.)

(Syllabus by the Court.)

1. LIMITATION OF ACTIONS \S 37(2) — CONSTRUCTION OF PETITION.

The petition considered, and *held*, its purpose was to state a cause of action for relief on the ground of fraud, which it clearly did.

2. LIMITATION OF ACTIONS \S 37(2)—FRAUD OR CONTRACT.

The gravamen of the action being fraud, the statute of limitations applicable to actions for relief on that ground governs, although the petition discloses appropriation of property for the payment of which the law implies a contract.

Appeal from District Court, Barton County.

Action by John C. Weigand against J. W. Shepard, Clement L. Wilson, and others. Demurrer to petition overruled, and defendant Wilson appeals. Reversed and remanded, with direction to sustain the demurrer to the petition.

E. D. McKeever, of Topeka, Carr W. Taylor, of Hutchinson, and Osmond & Cole, of Great Bend, for appellant.

Samuel Jones, of Lyons, W. M. Glenn, of Tribune, and Ben Jones, of Lyons, for appellee.

BURCH, J. The action was one for damages for depriving the plaintiff of property inherited from his father, Charles Weigand. A demurrer to the petition was overruled, and the defendants appeal.

[1] The petition may be summarized as follows: The plaintiff is a nonresident of the state. In June, 1915, he found his father, 75 years old, feeble and erratic in mind and suffering from disease, in bed, uncared for, and living alone in filth and squalor, in a one-room frame house near Horace, Kan. His father said the plaintiff visited him to get his property. The father had property worth about \$7,000, and money on deposit in the bank of Tribune amounting to about \$500. Charles Weigand had been treated by the defendant J. W. Shepard, who is a physician, and the plaintiff consulted him. At the suggestion of Shepard, Clement L. Wilson, an attorney, was consulted. As a re-

sult of conferences with the physician and the attorney concerning the best course to pursue, the plaintiff employed them to minister to his father's needs, to care for the property, and, in case of his father's death, to settle the estate. A contract of employment was executed, which included a power of attorney to the physician and the attorney to do everything necessary to be done in the premises, and the plaintiff returned to his home. Charles Weigand was taken to a hospital, a surgical operation was performed, and he died. The plaintiff was sent for, and returned to Kansas, when he was told of his father's death. The plaintiff was without knowledge of law, and depended entirely on the advice, statements, and representations of the physician and the attorney. The defendant William A. Sheppard was appointed administrator of the estate, the estate was hastily settled, and out of it the plaintiff received about \$640. In March, 1916, the plaintiff discovered he was the victim of a conspiracy between the physician and the attorney, joined later by the administrator, to loot his father's estate. Securing the contract was the first step in execution of the conspiracy, and, on learning the facts, the plaintiff canceled the contract and revoked the power of attorney. All the advice, statements, and representations of the physician and the attorney were deceitfully and fraudulently given and made, the settlement of the estate was a mere sham, and the plaintiff was cheated and swindled out of his property, by outrageous proceedings fully described, but which need not be detailed here. The prayer was for \$7,000 actual damages and \$20,000 punitive damages.

Even a cursory reading of the petition discloses that its purpose was to state a cause of action for relief on the ground of fraud, which it clearly did. The petition was filed on February 1, 1918, within the two-year period allowed for the commencement of actions for relief on the ground of fraud. Service was not obtained, however, until August 23, 1918, by means of a summons issued on that day; consequently the action, considered as one for relief on the ground of fraud, was barred by the statute of limitations.

[2] It is insisted that the petition discloses appropriation of property by the defendants, to their own benefit, which the law implies they should pay for, and, consequently, that the action may be maintained as one on implied contract. Such an action may be brought within three years from the time the cause of action accrued. According to the allegations of the petition, the appropriation was complete before August 4, 1915, and apparently the action was barred, even on the theory it was grounded on implied contract. However this may be, the gravamen

of the charge was fraud, and the statute of limitations applicable to actions for relief on that ground governs. *Orozem v. McNeill*, 103 Kan. 429, 175 Pac. 633.

The brief of the plaintiff strives to avoid the conclusion reached in the decision of the case just cited. The case was thoroughly considered, the opinion covers every phase of the subject, and the court adheres to the rule announced.

The judgment of the district court is reversed, and the cause is remanded, with direction to sustain the demurrer to the petition.

All the Justices concurring.

(105 Kan. 410)

STATE v. LOOMER. (No. 22363.)

(Supreme Court of Kansas. Oct. 11, 1919.)

(Syllabus by the Court.)

1. CRIMINAL LAW §448(12), 1036(1), 1170½
'(2)—WITNESSES §387—RULINGS ON ADMISSION AND REJECTION OF EVIDENCE NOT ERRONEOUS.

Rulings in the rejection and admission of evidence in a rape case held to have been correct or nonprejudicial.

2. RAPE §54(1), 59(3) — INSTRUCTION ON NECESSITY OF CORROBORATING EVIDENCE NOT ERRONEOUS.

Rulings regarding instructions given and refused held not to have been erroneous.

3. CRIMINAL LAW §814(5) — INSTRUCTION WITHOUT EVIDENCE TO SUSTAIN IT PROPERLY REFUSED.

Where the evidence of the complainant, if true, shows the commission of the completed offense of rape, and there is nothing in the record to suggest the absence of penetration, no material error is committed in refusing to give an instruction that it is necessary for the state to prove actual penetration.

Appeal from District Court, Miami County.

Harry Loomer was convicted of rape, and he appeals. Affirmed.

B. J. Carver, of Paola, for appellant.

Richard J. Hopkins, Atty. Gen., and Karl V. Shawver, of Paola, for the State.

MASON, J. Harry Loomer was convicted of rape upon a girl 12 years of age, and appeals.

In his behalf it is argued that the evidence did not support the verdict; but the real contention made in this connection is that the evidence of the complainant is untrue—a matter on which the decision of the jury and trial judge is, of course, final. The case turns so completely on the truth of the story told by the young girl that few serious questions of law are presented, although counsel,

doubtless with a desire to omit no step that might possibly be for his client's interest, has presented and argued a considerable number of assignments of error.

[1] 1. The mother of the girl on cross-examination testified that she had heard a lawyer, who appears to have been representing her, tell the defendant's brother that he would settle for \$1,000—apparently referring to a claim for damages. She added in response to a further question, that the lawyer did not say that, if this sum were paid, no further effort would be made in the criminal case. She was then asked if that was not what he meant, and an objection to the question was sustained. This ruling is complained of, but is manifestly correct, as the answer could only state a conclusion, and not a fact within the knowledge of the witness.

The defendant's wife was called as a witness in his behalf, and in the course of her testimony was asked whether she had heard the complainant make certain statements. Error is assigned with regard to the sustaining of an objection to this question. The ruling cannot be reviewed, inasmuch as no showing was made as to what answer would have been given. *State v. Wellman*, 102 Kan. 503, 170 Pac. 1052, 1 L. R. A. 1918D, 949, Ann. Cas. 1918D, 1006.

Complaint is made of the overruling of objections by the defendant to eleven separate questions asked of the state's witnesses by the prosecutor. Most of these rulings do not require to be passed upon. In six instances no answer was returned to the question objected to. In three others a formal answer was returned, but it was essentially negative, adding nothing to the case against the defendant. In one of these three instances a witness was asked if he remembered the time that Mr. Loomer was at a lawyer's office in Kansas City to settle the matter, and answered that he did not. In another the complainant's mother was asked if her daughter told her what caused her condition; she returned an affirmative answer, but no further inquiry was made as to what it was that had been told her. In the remaining instance the same witness was asked if she could tell when a portion of the human anatomy is infected, and gave a negative answer. Manifestly no prejudice could have resulted to the defendant from the court permitting these answers to be given.

The two remaining questions to which objection was made were asked in an effort to impeach the defendant's mother, who had testified in his behalf. She was asked on cross-examination whether she had not said to one person that, if her son didn't quit, he would land in jail, and to another that on a particular occasion she had left the complainant at home, although she was crying to come with her. Witnesses for the state were permitted to testify that she had made both these statements. Proper foundations hav-

ing been laid, the questions appear to have been competent; but in any event the matter elicited was not sufficiently important to form the basis for a reversal.

[2] 2. An instruction was given to the effect that, if the jury believed the testimony of the complainant, they might convict, even if there were no corroborating evidence. This is objected to, but has already been held proper in similar circumstances. *State v. Orth*, 101 Kan. 183, 186, 165 Pac. 652. See also 33 Cyc. 1495, 1496, 1512.

Complaint is made of the refusal to give a requested instruction, beginning with the statement that "the charge of rape against a person is easy to make, difficult to prove, and more difficult to disprove," and cautioning the jury on that account to compare and weigh all the testimony carefully and deliberately and without bias; a number of specific matters requiring such consideration being then enumerated. The words quoted are a paraphrase of those of Lord Hale. 1 Pleas of the Crown, 635. It is said that since his time—

"no case has ever gone to the jury upon the sole testimony of the prosecutrix, unsustained by facts and circumstances corroborating it, without the court warning them of the danger of a conviction on such testimony." 22 R. C. L. 1230, quoting from *People v. Benson*, 6 Cal. 221, 65 Am. Dec. 506.

The present case is not of the character referred to, for, while the story told by the complainant was the principal reliance of the state, it did not lack corroboration. It is true that convictions of rape have been reversed for the refusal to give requested instructions coupling such a warning with other statements held to be correct; the courts apparently attaching as much importance to that omission as to any of the others. *Conners v. State*, 47 Wis. 523, 2 N. W. 1143; *Reynolds v. State*, 27 Neb. 90, 42 N. W. 903, 20 Am. St. Rep. 659. But, on the other hand, convictions have been affirmed, notwithstanding the refusal of instructions like that here involved; the courts saying that such statements as that of Lord Hale with regard to the difficulty of defending against a charge of rape are not rules of law, but matters of argument. *Doyle v. State*, 39 Fla. 155, 22 South. 272, 63 Am. St. Rep. 159; *Crump v. Commonwealth*, 98 Va. 833, 23 S. E. 760; *People v. Barney*, 114 Cal. 554, 47 Pac. 41. Doubtless conditions may exist making such a caution necessary, and in that case it should, of course, be given. Whether it is necessary or not must depend upon the particular facts. Here we do not regard its omission as calling for a reversal. The jury were told that they should weigh all the evidence, and it was not essential that the court should direct their attention to the specific items.

[3] 3. A further instruction was asked to

the effect that the state was required to prove actual penetration, and its refusal is assigned as error. The defendant did not take the stand, and there was nothing in the evidence to suggest that, if the complainant's story was true at all, there was any question that penetration was accomplished. For the court to have intimated the existence of a doubt on the subject might have tended to obscure the real controversy, by diverting attention to an imaginary issue, lacking any substantial basis. At all events, in the absence of any special feature of the case calling for it, we do not regard the refusal to give the instruction as constituting material error.

The judgment is affirmed.
All the Justices concurring.

(105 Kan. 357)

SMITH et ux. v. GRIFFITH et ux. .
(No. 21914.)

(Supreme Court of Kansas. Oct. 11, 1919.)

(Syllabus by the Court.)

1. ESCROWS \hookrightarrow 14(2) — ESTOPPEL \hookrightarrow 92(3)
—ESTOPPEL BY RATIFICATION TO CONTEST
UNAUTHORIZED DELIVERY.

The contract between the vendor and the vendee of land provided, in effect, that the deed should be deposited in escrow in a bank, to be delivered to the vendee on payment to the bank of the sum of \$1,500. The vendor delivered the deed to the bank. The vendee paid the bank the sum of \$1,266.25, the bank delivered the deed to the vendee, and the vendee placed the deed on record. Subsequently, the vendor accepted from the bank the sum which the vendee had paid, and then sued the vendee for the difference between that sum and \$1,500. *Held*, the vendor was not precluded from recovering, either on the ground that acceptance of the smaller sum was a ratification of the act of his agent, the bank, or on the ground of equitable estoppel.

2. APPEAL AND ERROR \hookrightarrow 339(2), 1046(3) —
PLEADING \hookrightarrow 180(2) — VENDOR AND PUR-
CHASER \hookrightarrow 315(1)—OVERRULING OF DEMUR-
RER—REVIEW—BURDEN OF PROOF.

Assignments of error relating to pleading, procedure, and damages, considered, and *held* not to require a reversal.

(Additional Syllabus by Editorial Staff.)

3. ESCROWS \hookrightarrow 3—RELATION OF DEPOSITARY
TO PARTIES.

Where a vendor deposits his deed with a bank in escrow to be delivered on payment of certain amount which is to be paid over to him by depositary, the depositary is always something more or something less than an ordinary agent, and is the intermediary between vendor and purchaser, having the specific powers and duties created by escrow agreement, and no others.

Appeal from District Court, Pottawatomie County.

Action by Joseph Smith and wife against B. O. Griffith and wife. Judgment for plaintiffs, and defendants appeal. Affirmed.

W. F. Challa, of Wamego, for appellants.

Brookens & Francis, of Westmoreland, for appellees.

WEST, J. Smith and his wife, as vendors, sued Griffith and his wife, as vendees, for a portion of the price of a tract of land. The plaintiffs recovered, and the defendants appeal.

The contract contained the following provisions:

"Deed to be signed by parties of the first part and left in escrow at the Farmers' State Bank, Wheaton, Kan., until second party obtains a mortgage on said land or until he pays for same, to be paid inside one month from date of this contract. First party to have the use of the above-described land to March 1, 1915, without cost to him. First party agrees to pay all costs in foreclosure brought by second party in case such proceedings are dropped. In consideration of which, the said party of the second part covenants and agrees to pay unto the said party of the first part for the same the sum of fifteen hundred dollars, as follows: In cash in one month, and to assume all mortgages now on the farm, and to pay all interest on same, and all back taxes, and insurance premium. First party agrees not to abuse farm, or overpasture the pasture, and to keep all buildings in as good repair as possible, and second party to furnish all material for repairs.

"With interest on the amount due, payable at the time of each payment. And for the true and faithful performance of all and every of the covenants and agreements above mentioned, said parties bind themselves each to the other in the penal sum of * * * dollars as liquidated damages to be paid by the failing party."

The deed of the vendors was duly deposited with the bank. The vendees deposited with the bank the sum of \$1,266.25, procured the deed to be delivered to them, and filed it for record. Subsequently the vendors accepted the money which had been deposited with the bank, and then sued for the remainder of the contract price.

[2] A demurrer to the petition was overruled. The appeal was not taken until more than six months had elapsed after action taken on the demurrer, and the ruling cannot now be considered. *Norman v. Railway Co.*, 101 Kan. 678, 168 Pac. 830; *Fairbanks, Morse & Co. v. Simmons*, 103 Kan. 202, 173 Pac. 277.

A motion to strike out portions of the reply was denied. The matter complained of apparently consisted of denials of versions of the transactions between the parties, contained in the answer, and statements of the plaintiffs' version of such transactions. These denials and statements were pertinent to the plaintiffs' theory of the case, and the motion to strike was properly denied.

The burden of proof was imposed on the

defendants. The petition prayed for the balance due according to the terms of a written contract, the execution of which was not denied. The issue presented by the answer was, in substance, payment made in this way: By agreement with the plaintiffs, the defendants paid costs of the foreclosure proceedings, in the sum of \$233.75, and paid the balance of the contract price of the land, \$1,266.25, to the bank. Under these pleadings the burden of proof was properly rested on the defendants. In any event, the trial was before the court, the contentions of the parties were fully developed by the evidence, the question was not one of sufficiency of proof but of what testimony should be relied on, and it was not material who should proceed first. *Gemienhardt v. Ward*, 101 Kan. 250, 167 Pac. 1141.

[1, 3] The contract provided that the vendors should pay the costs of the foreclosure suit. The vendors authorized the vendees to pay the costs, amounting to \$5, out of the purchase money. The disputed question of fact was whether or not an attorney fee, amounting to \$228.75, was understood to be included in the term "costs," or, if not so included, was to be paid by the defendants and deducted from the \$1,500, the same as costs. The evidence bearing on this subject was oral and was conflicting, and this court is not authorized to reject the conclusion reached by the district court.

The principal legal question was whether or not acceptance by the vendors of the \$1,266.25 precluded them from recovering the remainder of the \$1,500. It is conceded by the vendees that the deed was an escrow, but the argument is that the bank was, nevertheless, the agent of the vendors to receive the purchase money and deliver the deed, and, when the smaller sum deposited by the vendees was accepted by the vendors, they ratified delivery of the deed by the depositary on the arbitrary terms proposed by the vendees.

The deed was an escrow, but it would not have been if the bank were an agent of the character claimed. A certain resemblance between the office of agent and the office of depositary of an escrow leads us to speak of a depositary as an agent. We immediately get into trouble, however, when we speak of a depositary as the agent of the vendor to receive the purchase money and deliver the deed. The depositary receives and pays over the purchase money for the vendee as much as for the vendor. The vendor has already delivered the deed, beyond his power of revocation, or the transaction would not be one of escrow, and the depositary holds and delivers the deed as much for the vendee as for the vendor. Following the line of least resistance, we hasten to say that the depositary is not the agent of the vendor merely, but is the agent of both parties. When, however, we undertake to found arguments upon and to draw conclusions from this applica-

tion of the name "agent," we immediately get into trouble. Death of the principal revokes agency, but death of neither vendor nor vendee abrogates an escrow contract. *Davis v. Clark*, 58 Kan. 100, 48 Pac. 563. The result is, a depositary is always something more or something less than an ordinary agent, and accuracy permits us to say no more than that the depositary is an intermediary between vendor and vendee, having the specific powers and duties created by the escrow agreement, and no others.

What the depositary does rightfully, he does pursuant to the escrow agreement, and not because he is in the attitude of representing a principal as agent. When the depositary steps outside the sphere of authority created by the escrow agreement, he does not act in the capacity of representative of a principal, and especially does not act as the agent of the party to the escrow agreement whose rights are prejudiced by his conduct. Since his powers are defined by the escrow agreement, there can be no misconception of them. Vendor and vendee deal with him in respect to the escrow at their peril. If he be guilty of a breach of duty in delivering, without payment of purchase money, a deed held for delivery on payment of purchase money, he is not agent of the vendor in making the misdelivery. The doctrine of ratification governing cases of ordinary agency does not apply, and the situation must be solved by resort to other legal principles.

The doctrine of equitable estoppel is invoked. It is said the vendors are estopped to recover the full amount of the purchase money because they took part of it. The doctrine does not apply because the vendors did nothing on which the vendees acted or relied to their prejudice. The escrow feature of the contract had nothing to do with the amount of consideration to be paid for the land. Consideration was covered by another provision. The escrow clause related to delivery of the deed. Delivery was conditioned on payment of the full price. Breach of the condition by the vendees and the depositary did not change the price, and did not compel the vendors to elect to repudiate delivery altogether or submit to an abatement of price. Suffering nothing themselves, the vendees can neither profit by their own misconduct nor dictate the vendors' remedy. The rights of innocent purchasers are not involved, and the vendors were at liberty to accept the situation created by the vendees, waive the condition of full payment before delivery of the deed, and sue for the remainder of the price.

It is said that failure to fill the blank in the concluding provision of the contract converted it into a stipulation that no damages were recoverable in case of breach. With the blank unfilled the provision was nugatory. Besides this, the action was not one for general damages for breach of contract, but was

one to enforce the contract by compelling payment in full according to its terms.

The judgment of the district court is affirmed.

All the Justices concurring.

(106 Kan. 395)

**TITLE LOAN & INVESTMENT CO. v.
FULLER et al. (No. 22293.)**

(Supreme Court of Kansas. Oct. 11, 1919.)

(Syllabus by the Court.)

**1. BILLS AND NOTES \S 348—TRANSFEREE OF
DEMAND NOTE AFTER UNREASONABLE TIME
NOT BONA FIDE HOLDER.**

Section 60 of the Negotiable Instruments Law (Gen. St. 1915, \S 6580), providing that, when an instrument payable on demand is negotiated an unreasonable length of time after issue, the holder is not deemed a holder in due course, applied, and *held*, that 20 months was an "unreasonable length of time."

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Unreasonable Time.]

**2. APPEAL AND ERROR \S 1046(3)—ERRONEOUS
CHARGE AS TO BURDEN OF PROOF HARM-
LESS ERROR.**

Rule applied that error in imposing the burden of proof in a trial before the court is not ground for reversal, in the absence of a showing of special prejudice.

**3. DISMISSAL AND NONSUIT \S 62—DISMISSAL
ON REFUSAL OF PLAINTIFF TO PROCEED.**

Where it appears from the pleadings and statements of counsel that the plaintiff's right to recover on a promissory note depends on a partnership accounting, and the plaintiff refuses to proceed after the burden of proof had been placed on him, the court may rightfully dismiss the action.

Appeal from District Court, Ellsworth County.

Action by the Title Loan & Investment Company against G. R. Fuller and others, revived in the name of A. B. Brandenburg, as administrator, etc. Judgment for defendants dismissing the action, and plaintiff appeals. Affirmed.

J. L. Travers, of Osborne, Samuel E. Bartlett, of Ellsworth, and Eugene S. Quinton, of Topeka, for appellant.

Ira E. Lloyd and N. F. Nourse, both of Ellsworth, for appellees.

MARSHALL, J. The action was one to recover on a promissory note. Judgment was rendered dismissing the action, and the plaintiff appeals.

The Quinter Garage Company, a partnership composed of A. R. Livingston and others, gave its note to Livingston, dated July 6, 1911, and payable on demand. The plaintiff

acquired the note in March, 1913. It was indorsed by Livingston. The pleadings and trial statements disclosed that the note grew out of partnership transactions. The defendants pleaded and stated that Livingston was indebted to the partnership in a sum largely in excess of the note. After the trial statements had been made, each side moved for judgment on the pleadings and trial statements. Both motions were denied. The court ruled that the note was nonnegotiable when it came into the hands of the plaintiff, and that the burden of the issues rested on the plaintiff to show, regardless of the note, how much, if anything, was due from the partnership to Livingston. The plaintiff then moved for judgment for the sum claimed in the petition, unless the defendants introduced evidence in their behalf. That motion was denied. The plaintiff then stated to the court it took the position that, under the pleadings, statements, and admissions, the burden of proof was on the defendants, and moved for judgment in its favor as prayed for in the petition, unless testimony were introduced on behalf of the defendants. That motion was denied. The plaintiff further stated that it stood on its motion, and the action was then dismissed.

[1] 1. Was the court in error in ruling that the note was nonnegotiable when it came into the hands of the plaintiff? In other words, was the plaintiff a holder in due course so as to cut off defenses on the part of the makers? Section 60 of the Negotiable Instruments Law provides that—

"Where an instrument payable on demand is negotiated an unreasonable length of time after its issue, the holder is not deemed a holder in due course." Gen. Stat. 1915, \S 6580.

Section 4 of the Negotiable Instruments Law provides that—

"In determining what is a reasonable time or an unreasonable time, regard is to be had to the nature of the instrument, the usage of trade or business (if any) with respect to such instruments, and the facts of the particular case." Gen. Stat. 1915, \S 6524.

In this instance the circumstances attending the giving of the note indicated that it was to run but a short time. The plaintiff acquired it from the payee 20 months after it was issued. That was an unreasonable length of time. 8 C. J. 406-409; 3 R. C. L. 1047, 1048; Crawford's Annotated Negotiable Instruments Law, \S 53; Daniel on Negotiable Instruments (5th Ed.) \S 783; 8 M. A. L. 109-111. The note could not then be acquired in due course, and was subject to the same defenses as if it were nonnegotiable. Neg. Inst. Law, \S 65; Gen. Stat. 1915, \S 6585.

[2] 2. The principal contention is that the court erred in holding the burden of main-

taining the issues was on the plaintiff. If the plaintiff had acquired the note in due course, the contention would be sustained, because no defense that could be interposed against a holder in due course was pleaded or stated. The whole defense depended on the note being overdue when it was transferred. The defense was available, and made the action one for an accounting between partners. In such an action, one in equity and triable without a jury, the burden of proof is not ordinarily a material matter. All that is really substantial is that each party be given opportunity to introduce all his evidence. Even if the court were in error in holding that the burden of proof was on the plaintiff, the judgment may not be reversed in the absence of any showing that the plaintiff was specially prejudiced, and there is no such showing. *Bank v. Brecheisen*, 98 Kan. 193, 157 Pac. 259; *Hennig v. Gas Co.*, 100 Kan. 255, 164 Pac. 297; *In re Holloway's Estate*, 100 Kan. 368, 371, 164 Pac. 298.

[3] 3. The plaintiff elected to stand on its motion for judgment on the pleadings and statements of counsel, and refused to introduce evidence in its behalf. The ruling requiring the plaintiff to proceed first not being one of which the plaintiff can complain as prejudicial, the court rightfully dismissed the action. Civ. Code, § 395, subdiv. 5 (Gen. St. 1915, § 7299); *Drake v. National Bank*, 33 Kan. 634, 7 Pac. 219; *Burdick v. Investment Co.*, 71 Kan. 121, 80 Pac. 40; *Anderson v. Denison Clay Co.*, 104 Kan. 766, 180 Pac. 797.

The judgment is affirmed.
All the Justices concurring.

(106 Kan. 396)

CITY OF TOPEKA v. RITCHIE et al.
(No. 22302.)

(Supreme Court of Kansas. Oct. 11, 1919.)

(Syllabus by the Court.)

1. MUNICIPAL CORPORATIONS — LIABILITY OF SURETY ON CONTRACTOR'S BOND FOR EXPENSES OF LITIGATION.

Where a surety company has signed a contractor's bond guaranteeing the honest and faithful performance of a construction contract made by him with a municipality and binding the surety to hold the city harmless from all costs and damages of every kind and nature whatsoever which might flow from the breach of the contract or the contractor's infidelity, and where such contract is grossly breached and the city is swindled out of a large sum of money because of insufficient and defective construction of the work contracted for, the city's expenses in whatever courts it was necessary to resort to for the recovery of that sum of money are a proper charge against the contractor's surety under the terms of the bond.

2. MUNICIPAL CORPORATIONS — LIABILITY FOR SERVICES ON INFORMAL CONTRACT OF EMPLOYMENT.

Where there is no want of power on the part of a municipality to make a contract of employment, but merely a failure to comply formally with the provisions of the statute authorizing the city to make such a contract, the city is liable for services rendered by a person informally employed by the city, when his services have been recognized, and accepted by the city, and where the city has received valuable benefits from such services, following *Mound City v. Snoddy*, 53 Kan. 126, 35 Pac. 1112.

3. MUNICIPAL CORPORATIONS — POWER TO EMPLOY SPECIAL COUNSEL TO ASSIST CITY ATTORNEY.

Although a city of the first class is provided with a city attorney whose duties are to attend to all the litigation in which the city is involved, yet the city may employ special counsel to assist the city attorney when the gravity or extent of the litigation reasonably requires the services of such additional counsel.

Appeal from District Court, Shawnee County; George A. Whitcomb, Judge.

Action by the City of Topeka against John Ritchie and the Fidelity & Deposit Company of Maryland. Judgment for plaintiff, and defendants appeal. Affirmed.

T. F. Garver and Otis E. Hungate, both of Topeka, for appellants.

George P. Hayden and F. G. Drenning, both of Topeka, for appellee.

DAWSON, J. This appeal covers another chapter of some ten years' litigation about certain public improvements constructed in Topeka in 1905 and 1906. Earlier and related chapters are recorded in our own reports and in those of the federal court. *Ritchie v. City of Topeka*, 91 Kan. 615, 138 Pac. 618; *City of Topeka v. Ritchie*, 102 Kan. 384, 170 Pac. 1003; *City of Topeka v. Federal Union Surety Co.*, 213 Fed. 858, 130 C. C. A. 364.

These earlier chapters tell of defective construction, of official delinquency, swindled taxpayers, attempts to recoup the city for overpayments for insufficient sewer construction, and of stiff battles and partial successes of bondsmen to avoid or reduce their liabilities for the shortcomings of their bonded principals.

In this case the plaintiff's petition necessarily retells much that is already chronicled in our reports. In 1905 the city of Topeka awarded a contract to John Ritchie and J. D. Hanley to construct a sewer. The Fidelity & Deposit Company, defendant, became surety for the faithful performance of that contract. The contract provided:

"17. 29. It is further expressly agreed and understood that the said parties of the first part shall save and hold harmless the said party of the second part from any and all damages, costs and expense, of every kind, character and

nature whatsoever occurring upon or about said works, or in consequence of the same being done or constructed, for the payment of which said party of the second part may become liable, whether the same is occasioned by the negligence of said parties of the first part or otherwise."

The bond provides:

"Now, therefore, if the said Hanley & Ritchie shall honestly and faithfully discharge, perform and fulfill all and singular the obligations of said contract and specifications, bound herewith, and shall save and hold harmless the said city from all liens, charges, costs, and damages of every kind or nature, whatsoever, then the above obligation to be void, otherwise to be of full force and virtue in law."

There was much defective workmanship and gross insufficiency in the construction of the sewer, but either through the negligence or connivance of the city engineer whose duty it was to inspect and approve the work the city overpaid the contractors about \$20,000. In 1907, the city commenced an action to recover this overpayment. In 1910 the city, being indebted to John Ritchie on another contract which was for paving, took formal action to withhold from Ritchie about \$10,000 due him thereon, the city's purpose being to apply that sum on whatever judgment it might eventually obtain against Ritchie & Hanley in its lawsuit then pending for the recovery of the \$20,000 overpayment.

In 1911, Ritchie brought an action against the city to recover the \$10,000 due him for the paving. The city answered, setting up the facts touching its \$20,000 claim against Ritchie and his partner, and of the pendency of the action against them to recover the overpayment. The city prevailed, and the judgment was affirmed, with modifications by this court. 91 Kan. 619, 188 Pac. 618. The final judgment entered against Ritchie and in favor of the city was for \$12,923.90, and that judgment, being unsatisfied, is the basis of the present action against the Fidelity & Deposit Company, which as surety bound itself to make good any and all consequences which might flow from the shortcomings of Ritchie & Hanley under the sewer construction contract of 1906.

Plaintiff's petition alleged that to save the city from loss, it was necessary for it, in the action of Ritchie against the city for his compensation on the paving contract, to plead the city's right to set off its claim against Ritchie and his partner for the \$20,000 overpayment on the sewer contract; that the city was put to great expense on account of Ritchie & Hanley's derelictions and delinquencies; that expert engineers had to be and were employed to remeasure the sewer excavations; that certain phases of the controversy precipitated litigation in the state and federal courts, which subjected the city to court costs and attorney's fees, and for all

of which the defendant surety company was alleged to be liable.

The answer of the surety company, among other matters, pleaded that the employment of an attorney and the payment of fees to him were irregular and illegal, and that certain expenditures of the city in the federal courts were not chargeable to the defendant surety company, and not within the terms of its surety obligation.

The city prevailed, and the defendants appeal.

[1] Appellants first contend that the costs and expenses of certain federal litigation cannot be recovered against the defendant surety company. When the paving contract was completed, Ritchie owed a large amount to materialmen. The Federal Union Surety Company, which was surety for Ritchie, began a suit in the federal district court against the city to have Ritchie's \$10,000 paving claim, against the city devoted to the satisfaction of the materialmen's claims. The city resisted, seeking to set-off against Ritchie's paving claim its \$20,000 claim against Ritchie. Although defeated in the federal district court, the city finally prevailed in that matter in the Circuit Court of Appeals. *City of Topeka v. Federal Union Surety Co.*, 213 Fed. 958, 180 C. C. A. 364. It was proper, indeed it was the duty of the city, to maintain that litigation. Its necessity was clearly traceable to the wrongdoing of Ritchie & Hanley, for whose fidelity the present appellant surety company was bound. Moreover, the city's success in that litigation vastly reduced the appellant surety company's present liability. The trial court did not err in holding that the city's reasonable expenditures in that litigation were fairly within the terms and meaning of the surety company's bond. It may not be necessary to determine positively whether this feature of the present appeal was concluded in *City of Topeka v. Ritchie*, 102 Kan. 384, 170 Pac. 1003, when this case was here on a demurrer to the petition, but certainly the doctrine there stated is decisive here. It was said:

"The second count sets up large expenditures * * * in defending other causes in district and federal courts, all growing out of the default and opposition of the contractor. No reason is apparent why these claims should not, if proved, be recovered. All items set up in the second count which did not accrue more than five years before this action was begun are properly pleaded, and the order overruling the demurrer to the second cause of action is affirmed." 102 Kan. 390, 170 Pac. 1005.

But for the wrongdoing of Ritchie and those confederating with him the city would not have been swindled out of \$20,000. The logical consequences of that wrongdoing required the city to sue for the return of that large sum, to set it up as a set-off, to resist the suit of the Federal Union Surety Company, and to appeal from the erroneous de-

cision of the federal district court. These consequences were not remote, but proximate, and Ritchie & Hanley's surety is bound therefor according to the tenor of its bond. *City of Topeka v. Brooks*, 99 Kan. 643, 650, 164 Pac. 285.

"The comprehensive significance of this language [of the bond] is such that all the claims set forth in the amended petition before us are safely immured therein beyond the power of fugacity." *City of Topeka v. Ritchie*, 102 Kan. 384, 386, 170 Pac. 1003, 1004.

[2, 3] A considerable portion of the amount sought to be recovered herein is to reimburse the city for the services and expenses of special counsel for the city, who was largely in charge of the litigation provoked by the \$20,000 overpayment. The reasonableness of the attorney's fees and expenses is not assailed, but the contention is strongly made that the city unlawfully paid them, that the special attorney was not lawfully employed, that he acted as a mere volunteer, and that the payment of his fees was voluntary and created no liability on the defendants to reimburse the city. As a part of this argument it is pointed out that the statute provides for a city attorney whose duty it shall be to attend to the city's litigation in all courts. Gen. Stat. 1915, §§ 1131, 1550.

The law, however, does sanction the employment of special counsel by a city of the first class like Topeka.

"The mayor, by and with the consent of the council, * * * may appoint * * * such other officers, servants and employés as they may deem necessary for the best interests of the city, but no such officer shall be appointed until his term of office and salary shall have been fixed by ordinance; and all contracts of employment of * * * attorneys, counselors * * * for any special purpose shall be by ordinance." Gen. Stat. 1915, § 1141 (Laws 1909, ch. 70, § 1).

It must be admitted that the formal steps required by this statute were not followed in the employment of the city's special counsel. This lawyer had been city attorney, and after his official term expired his further services in connection with this prolonged and complicated litigation were only informally procured and continued by succeeding mayors and commissioners of Topeka. There was an ordinance passed in 1909 which related to this employment:

"An ordinance authorizing the mayor to employ F. G. Drenning as special counsel for the trial of certain city cases now pending in the district court of Shawnee County, Kansas, and the Supreme Court of Kansas.

"Be it ordained by the mayor and councilmen of the city of Topeka:

"Section 1. The mayor of the city of Topeka is hereby authorized to employ F. G. Drenning as special counsel to conduct the following cases:

"The City of Topeka v. Hanley & Ritchie.
* * *

"The said employment of F. G. Drenning in the above cases shall begin at the expiration of his term of office as city attorney, and on April 10, 1909, and the compensation to be paid to said F. G. Drenning shall be such as shall be agreed upon between the mayor and said F. G. Drenning."

Owing to the duration and extent of the litigation, the terms of the employment of the special counsel were informally changed. Later and less formal resolutions authorizing this special counsel to proceed with the litigation were adopted from time to time by the mayor and commissioners of Topeka. His fees were formally presented and paid "by approving his bill and appropriating the \$5,000 by ordinance to pay the claim."

Much law is cited by counsel for appellants that such informal employment is insufficient to fasten a liability on the city, and that consequently the city's voluntary payment of an unenforceable claim against it gives the city no right to have recoupment. But in many not dissimilar situations, this court has held that where there is no want of official power to contract or employ, but merely a failure to formally invoke that power, a city cannot withhold compensation for services rendered to and accepted by it. *Ritchie v. City of Wichita*, 99 Kan. 663, and citations therein, 163 Pac. 176. See, also, *Huffman v. County of Greenwood*, 23 Kan. 281; *City of Ellsworth v. Rossiter*, 46 Kan. 237, 26 Pac. 674; *Mound City v. Snoddy*, 53 Kan. 126, 35 Pac. 1112; *Matheney v. El Dorado*, 82 Kan. 720, 109 Pac. 166, 28 L. R. A. (N. S.) 980; *Watkins v. School District*, 85 Kan. 760, 118 Pac. 1069.

In *Mound City v. Snoddy*, supra, certain bonds of the city had got out of possession of the municipality irregularly; and the mayor, without the consent of the council or other formality, employed Snoddy, a lawyer, to institute an action for the recovery of the bonds. Before the action was concluded, the city council passed a resolution dispensing with Snoddy's services, and the further judicial proceedings were in charge of the city attorney. It was held that such services as Snoddy rendered were ratified and accepted by the city government, and the city was liable for the fair value of his services. This court said:

"Of course the mayor, by virtue of his office alone, could not make an employment which would create a liability against the city for the services rendered; but if the city had knowledge of his employment, and of the rendition of the services, and acquiesced in and accepted the fruits of the same, the employment would bind the city." 53 Kan. at page 130, 35 Pac. 1112.

See, also, *Thacher v. County of Jefferson*, 13 Kan. 182; *Doster v. Howe*, 28 Kan. 353; *Smith v. Mayor of Sacramento*, 13 Cal. 531; *Hornblower v. Duden*, 35 Cal. 664; *City of Denver v. Webber*, 15 Colo. App. 511, 63 Pac.

804; State v. City of Paterson, 40 N. J. Law, 186; Dillon, Municipal Corporations (5th Ed.) § 824; McQuillin, Municipal Corporations, § 1173.

While a Kansas municipality cannot needlessly employ special attorneys to do the ordinary professional work which the city attorney is by his office required to do, yet it often happens, and undoubtedly did happen in the present instance, that a city may be so greatly harassed with suits that it would be a physical impossibility for the city attorney to attend to all the legal business of the municipality without the assistance of special counsel. In such cases, the employment of special counsel is lawful and proper. The court holds that there was no want of power on the part of the city to employ special counsel in this protracted litigation, and that the city's failure to exercise that power formally before employing the special counsel did not relieve the city from its obligation to pay him after his services were rendered and accepted by the city and after it reaped the benefits of his skill and industry. And the city, having lawfully paid the reasonable value of the services of the special counsel, is now entitled to recoupment against the defendants.

The other points urged by defendants have been carefully considered. They relate chiefly to matters disposed of when this case was here on demurrer, and need no further discussion.

The judgment is affirmed.

All the Justices concurring.

(105 Kan. 383)

VANEK v. VANEK et al. (No. 22284.)

(Supreme Court of Kansas. Oct. 11, 1919.)

(Syllabus by the Court.)

1. HOMESTEAD §217—EVIDENCE INSUFFICIENT TO SHOW OCCUPATION AND TITLE.

A widow brought suit in ejectment and to cancel a deed executed and delivered by her deceased husband in his lifetime, in which she joined, her claim being that from the time of her marriage and until her husband's death the real estate was occupied by her husband and herself as their homestead, that she continued to occupy it as her homestead after his death, and that the deed which purported to convey the title was without consideration, and, further, was void because at the time she executed it she was, and at the time of the commencement of the action was yet, a minor under the age of 18 years. The findings, sustained by evidence, are to the effect that after the marriage of plaintiff the real estate in controversy was never in the possession nor occupied by plaintiff and her husband as their homestead; that the equitable title belonged to the defendants, the naked legal title resting in plaintiff's husband; and that the deed was made

to carry out and complete a contract given for a valuable consideration, the terms of which had been fully complied with. *Held*, that the findings compel a judgment in favor of the defendants.

2. HOMESTEAD §213, 214—PARAMOUNT EQUITABLE TITLE OF DEFENDANT CARRYING RIGHT OF POSSESSION.

On the facts stated in the foregoing paragraph, the defendants were entitled under a general denial to show a paramount equitable title which carried with it the right of possession; and a written contract between the plaintiff's husband and the defendants executed prior to the marriage of plaintiff, by which he agreed for a valuable consideration to convey the property to the defendants, was competent evidence to sustain the defendants' claim.

Appeal from District Court, Republic County.

Action in ejectment by May Vanek, a minor, by Bert Ainsworth her next friend, against Edward Vanek and others. Judgment for defendants, and plaintiff appeals. Affirmed.

See, also, 104 Kan. 624, 180 Pac. 240.

R. E. McTaggart and W. D. Vance, both of Belleville, for appellant.

Mahin, Hasty & Mahin and J. M. Livingston, all of Belleville, for appellees.

PORTER, J. The action was one in ejectment and to cancel and set aside a deed to certain real estate. The plaintiff, a minor, sues by her next friend. The judgment was in favor of the defendants, and the plaintiff appeals.

In her petition, the plaintiff alleged that on February 29, 1916, she married James Vanek, a brother of the defendant Edward, and lived with him as his wife until his death, which occurred on April 25, 1917; that at the time of her marriage she was less than 16 years old; that James Vanek died intestate, leaving her as his sole and only heir at law; that at the time of his death he was seised and possessed of a certain quarter section of land in Republic county, the north half of which is involved in this controversy. She alleged that immediately after their marriage she and James Vanek moved upon the property and continued to occupy it as their homestead until his death, and that she still occupies the same as her homestead, except as her use and possession have been interfered with by the wrongful acts of the defendants. The petition alleged that on the 18th day of April, 1916, while the property was being occupied and used as the homestead of James Vanek and plaintiff, and while she was under the disability of infancy, she and her husband executed and acknowledged a deed, purporting to convey the north half of the quarter section to the

defendants; that by reason of the premises being a homestead and because of her legal disability on account of her infancy, the purported deed of conveyance was void, both as to the plaintiff and James Vanek, her husband; that it was executed wholly without consideration; that neither she nor her husband received anything of value on account of the conveyance, and she asked that the deed be canceled and held void.

The answer was a general denial, with the further defense that the plaintiff was of legal age on the 18th of April, 1916, when the deed of conveyance was delivered.

The case was tried without a jury, and the court made findings of fact adverse to the claims of the plaintiff, and rendered judgment accordingly. The findings are that the age of the plaintiff at the time of her marriage to James Vanek was 15 years and 6 months; that James Vanek formerly owned the entire quarter section, which does not exceed 160 acres in extent; that from plaintiff's marriage with James Vanek until his death they both resided on the south half of the quarter section, the improvements being on the southeast quarter, and that plaintiff held her residence thereon during her widowhood, and now lives thereon with her second husband; but that at no time did plaintiff ever occupy or have possession of that portion of the quarter section which is in controversy; that the possession and occupancy of the north half of the quarter section were at all times after April 25, 1914, in Edward and Eva Vanek. The court finds that for several years before his marriage and until his death, James Vanek was in poor health; that his brother, Edward, during the fall of 1914 having registered at a public land drawing in Montana, was successful in obtaining the right to a homestead of 160 acres of land there, and was preparing to go to Montana to locate thereon, when his brother James, hearing of his intention, offered if he would remain and live near him and help take care of him, to deed to Edward the north half of the quarter section of land upon which James was then living; and that Edward Vanek accepted the offer. The court finds that on April 25, 1914, when James Vanek was a single and unmarried man, and lived alone upon the quarter section, he and Edward Vanek entered into the following written contract:

"This is to show that I have to-day given the north 80 acres of my farm in Norway township in Republic county, Kansas, to my brother Ed Varnick, and his wife, Eva Varnick, and they agree not to go to Montana to live, but to stay here and live near me. I am to get this and next year's crops off the land and pay the taxes, but the land is now Ed's and he is in possession and can go ahead and make any improvements on the land he wants to and I give him my note for \$7,000.00 to show him

I will give him a deed to the land when I get the two crops off the land and then he is to give me back my note."

The court further finds that immediately after the execution of the contract Edward and Eva Vanek entered into possession of the north half of the quarter section, made lasting and valuable improvements thereon, and have remained in possession ever since; that while the improvements made by them represented no large amount of money, they were all that the land at that time required, and all that defendants could well make until they were ready to build a residence thereon; that in pursuance of the terms of this contract, Edward and Eva Vanek performed considerable labor and rendered many services for James Vanek; took care of him in his sickness; gave up their intention of moving to Montana; remained in Republic county near him, and in no respect failed to do the things required by him or stipulated in the contract between the brothers. The court finds that in February, 1916, a few days prior to the marriage of James Vanek and plaintiff, the matter of executing a deed to Edward and Eva Vanek for the north half of the quarter was discussed by the plaintiff and James Vanek and the defendants, and that at the plaintiff's request the execution of the deed was postponed until after her marriage with James Vanek; that she agreed that if the execution of the deed was postponed until after the marriage, she would join with her husband in a deed to the defendants; that she fully understood at the time the conditions surrounding the title to the north 80 acres, and that all the parties believed at that time that the transaction could be legally and properly completed by plaintiff joining with her husband in a deed after their marriage. There is a further finding that on April 18, 1916, the plaintiff joined with her husband in deeding to the defendants the north half of the land in accordance with the written contract, and that the deed was duly delivered and recorded; that at the same time the \$7,000 note executed by James Vanek was returned to him and by him destroyed. The court further finds that the contract of April 25, 1914, between the brothers was executed for a valuable consideration, and that the deed of April 18, 1916, was executed for a valuable consideration, namely, the complete performance of the contract by Edward Vanek and his wife; that the note for \$7,000 executed by James Vanek to Edward in accordance with the original contract was given as security that James Vanek was to live up to his contract; that the contract and note of April 25, 1914, were executed and delivered before plaintiff contracted or contemplated marriage with James Vanek; that she was informed of the contract between the brothers before

her marriage to James, and knew that the land was to be deeded to defendants, and that she agreed to join in a conveyance after her marriage to him; that James Vanek recognized the contract as binding, and fully performed and executed the deed, and demanded in return the note given by him to secure his carrying out the contract. The finding is that plaintiff voluntarily joined with James Vanek in the execution of the deed of April 18, 1916.

As conclusions of law the court held that at the time of the marriage of James and May Vanek, the equitable title to the north half of the quarter was in Edward and Eva Vanek; that their contract with James was fully performed, and they were entitled to the deed; that no homestead right was ever acquired by plaintiff in the 80 acres in controversy, and judgment was rendered in favor of the defendants.

[2] There was some conflict in the evidence, but it was resolved in favor of the defendants, and all the findings are abundantly sustained by evidence. It is contended, however, that the court committed error in permitting the contract between the brothers to be introduced in evidence. The contention is that the answer admitted the execution of the deed, and merely set up the defense that plaintiff was of full age when she signed it; that without pleading the contract in avoidance, the admission of the contract was not competent evidence. It is sufficient answer to say that there was a general denial, and that under such an answer in an action of ejectment the defendant may introduce any evidence which tends to defeat the plaintiff's title; he may show under a general denial a paramount title, provided such title carries with it the right of possession, whether the title is legal or equitable. *Mastin v. Gray*, 19 Kan. 458, 27 Am. Rep. 149; *Clayton v. School District No. 1*, 20 Kan. 256; *Wiggins v. Powell*, 96 Kan. 478, 152 Pac. 765. The defendants were asking no affirmative relief under the contract. They needed none, because it had been fully executed by both principals to the contract. The contract was properly introduced as evidence to support the deed of conveyance which the plaintiff sought to set aside. The findings show that the contract had ripened into title, and that James Vanek had executed it in his lifetime so far as it was possible for him to do so, and had by the execution liquidated an indebtedness of \$7,000, for which he was liable in case he had failed to execute and deliver the deed in accordance with the terms of the contract.

[1] The conclusions reached by the trial court follow from the facts found. In the first place, the finding that James Vanek and the plaintiff never occupied the north half of the quarter section as their homestead after their marriage, but established their

residence and homestead on the south half of the quarter where the improvements were, was sufficient of itself to defeat the plaintiff's claim. Besides, the widow's right to a homestead depends upon the title of her husband at the time of the marriage. The findings are, and the law is, that James Vanek at the time of his marriage to the plaintiff held only the legal title to the land; the equitable title was in the defendants. In *Dillon v. Gray*, 87 Kan. 129, 123 Pac. 878, it was said:

"Marriage will not constitute the wife a purchaser of an interest in lands owned or held by the husband. Upon his death the wife acquires no interest by will or under the statute in any property to which he held the legal title, but which in equity belonged to others." Syl. 2.

While in that case no question of a homestead was involved, the situation here is analogous, for the reason that a claim of the homestead right can only be asserted as to real estate of which the decedent was seised at the time of his death. In 21 Cyc. 581, it is said:

"The interest of the decedent need not have been a fee simple, although it has been held that homestead can be claimed only in property of which he died seised; and he should have had such an interest as could ordinarily be sold by his personal representatives for the payment of debts."

It is further said that—

"If the property be held in trust * * * the widow obtains no homestead therein." Page 582.

In support of the last statement of the law, the case of *Osborn v. Strachan*, 32 Kan. 52, 3 Pac. 767, is cited. The principles of law stated in the syllabus of that case seem to control the case at bar. It reads:

"Where a trustee has merely the naked title to real estate, and the cestui que trust is in the actual possession thereof, and the trustee, who is a married man, executes a conveyance to the cestui que trust, and the premises have never been occupied as a residence by the family of the trustee, the wife of the trustee can claim no homestead interest in the premises so conveyed. *Swenson v. Kiehl*, 21 Kan. 533; *Farlin v. Sook*, 26 Kan. 397."

While the wife was under no disability such as minority, as in this case, it appears from a statement of facts in the opinion that the wife refused to join her husband in the deed conveying the property to the cestui que trust. There was conflicting evidence in regard to the possession of the property, but a general finding against plaintiff was held sufficient to show that neither the trustee nor his family had ever occupied the land in controversy as a residence or had any possession thereof. The case fits the present one

like a blanket. It has never been cited by this court, but, in a recent opinion by the District Court of Appeals of California, it is cited in support of a decision holding that a mother could not legally declare a homestead in property held by her in trust for her daughters. *Oree et al. v. Gage et al.*, 175 Pac. 799.

The judgment is affirmed.

All the Justices concurring.

(105 Kan. 347)

STATE v. KENNEDY. (No. 21762).*

(Supreme Court of Kansas. Oct. 11, 1919.)

(Syllabus by the Court.)

1. FORGERY \S 15—PASSBOOK "BOOK OF ACCOUNT" WITHIN DEFINITION OF FORGERY IN THIRD DEGREE.

The passbook issued by a bank to a depositor is a "book of accounts" within the meaning of section 185 of the Crimes Act (Gen. Stat. 1915, \S 3512), which defines forgery in the third degree (citing Words and Phrases, Book Account).

2. FORGERY \S 31—SUFFICIENCY OF INFORMATION FOR FORGERY IN THIRD DEGREE.

An information charging that defendant, with intent to defraud a telephone company, a corporation authorized to do business as such, in this state, falsely altered a certain entry in the book of accounts kept by and in the offices of the corporation and commonly known as a passbook of deposits by the corporation in a national bank, describing the entry as originally made and as altered, and alleging that by the alteration it was then and there made to appear that a certain pecuniary obligation of the bank was purported to be created and effected, states facts sufficient to show the offense of forgery in the third degree.

3. FORGERY \S 14—ALTERATION OF ENTRY IN PASSBOOK FORGERY IN THE THIRD DEGREE.

Where an employé, whose duty it is to collect the cash of a moneyed corporation and deposit it in the bank, falsely, and with intent to cover up his defalcation, alters the date of an original entry in the passbook so as to prevent the officers or other employés of the corporation from discovering the true state of the account, the alteration constitutes forgery within the provisions of the statute referred to, notwithstanding the actual amount of money to the credit of the corporation remains the same after the alteration as before.

4. FORGERY \S 44(1/2)—EVIDENCE THAT PASSBOOK WAS DELIVERED OR INTENDED TO BE DELIVERED TO DEPOSITOR.

In such a case, proof that the passbook was used by the corporation for the ordinary purposes of a passbook is sufficient to show that it was "delivered or intended to be delivered" to some person dealing with the corporation, within the meaning of the statute.

5. FORGERY \S 35—EVIDENCE THAT ALTERATION OF PASSBOOK WAS INTENDED TO CONCEAL SHORTAGE.

Where there was proof that the person who made the entries did so for the purpose of concealing a shortage in his accounts with the corporation, the state was not required to show the amount of such shortage.

6. FORGERY \S 15—TELEPHONE CORPORATION "MONEYED CORPORATION."

A corporation engaged in furnishing general telephone service for hire is a "moneyed corporation" within the meaning of the statute. *State v. Chance*, 82 Kan. 392, 108 Pac. 791, 20 Ann. Cas. 134.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Moneyed Corporation.]

7. CRIMINAL LAW \S 829(18)—INSTRUCTIONS AS TO REASONABLE DOUBT SUFFICIENT.

Where the instructions charge that, before the defendant could be convicted on any of the counts of the information, the jury must believe from the evidence beyond a reasonable doubt that he was guilty as charged, there was no error in failing to instruct that it would be their duty to acquit unless they did so believe from the evidence beyond a reasonable doubt.

8. CRIMINAL LAW \S 772(4), 814(17), 824(9), 1172(2) — INSTRUCTIONS — CIRCUMSTANTIAL EVIDENCE—PRESUMPTION.

Other instructions considered, and held not improper.

Appeal from District Court, Sedgwick County.

L. W. Kennedy was convicted of forgery in the third degree, and he appeals. Affirmed.

Charles B. Hudson, of Wichita, and Ed. J. Fleming, of Tulsa, Okl., for appellant.

Richard J. Hopkins, Atty. Gen., and C. F. Clark, and T. E. Elcock, both of Wichita, for the State.

PORTER, J. The appellant was convicted of forgery in the third degree as defined by section 185 of the Crimes Act (Gen. Stat. 1915, \S 3512), which reads:

"Every person who, with intent to defraud, shall make any false entries, or shall falsely alter any entry made in any book of accounts kept by any moneyed corporation within this state, or in any book of accounts kept by such corporation or its officers, and delivered or intended to be delivered to any person dealing with such corporation, by which any pecuniary obligation, claim or credit shall be or shall purport to be created, increased, diminished or discharged, or in any manner affected, shall upon conviction be adjudged guilty of forgery in the third degree."

For three or four years prior to 1915, the appellant was cashier of the Missouri & Kansas Telephone Company at Wichita. In

*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

*Rehearing denied November 13, 1919.

each of the eight counts of the information he was charged with a separate offense—that of falsely altering a certain entry in a certain book of accounts, commonly known as a passbook of deposits made by the telephone company in the Kansas National Bank of Wichita. The language employed in each of the separate counts of the information was the same except as to the date of the original deposit and the amount thereof. In the first count it was charged that the passbook when originally made read, "February 2, 1915, \$2,993.11," and when falsely altered was made to read, "January 30, 1915, \$2,993.11," and:

"That by said alteration of said entry in said book of accounts it was then and there made to appear that a certain pecuniary obligation of the said the Kansas National Bank in the sum of \$2,993.11 was then and there purported to be created and effected."

[1] The appellant contends that the information fails to state facts sufficient to constitute an offense, and that it was error to overrule a motion to quash the information. This contention is based upon the rather technical objection that a passbook of a bank is not a book of accounts, and that the passbook in this case was not a book of accounts kept by the telephone company. It is insisted that, within the meaning of the words as used in the statute, the passbook was "kept by" the bank; that "kept by" in the statute does not mean the physical possession or custody or control of the book, but the entering therein of credits and debits; that, if it was a book of accounts at all, then it would be a book of accounts "kept by" the bank and not by the depositor. We find no force in this contention. The common usage by which passbooks are issued by banks to depositors is well known and understood. Every entry made there by the party who is authorized to make it, which is the receiving teller of the bank, is entered with the depositor's consent, and amounts to an admission by both parties of a credit in the depositor's favor. While not conclusive, it is *prima facie* evidence of the condition of the depositor's account.

The definition of "bank book" given in 5 Cyc. 226, is:

"A book kept by a customer of a bank, showing the state of his account therewith."

See, also, Wharton, L. Lex.

In 1 Words and Phrases Jud. Def. 839, it is said:

"In law the words 'book account' have a well-settled meaning. A book account is detailed statement kept in a book, in the nature of debit and credits between persons, arising out of contract or some fiduciary relation. Rap. Law Dict. A less technical definition given by the general lexicographers is 'an account or record of debit or credit kept in a book.'"

In the present case the telephone company was the holder of the passbook. It was the property of the company, and was kept by it. It was a matter of no importance that an employé of the bank was authorized by the depositor to make the entries. We hold, therefore, that a passbook issued by a bank to a depositor is a book of accounts kept by the depositor within the meaning of the statute in question.

[2-4] The testimony against the appellant was overwhelming and made up in part of positive statements of a witness who saw him make the alleged alterations, and to whom he made numerous admissions showing his purpose and intent in making the alterations. It was his duty as cashier to receive the money that came into the local office and deposit it in the bank. There is abundant evidence to show that he was short in his accounts. It was the duty of another employé who first received the cash to take charge of the stubs representing receipts for services, and when she received the cash she would give a duplicate receipt to the person who paid it. She would then hand the cash to the appellant, and he would return the stubs to her, so that her accounts would balance for the cash she had delivered to him. The evidence showed that the amount of the embezzlement by the appellant gradually increased, and that in order to cover the shortage the dates of entries in the bank passbook were changed by him so as to make it appear that a particular deposit was made at an earlier date, thus giving him that much additional time to conceal his shortage by the accumulation of current receipts. He was seen by the other employé to make the particular alterations set forth in the information. He made them with an acid or chemical. In each instance the date of the particular deposit was altered, but there was no alteration in the amount of the deposit. It is insisted that there was a failure to allege facts showing that the alterations created or increased, diminished, or discharged, or in any manner affected any pecuniary obligation, claim, or credit, and that the motion to quash should have been sustained; and, further, that the alterations could not have defrauded the telephone company or any one else because the actual deposits as made remained actually in the bank after the alterations. It is true that there was on deposit in the bank the same amount of money to the credit of the telephone company after each alteration as before; but by the alteration of the date which evidenced a particular deposit to an earlier or later one it was made to appear that the bank's obligation to the telephone company was changed in point of time. Each of the altered entries was of apparent legal efficacy or evidence of a legal right. The purpose of a passbook is to inform the holder of the state of his bank account. Where an employé, whose

duty it is to collect the cash of a moneyed corporation and deposit it in the bank, falsely and with intent to cover up his defalcation, alters the date of an original entry in the passbook so as to prevent the officers or other employees of the corporation from discovering the true state of the account, the alteration constitutes forgery within the provisions of the statute referred to, notwithstanding the actual amount of money to the credit of the corporation remains the same after the alteration as before.

[5] It was not necessary that the state produce evidence concerning any particular use of the passbook by the corporation. Proof that it was used for the ordinary purposes of a passbook was sufficient to show that it was "delivered or intended to be delivered" to some person dealing with the corporation within the provisions of the statute. Nor was it necessary in order to sustain a conviction to show what the total amount of appellant's shortage was. It was not a prosecution for embezzlement, but for falsely altering certain entries in a book of accounts with intent to defraud; and the amount of the defalcation of the appellant was not important; the only purpose of proving that a shortage existed was to show the intent with which the alterations was made.

[6] There is a further complaint that there was no evidence that the telephone company was a moneyed corporation. There was the testimony of one of the officers of the corporation that it did a general telephone business for hire, and there was testimony showing the receipt of money for services. It was therefore a moneyed corporation within the meaning of section 185 of the Crimes Act, as was held in *State v. Chance*, 82 Kan. 392, 108 Pac. 791, 20 Ann. Cas. 134.

[7, 8] It is urged that the court erred in failing to instruct the jury that it would be their duty to acquit unless they were satisfied of defendant's guilt beyond a reasonable doubt. In a half dozen instructions the court charged that before the defendant could be convicted on any of the counts, the jury must believe from the evidence beyond a reasonable doubt that he was guilty as charged therein. It was not necessary to follow the words of the statute and charge that it would be their duty to acquit unless they were so satisfied. The court gave the usual instruction that—

"Upon the question of intent the law presumes a man to intend the reasonable and natural consequences of any act intentionally done by him, and this presumption of law prevails unless from a consideration of all the evidence bearing upon the subject you entertain a reasonable doubt as to whether such intent did in fact exist."

We concede that the intent to defraud was the gist of the action, but there was such an abundance of proof to show the intent with

which the alterations were made that it is difficult to see how a mere statement of the general presumption upon the question of intent could possibly have hurt the appellant.

There was no error in failing to instruct upon circumstantial evidence. There was no request by appellant for any particular instruction upon this character of evidence, and, moreover, most of the evidence was positive instead of circumstantial. There is a general complaint of the court's instruction defining "reasonable doubt." It is not stated in what respect the definition is erroneous. We have examined it carefully and find no ground for the complaint.

Complaint is made of instruction No. 4, which charged that it is incumbent upon the state before conviction to prove that the alleged crimes were committed within two years prior to the commencement of the action, December 8, 1916. The complaint upon which the information is based was filed on November 20, 1916, and it is urged that the appellant should not legally be convicted for any offense committed after November 20, 1916. Neither the dates fixed by the information nor by the proof relate to acts committed after the complaint was filed. We find no error in the instructions nor in the refusal to grant a new trial.

The judgment is affirmed.

All the Justices concurring.

(105 Kan. 374)

CHUMOS v. CHUMOS. (No. 22156.)

(Supreme Court of Kansas. Oct. 11, 1919.)

(Syllabus by the Court.)

1. DIVORCE \S 309—WIFE'S EXECUTOR HAS NO INTEREST IN ORDER RELIEVING DEFENDANT OF SUPPORT OF CHILDREN.

In an action for divorce, alimony was awarded the wife for the support of herself and children given to her custody, in a certain sum, payable in monthly payments of a specified amount. The decree further provided that if the wife should die before the entire sum was paid, the remainder should accrue to and be paid to the children. *Held*, the executor of the wife's will has no interest in payments falling due after her death, and has no standing to contest an order relieving the husband, who was given custody and appointed guardian of the children, from making the payments to the children.

2. DIVORCE \S 255—ADJUDICATION NOT AFFECTING HUSBAND AS GUARDIAN OF CHILDREN ON DEATH OF WIFE.

In the divorce action it was adjudged that the wife owned a certain certificate of deposit, which the husband had used as collateral security for the payment of a debt. *Held*, the adjudication did not bind the husband in his capacity of guardian for the children.

3. DOMICILE **§5—GUARDIAN AND WARD** **§8, 11—JURISDICTION TO APPOINT HUSBAND AS GUARDIAN ON DEATH OF DIVORCED WIFE.**

On the death of the wife in a foreign state, natural guardianship of a child which had been in her custody devolved on the husband; his domicile became the child's domicile; the probate court of his domicile had jurisdiction to appoint him guardian, although the child was absent from the state; the wife not being surviving parent, designation of a different guardian in her will was void; and the district court had authority to adjudicate the question of guardianship in the proceeding to try title to the certificate.

4. DIVORCE **§303(3)—EXECUTOR OF DIVORCED WIFE CANNOT CONTEST CUSTODY OF CHILDREN.**

The executor of the wife's will has no standing to contest an order formally transferring custody of the children to the husband, following the wife's death.

Appeal from District Court, Shawnee County.

Action for divorce by Maria Chumos against Constantine G. Chumos, in which there was a judgment of divorce awarding her alimony for the support of herself and the children given to her custody, and an adjudication that a certificate of deposit was her property, and after the death of plaintiff, and the appointment of defendant as guardian of the children which were thereafter awarded to his custody, the action was revived in the name of A. D. Chacona, executor. From an order modifying the provisions as to alimony, the executor appeals. Affirmed.

Waters & Waters, of Topeka, for appellant.

Ferry & Doran, of Topeka, for appellee.

BURCH, J. The appeal was taken from an order of the district court of Shawnee county, modifying the provision relating to alimony contained in a divorce decree.

The suit was that of Maria Chumos against Constantine Chumos. The plaintiff prevailed, and was granted a divorce on April 18, 1910. There were three children, George, aged four, Nicholas, aged two, and a daughter, Panagiota, aged one year. Custody of the children was given the plaintiff, with right reserved to the defendant to see them once a week. The decree further provided as follows:

"It is further considered, ordered, adjudged and decreed by the court that if said plaintiff shall at any time desire to leave the jurisdiction of this court, she may take the youngest child with her, and shall deliver the other two children, to wit, George and Nicholas, to the defendant, to be cared for by him until such time as said plaintiff shall return to the jurisdiction of the court. * * *

"And it is further decreed that the court takes to itself the further and future disposition of

the children, and to alter the custody thereof, whenever to the court it may seem advisable and proper."

The plaintiff was awarded alimony for the support of herself and the children, in the sum of \$12,000, payable in monthly payments of \$75, beginning May 1, 1910. There was introduced in evidence at the trial a certificate of deposit issued by a bank in Greece, for 11,000 drachmas, worth about \$2,015. On the evidence before it, the court found the certificate was the property of the plaintiff. The certificate had been used as collateral security for an obligation of the defendant, and the decree provided that when it was released, and was delivered to the clerk of the court for the plaintiff, the defendant should be credited with its value. The decree further provided as follows:

"The court further finds that in case the care, custody, control, and maintenance of said children, or either of them, shall be hereafter changed by order of this court from the plaintiff to the defendant, then the court shall make such reduction in the amount awarded the plaintiff as alimony and for the support and maintenance of said children, as the court shall deem right and proper. * * *

"The court takes to itself the right to deduct from the sum of money awarded the plaintiff as alimony, for the support of herself and the care and maintenance of her children, such a sum as it may deem equitable and just, in case the custody of said children or either of them be changed from the plaintiff to the defendant; and in case the said plaintiff shall die, or marry again, before the entire sum awarded her as alimony has been paid, the same shall accrue to and be paid to said children at the times herein provided."

Soon after the decree was entered the plaintiff went to Pennsylvania, taking the infant daughter with her, and leaving the two boys with their father. In July, 1910, Nicholas died. His father paid the expenses of his illness, funeral, and burial, in the sum of \$250. On January 6, 1912, the plaintiff died in Pennsylvania. She left a will, giving three-fourths of her property to her daughter, and one-fourth to her brother. She also undertook to appoint a guardian for her daughter. A. D. Chacona, the present appellant, was named executor of the will, which was duly probated in Venango county, Pa. On February 14, 1912, the father was appointed guardian of the children, George and Panagiota, by the probate court of Shawnee county, the domicile of both parents before divorce, and of the father thereafter. In March, 1912, Panagiota was taken to Greece by Angeline Lambros, the person named as guardian in the will of Maria Chumos, and has been kept there ever since. Angeline Lambros acted without the consent and over the protest of the child's father and

guardian. In October, 1912, the court entered an order formally changing the custody of the living children from Maria Chumos to their father. In January, 1915, as the result of proceedings initiated in 1912, the action was revived in the name of A. D. Chacona, as executor of the will of Maria Chumos, deceased. See *Chumos v. Chumos*, 93 Kan. 33, 143 Pac. 420. At the death of the plaintiff the defendant was in arrears, in respect to monthly payments, in the sum of \$475, \$400 of which was paid in October, 1912. Until the present proceedings were instituted, the defendant had not paid the costs of the action, amounting to \$171.45.

Constantine Chumos, as defendant in the action, filed a motion for modification of the decree. After a hearing, the motion was allowed, and the decree was modified accordingly, as follows: The defendant was required to pay to Chacona as executor the sum of \$246.45, composed of the balance of \$75 due at the death of Maria Chumos, and the costs. On payment of that sum, he was relieved from further obligation to make the monthly payments specified in the original decree. Constantine Chumos, as guardian of the children, George and Panagiota, filed a motion, alleging that his wards were owners of the certificate of deposit which has been mentioned, and asking that the decree be modified in accordance with the fact. At the hearing, title to the certificate of deposit was established in the children, and the court ordered the instrument delivered to the guardian for their benefit.

The argument of the executor in reference to the propriety of the order discontinuing monthly payments of \$75 touches: First, the authority of the court to make division of property and to award alimony; second, the effect of such an order; and, third, the power to change such an order, once made.

The court may restore to the wife property belonging to her, may divide property, may give the wife a share of her husband's property, may give property in fee, and may give money, the same as real or personal property, outright, or conditionally, all as may appear to be equitable and just. None of these principles is in doubt, and it is of more interest to observe how the court exercised its conceded power.

What the court did was to give Maria Chumos \$10,000, plus the value of the certificate of deposit, which Constantine had hypothecated as security. Constantine could get credit for the value of the certificate, \$2,015, by turning it in. He was not obliged to do so, but if he did not do so, he was required to pay the full sum of \$12,000, in monthly installments of \$75. These are the heavy black lines of the decree which the astigmatic eye of the executor sees with great vivid-

ness, all else being blurred and indistinct. Scrutinized by normal vision, the award and its conditions and limitations all look alike, and are equally clear. The award was not made for the benefit of Maria alone. She was given the custody, care, and maintenance of three small children, and the award was stated to be for the support of herself and the children. Change in custody of the children, or some of them, was foreseen, and power was reserved to deal with the award accordingly. Besides that, it was expressly provided that, should Maria die or marry, the portion of the award payable thereafter should accrue, not to her estate or her devisees, but to the children. All her interest in the award terminated absolutely with her death. Whether or not the award was equitable and just is not now material. The subject was one over which the court had full jurisdiction, as the numerous authorities industriously collated by counsel indicate. The award expressed the conclusion of the court. Maria was satisfied, and did not appeal or otherwise complain. She became bound by the award of monthly payments of a specified sum, subject to modification and ceasing altogether at her death, and her executor is bound to the same extent, that is, conclusively.

[1] With reference to the effect of an award of alimony, the brief of the executor asserts that whatever is given the wife is hers absolutely and unconditionally, and not temporarily; the right and title of the husband to the portion given is cut off; there is no reverter; the judgment is final, and disposes of the entire subject; the wife may spend, sell, or trade off the award, as she may see fit; it is hers while she lives, and it belongs to her estate when she is dead. The court will agree with the executor whenever he presents a case of an award of money or property to the wife, outright, unconditional, and without limitation. We have here a case in which the court, having jurisdiction of the parties and of the subject-matter, and being fully advised in the premises, exercised its judgment and discretion, and made an award of monthly payments, which were to cease, so far as the wife and her estate were concerned, at her death. Any part of the award paid to Maria, and not consumed at the date of her death, and any monthly payment or payments, due according to the provisions of the award, but not yet paid at the date of her death—such as the sum of \$475 which has been mentioned—belong to her estate; but she had no interest, and her executor had no interest, in any part of the award payable after January 6, 1912, the date of her death, because the decree itself cut off alimony to her on the occurrence of that event.

It is said that it is the duty of the court to

determine, from the circumstances as they existed at the date of the decree, what part of the award was personal to Maria as her alimony, and what part was for support of the children; the court could not give it all to her, nor all to the children; and when her individual share is determined, it belongs to her. The court had power to give to Maria, or to withhold, or to give to the children, or to withhold, as seemed wisest and best. In this instance the court made an apportionment. It gave Maria \$75 per month, to be expended as she saw fit for herself and children, until her death. The remainder of the award was then made payable to the children. It is quite idle to contend that this court now has power to revise the terms of the award, which became final and conclusive when the time elapsed within which Maria Chumos might have appealed.

Referring to the power of the court to change an award of alimony, once made, the brief of the executor cites the cases holding that an original award may not be increased or diminished on subsequent application, because of changed conditions or circumstances. The cases are sound, but have no bearing on this controversy. The original award may be of payments to cease in one year, or five years, or on remarriage, or at death. In this instance they were to cease at death. There was no modification of the award while Maria lived. At her death her interest ceased entirely, and what the court does with the remainder is of no concern whatever to her executor. On this branch of the case the brief of the executor concludes as follows:

"Finally, on this proposition, this court as its latest expression, in exactly just such a case, where the relief asked was the same, where the judgment was an alimony award, where such award was to be paid in installments, where, like this, it was to be paid in full of all claims on the husband's property, when the wife died before the last installment became due, this court held that the judgment [for alimony] was final and conclusive; and this decision should be conclusive of this part of the controversy. *Bassett v. Waters*, 103 Kan. 853, 176 Pac. 663."

The *Bassett Case* is identical with this one in the particulars enumerated. It is not identical with this one in two material respects; right to modify the award was not reserved, and payments were not to cease at the wife's death. In the opinion in the *Bassett Case* the court said:

"The nature and effect of the judgment must be determined from its terms. The court had power to decree alimony to the wife in the form of support payable periodically, which would be subject to modification on account of changed circumstances, or to award her permanent alimony in the form of a final judgment enforceable as an ordinary judgment at law." 103 Kan. 854, 176 Pac. 663.

In this instance the provision of the divorce decree, discontinuing payments at death of Maria, was as binding on her, and is as binding on her executor, as the provision requiring payments to be made. Because the executor has no interest in monthly payments provided for by the decree, accruing to the children after Maria's death, he is not authorized to complain of the order relieving Constantine, who is now custodian and guardian of the children, from making them.

Two contentions are made respecting the portion of the appeal relating to the title to the certificate of deposit: First, the court was without authority to hear the motion of Constantine Chumos as guardian; and, second, he was not qualified to present the motion.

[2] The finding in the divorce decree that the certificate of deposit belonged to Maria did not bind the children. They were not parties to the suit. They subsequently came into court, by motion of their guardian, substantially as interveners, and established their title to the certificate precisely as a stranger might have done. The fact that it was the defendant in the action who had become guardian was of no consequence. His status was the same as the status of Angelina Lambros would have been had she been guardian and had she intervened on behalf of the children.

[3, 4] Passing to the second contention, it may be noted preliminarily that, in absence of pleading and proof to the contrary, the law of Pennsylvania is assumed to be the same as the law of this state.

The divorce and the removal of Maria to Pennsylvania did not destroy the common relation of herself and Constantine as parents to their children, and her death did not destroy the relation of Constantine as parent to the children. On the death of Maria, natural guardianship of the child Panagiotis devolved on Constantine. Gen. Stat. 1915, § 5041. Likewise, the domicile of Constantine became the domicile of Panagiotis, and the probate court of Shawnee county had jurisdiction to appoint him guardian, although the child was out of the state. *Modern Woodmen v. Hester*, 66 Kan. 129, 71 Pac. 279. The designation of Angelina Lambros as guardian in the will of Maria was of no legal effect whatever; Maria not being surviving parent. Gen. Stat. 1915, § 5042. Angelina Lambros did not attempt to qualify under the void appointment. She is merely brought forward as a stalking horse by the executor, and the court had jurisdiction to adjudicate the question of guardianship in the proceeding to try title to the certificate of deposit. *Modern Woodmen v. Hester*, supra.

In the brief of the executor it is said the order formally transferring custody of the children to Constantine after Maria's death

was invalid because made before the action was revived. The continuing jurisdiction of the court to supervise custody of the children did not abate with Maria's death. On the other hand, exercise of the jurisdiction was challenged by that event. It was not necessary that the executor, whose sole interest was financial, should be a party on the record to enable the court to look after the children. If he had been a party, the court would not have listened to him on the subject, because he had no interest in it, and, if the order be void, he has no standing to raise the question. He is interested in nothing but assets of the estate of Maria Chumos.

The judgment of the district court is affirmed.

All the Justices concurring.

'94 Or. 1)

WRIGHT v. WIMBERLY et al.

(Supreme Court of Oregon. Oct. 21, 1919.)

1. EQUITY §415—JUDGMENT §1—"DECREE" AND "JUDGMENT" DISTINGUISHED.

The final determination of an action at law by a court in Oregon is called a "judgment," while that of a suit in equity is denominated a "decree."

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Decree; Judgment.]

2. MORTGAGES §381—CONSTRUCTION OF STATUTES REGULATING FORECLOSURE.

No rule having existed at common law respecting the foreclosure of mortgages, statutes regulating the procedure in such a case are not in derogation of common law and should not be strictly construed.

3. MORTGAGES §381—FORECLOSURE BY GRANTING EQUITY OF REDEMPTION NOT OF COMMON-LAW ORIGIN.

Unless a custom of the common law had its origin when the memory of man runneth not to the contrary, or from the beginning of the reign of Richard I, the rule could not be classed as part of the common law, so that foreclosure of mortgages by granting equity of redemption is not of common-law origin, having been instituted probably in the reign of Queen Elizabeth.

4. STATUTES §236—LIBERAL CONSTRUCTION OF REMEDIAL ENACTMENTS.

While statutes conferring special privileges on individuals should be construed strictly against them, enactments to redress existing grievances and for the protection of rights are remedial and should be liberally interpreted.

5. CONSTITUTIONAL LAW §208(1)—STATUTE PROTECTING ALL MEMBERS OF CLASS NOT CLASS LEGISLATION.

Legislation which protects alike all the members of a class that are or may be affected thereby is not obnoxious to Const. art. 1, § 20.

6. MORTGAGES §497(1)—FORECLOSURE AS BAR TO ACTION FOR DEFICIENCY.

Although L. O. L. § 426, abolishing deficiency judgments upon foreclosure of real estate purchase price mortgages, does not so modify section 429, relating to action at law on indebtedness secured by mortgage, as to prevent the holder of purchase-money mortgage note from disregarding the mortgage and bringing action for personal judgment on the note; yet, where such holder does sue to foreclose, then, since the court is inhibited by section 426 from awarding under section 425 a conditional recovery or "deficiency judgment" against the mortgagor, its determination of the entire sum due upon the personal obligation, as required by section 422, is not equivalent to decreeing recovery thereof, except only as the award is limited to the mortgage realty; and, as the foreclosure sale necessarily exhausts the power given to the court, the effect as res judicata of the decree thus denying deficiency judgment is to prohibit a later separate action at law by the mortgagee for such a deficiency.

7. APPEAL AND ERROR §843(2)—DUTY OF SUPREME COURT TO ANNOUNCE THE LAW.

Under Const. art. 7, § 8, when some other determination necessarily follows from the conclusion reached, it is the duty of the Supreme Court to announce the law in order to curtail expenses and promote the peace of society.

8. EVIDENCE §11—JUDICIAL NOTICE OF FINANCIAL DEPRESSION.

The courts should take judicial notice that in 1897 and for some time thereafter great financial depression prevailed in the Pacific Coast states.

In Banc.

Appeal from Circuit Court, Douglas County; J. W. Hamilton, Judge.

Action by A. H. Wright against L. Wimberly and Cora Wimberly. From decree dismissing the action, plaintiff appeals. Affirmed.

This is an action by A. H. Wright against L. Wimberly and Cora, his wife, to recover money. The facts are that on January 27, 1910, O. C. Jones and his wife, in consideration of \$4,000, executed to L. Wimberly a deed of a tract of land in Douglas county, Or. The purchaser paid \$1,000 down, and thereupon he and his wife executed to Jones a promissory note for \$3,000, maturing on or before ten years with interest at the rate of 6 per cent. payable annually, but, if default were made as to any such installments, the principal and interest were to become immediately due and collectible at the option of the holder of the note, and in case suit or action were instituted thereon the makers promised to pay such additional sum as the court might adjudge reasonable as attorney's fees. In order to secure the payment of the negotiable instrument, the makers at the time it was given also executed to Jones a mortgage of the real property so purchased. The

note was assigned to the plaintiff, who, upon default in the payment of interest, elected to treat the entire debt as due and collectible, and thereupon instituted a suit against the defendants herein and others to foreclose the mortgage. Pursuant to the provisions of section 426, L. O. L. hereinafter quoted, the lien was foreclosed; but the trial court refused to give a deficiency judgment, whereupon an appeal was taken and such final determination was affirmed. *Wright v. Wimberly*, 79 Or. 626, 156 Pac. 257. Obeying the command of the decree, the sheriff of that county on January 28, 1913, regularly sold the real property so mortgaged for \$2,250, and after deducting the expenses of such sale, the costs and disbursements of the suit, and the further sum of \$300, which was adjudged reasonable as attorney's fees, the remainder of the proceeds, \$1,909, was indorsed on the promissory note.

Allowing credit therefor as a voluntary payment, this action was instituted to recover the balance due on the note with interest from January 28, 1913, and the further sum of \$150 as additional attorney's fees. The complaint states the facts in substance as hereinbefore detailed and alleges in effect that the plaintiff purchased the note in due course, before maturity for a valuable consideration and without notice or knowledge that the mortgage was executed to secure the payment of the purchase price of the land; that neither the note nor the mortgage indicated that either was given for that purpose; and that it appeared from the deed records of Douglas county, Or., that O. C. Jones conveyed the real property to the defendant L. Wimberly on the day the note and mortgage were executed. The complaint also narrates the suit to foreclose the mortgage, the decree given therein, the sale of the land pursuant thereto, and the credit of the remainder of the proceeds upon the promissory note, and also avers that no other payments than those mentioned had been made.

The allegation in the initiatory pleading, relating to the plaintiff's purchase of the note and mortgage without notice or knowledge that they had been executed to evidence any part of the purchase price of the mortgaged real property, was stricken out upon motion of defendants' counsel. Their demurrer to the remainder of the complaint on the ground that it did not state facts sufficient to constitute a cause of action was sustained, the action was dismissed, and the plaintiff appeals.

O. P. Coshow and B. L. Eddy, both of Roseburg, for appellant.

A. N. Orcutt and Carl Wimberly, both of Roseburg (Rice & Orcutt and Neuner & Wimberly, all of Roseburg, on the briefs), for respondents.

McBRIDE, C. J. (after stating the facts as above). This cause was argued and sub-

mitted April 24, 1918, but, owing to the inability of the justices to agree, was continued for further consideration. The late Justice Moore, before his death, and in fact during his last long illness, prepared an opinion in the case which, in the judgment of the writer, correctly states the law. It is a monument to the faithfulness of the deceased jurist, to the duties of his office, and the last evidence of that industry which only death could abate. The writer adopts Judge Moore's opinion as his own, and it is here given in full:

MOORE, J. [1] Before discussing the questions here involved, it should be said that in Oregon, though the same judge usually presides at the trial of actions at law and of suits in equity, these forums are essentially distinct. The final determination of an action at law by a court in this state is called a "judgment," while that of a suit in equity is denominated a "decree." A party who has an equitable defense in a law action is not remediless, however; for, if a defendant in such action is entitled to relief arising out of facts requiring the interposition of a court of equity and material to his defense, he may, upon filing his answer in the action, also as plaintiff file a complaint in equity in the nature of a cross-bill, the institution of which suit shall stay the proceedings at law, and the case shall thereafter continue as a suit in equity, in which the maintenance of the action at law may be perpetually enjoined by final decree, or allowed to proceed in accordance therewith. L. O. L. § 390.

With these preliminary observations, attention will be called to some provisions of our statutes, relating to the foreclosure of mortgages. The Code adopted October 11, 1862, and which went into effect June 1, 1863 (Deady's Gen. Laws of Oregon 1845-64, p. 139), contained clauses which, having been incorporated in Lord's Oregon Laws, read:

"A lien upon real or personal property, other than that of a judgment or decree, whether created by mortgage or otherwise, shall be foreclosed, and the property adjudged to be sold to satisfy the debt secured thereby by a suit. In such suit, in addition to the decree of foreclosure and sale, if it appear that a promissory note or other personal obligation for the payment of the debt has been given by the mortgagor or other lien debtor, or by any other person as principal or otherwise, the court shall also decree a recovery of the amount of such debt against such person or persons, as the case may be, as in the case of an ordinary decree for the recovery of money." L. O. L. § 422.

"During the pendency of an action at law for the recovery of a debt secured by any lien mentioned in section 422, a suit cannot be maintained for the foreclosure of such lien, nor thereafter, unless judgment be given in such action that the plaintiff recover such debt or some part thereof, and an execution thereon against the property of the defendant in the judgment is returned unsatisfied in whole or in part." Id., § 429.

These and other sections of the Code, relating to the foreclosure of mortgages, which later provisions are not deemed to be involved herein, were in force February 24, 1903 (Laws 1903, p. 252), when there was filed in the office of the Secretary of State a statute, which, omitting the enacting clause, is as follows:

"An act to abolish deficiency judgments upon the foreclosure of mortgages to secure the unpaid balance of purchase price of real property.

"Section 1. When judgment or decree is given for the foreclosure of any mortgage, hereafter executed, to secure payment of the balance of the purchase price of real property, such judgment or decree shall provide for the sale of the real property, covered by such mortgage, for the satisfaction of the judgment or decree given therein, and the mortgagee shall not be entitled to a deficiency judgment on account of such mortgage or note or obligation secured by the same." L. O. L. § 426.

Obedying the restriction contained in the clause last quoted, the trial court, though determining the amount of the debt, evidenced by the promissory note as a charge against the land if it would sell for that much, refused to grant a deficiency judgment in the suit to foreclose the mortgage, if the proceeds of the sale were insufficient for that purpose. *Wright v. Wimberly*, 79 Or. 626, 156 Pac. 257. For the same reason, the demurrer to the complaint in this action was sustained. The question to be considered is what effect the enactment of section 426, L. O. L., has upon the prior provisions of the statute hereinbefore set forth.

Mr. Wiltzie, in his work on *Mortgage Foreclosure* (3d Ed. § 11), says:

"In most states a mortgagee, after default, has three remedies, any one or two or all of which he may pursue concurrently. These remedies are, (1) an action at law to recover the debt, being usually an action on the bond or note, (2) an action in ejectment to obtain possession, and (3) the action of foreclosure; but when he pursues these remedies concurrently, each must be governed by the rules of law applicable to the forum in which it is brought. In some states, however, the action of ejectment can no longer be maintained by the mortgagee for the recovery of the mortgaged premises."

Another author discussing this subject, remarks:

"Furthermore, the mortgagee may, in jurisdictions wherein the rules of the common law prevail, bring an action of ejectment, in addition to his action on the debt secured, or a bill for foreclosure and sale." 19 R. C. L. 512.

To the same effect, see, also, *Coote, Mort.* 518.

It is probable that section 429, L. O. L., was enacted to prevent the maintenance con-

currently of a suit "in rem" to foreclose the mortgage, and of an action "in personam" on the note or other obligation thereby secured.

An exception to the general rule that, when jurisdiction of a cause has been secured by a court of equity for any purpose, power to hear and determine the entire matter will be retained until a final decree is rendered, was recognized by some courts of chancery which held that in suits to foreclose mortgages no personal recovery against a mortgagor could be rendered, even if the property hypothecated was insufficient to pay the debt secured, since a judgment for such deficiency could only be given in an action at law. 19 R. C. L. 667. Such conclusion originally made it necessary, in case the proceeds of a sale of the mortgaged property were insufficient to discharge the entire debt thus secured when that sum was sought to be recovered, to maintain a suit in equity to foreclose the mortgage, and also an action at law to obtain the remainder, thereby incurring the costs and disbursements incident to two trials. 4 Kent's Com. §§ 182-184; *Hatch v. White*, 2 Gall. 152, Fed. Cas. No. 6,209. In order to avoid such extra expenses, statutes have been passed authorizing courts of equity, in decreeing the foreclosure of a mortgage, also to award a conditional recovery of the deficiency, if any should be found to exist, after a sale of the mortgaged premises and an application of the proceeds to the debt secured, and without an enactment of that kind it is generally conceded in some states that such a court does not have inherent power to grant relief of that character. *Jones, Mort.* (7th Ed.) § 1711; 9 Ency. Pl. & Pr. 452. In compliance with the supposed requirement that a statute was essential to empower a court of equity in decreeing the foreclosure of a lien, also to award a conditional recovery against the maker of the note, section 422, L. O. L., was evidently enacted so as to prevent the maintenance of more than one proceeding for the collection of the debt when resort was had to a court of equity. Thereafter section 426, L. O. L., was passed to prohibit a court of equity, when decreeing the foreclosure of a lien, from awarding a conditional recovery against the maker of a note or obligation secured by a mortgage executed to evidence a part or the whole of the purchase price of mortgaged real property, thereby limiting the recovery exclusively to such land.

Since the title of the act hereinbefore quoted relates to "the foreclosure of mortgages," it was held that the enactment did not impliedly repeal, amend, or modify section 429, L. O. L., so as to prevent the maintenance of an action at law to recover the amount of a promissory note given to evidence a part of the purchase price of land, though the note was secured by a mortgage of the

premises so bought. Page v. Ford, 65 Or. 450, 131 Pac. 1013, 45 L. R. A. (N. S.) 247, Ann. Cas. 1915A, 1048. It was also decreed that the enactment of section 426, L. O. L., impliedly amended section 422, Id., so as to prevent a court of equity, upon the foreclosure of a real estate mortgage, from awarding a conditional recovery against the maker of a promissory note which was secured by a mortgage given to evidence a part of the purchase price of the mortgaged land. Wright v. Wimberly, 79 Or. 626, 156 Pac. 257.

If section 426, L. O. L., is to be strictly construed, it might follow that an enactment, which was unquestionably designed to benefit a person who had given a mortgage to secure the purchase price of real property, by making an enforced sale thereof pursuant to a decree, the limit of the recovery would impose upon him the costs and disbursements of a suit in equity to foreclose the lien, and also of an action at law to recover the deficiency, if any, when prior to the passage of the statute he could have been subjected to the expenses of only one trial, while a liberal interpretation of the section will necessarily restrict the costs and disbursements to but one proceeding.

[2] No rule existed at common law respecting the foreclosure of mortgages, and this being so our statutes regulating the procedure in a case of that kind, are not in derogation thereof, and for that reason should not be strictly construed. In speaking of the rules thus anciently adopted and enforced in England, a noted author observes:

"For the authority of these maxims rests entirely upon the general reception and usage; and the only method of proving that this or that maxim is a rule of the common law, is by showing that it hath been always the custom to observe it." 1 Black Com. *68.

A mortgage at common law was an estate upon a condition subsequent. 2 Black. Com. 154. As soon as the estate was created, the mortgagee might immediately enter upon the lands, but he was liable to be dispossessed upon the performance of the condition by payment of the mortgage money at the day limited. It was usual, however, for the parties to agree that until the maturity of the debt the mortgagor should retain possession of the real property, but in case of his failure promptly to discharge the obligation, the mortgagee was entitled to take possession of the premises without any possibility at law of being afterward evicted by the mortgagor, to whom the land was forever thereafter dead. Id., *158. To the same effect, see, also, Digby's History of the Law of Real Property (5th Ed.) 285.

A text-writer, in referring to the kind of mortgage thus in general use, remarks:

"The mortuum vadium was always made upon definite and exact terms of forfeiture; and if the conditions were not punctually kept, the

title passes absolutely and forever from the debtor to the creditor. This form of landed security was extremely severe and often grossly unjust to the debtor. The spirit of the common law was inexorable, and allowed no redress to the unfortunate debtor." 1 Wiltzie, Mort. Foreclosure (3d Ed.) § 2.

In order to mitigate the severity of such a harsh rule, courts of equity interposed, and by comparing the value of the tenements with the sum loaned, if it were determined that the land was of the greater worth, a reasonable time was allowed the mortgagor to recall the estate, which right thus granted was denominated the "equity of redemption." 2 Black. Com. *159; Burton, Real Property, 481; 1 Greenleaf's Cruise on Real Property, 547.

In a note at page 3 of Burton's Real Property, in speaking of judges, the author observes:

"The true idea of the common law seems to be that of an organized system having its principles of growth within itself, and of which these officers are themselves a part. No new law can ever proceed from them; but the old is by their means in a continual process of further development."

On the following page this text-writer asserts:

"The rules and usage of causes of equity form a system which may be regarded as a kind of secondary common law, applicable generally to matters in which the courts of law have no jurisdiction, but sometimes interfering with those courts, and correcting the law which they observe."

See, also, Wiltzie Mort. Foreclosure (3d Ed.) § 216.

In speaking of the ingrafting of equitable principles upon the severe rules of the common law regarding mortgages, a text-writer remarks:

"It is believed that the first encroachments by the courts of chancery were in the reign of Queen Elizabeth; but their powers were not fully exercised until the time of James I." Wiltzie, Mort. Foreclosure § 2.

To the same effect, see Coote, Mort. *20; 4 Kent's Com. (11th Ed.) *158.

[3] Unless a custom had its origin "when the memory of man runneth not to the contrary," or from the beginning of the reign of Richard I, the rule was not sufficiently ancient to be classed as a part of the common law. 2 Black. Com. *31. The reign of Richard I, began 369 years prior to that of Queen Elizabeth, so that the foreclosure of mortgages by granting an equity of redemption is not of common-law origin.

The principles of the common law which can be violated by the enactment of a statute must be a system of procedure which, from time immemorial, has been recognized in and

enforced by courts of law, and, since such maxims contained no provision relating to the foreclosure of a mortgage, our statutes on that subject are not violative of the ancient rules.

[4, 5] While it is conformable to practice that statutes conferring special privileges on individuals should be construed strictly against them, it is also true that enactments for the redress of existing grievances and for the protection of rights are known as "remedial," and as such should be liberally interpreted. 36 Cyc. 1174. Legislation which protects alike all the members of a class that are or may be affected thereby is not obnoxious to section 20 of article 1 of the Constitution of Oregon. In re Oberg, 21 Or. 406, 28 Pac. 130, 14 L. R. A. 577. The remedial character of section 426, L. O. L., which grants to a person the privilege of securing a tract of land for himself and family, by giving a mortgage upon the premises for a part of the purchase price, limiting a recovery in case of a foreclosure to a sale of the land so purchased, and permitting the mortgagee to retain the sum of money received on account thereof, renders the statute subject to a liberal construction and makes it of greater importance to the state in securing home builders, than the recognition of a rule which asserts that enactments conferring special privileges upon individuals should be strictly interpreted. Upon principle and authority section 426, L. O. L., should be liberally construed in favor of the particular class of individuals there specified.

[6] So interpreting the clauses of the statute under consideration they will be examined. It will be remembered that section 422, L. O. L., substantially provides that a lien created by mortgage shall be foreclosed by a suit and the property adjudged to be sold to satisfy the debt secured thereby, and, if it appears that a promissory note for the payment of the debt has been given by the mortgagor, the court shall decree a recovery of such debt against him, as in the case of an ordinary decree for the recovery of money. In foreclosing a mortgage in this state, the general practice has been, in a suit of this kind, to allege in the complaint that one or more of the defendants executed a promissory note to a person named, setting forth a copy of the instrument; that in order to secure the payment of such obligation the defendants also executed to the payee of the note a mortgage of real property describing the premises; that the mortgage provided that if the note were paid according to stipulation the mortgage should be void, but if default in this respect were made the payee of the note or his assignee was authorized to foreclose the lien; that the plaintiff was the holder of the note, no payments on account of which had been made except as stated, thus leaving due a certain amount; and that the conditions of the mortgage had thus been

broken. The prayer of the bill was for a determination of the amount of the debt, and a foreclosure of the lien of the mortgage that if, upon a sale of the premises, the proceeds thereof were insufficient to satisfy the expenses of the sale, the costs and disbursements of the suit, and the amount of such debt, the plaintiff might have execution for the remainder. The decree invariably followed the prayer of the complaint, if its averments were substantiated.

"When a decree of foreclosure and sale is given, an execution may issue thereon against the property adjudged to be sold." L. O. L. § 425, subd. 1.

"When the decree is also against the defendants or any one of them in person, and the proceeds of the sale of the property upon which the lien is foreclosed is not sufficient to satisfy the decree as to the sum remaining unsatisfied, the decree may be enforced by execution as in ordinary cases." Id., subd. 2.

Though the final process, issued pursuant to a decree of foreclosure, is thus denominated an "execution" against particular property, the practice in Oregon has been for the clerk in the first instance to send forth, attested by his official seal and signature, what is known as "an order of sale," containing the title of the court and cause, addressed to the sheriff or other officer, commanding him in the name of the state of Oregon to enforce such mandate, which consists of a copy of the decree and an order to sell the property particularly described therein "as upon execution," and to apply the proceeds arising from the sale in the manner there specified. Where, after personal service of process, a decree was rendered against a defendant, foreclosing a mortgage given to secure a promissory note, and the proceeds of the sale of the mortgaged property were insufficient to satisfy the debt, the procedure adopted in this state for the enforced collection of the remainder, after the return of the order of sale, has been to cause to be issued, without further leave of court, an execution as in ordinary cases. It will thus be seen that, though our statute does not in express terms provide for giving a "deficiency judgment," such authority is impliedly conferred by section 425, L. O. L., which prescribes the method to be pursued to collect the remainder after a sale of land upon the foreclosure of a mortgage securing the payment of a promissory note, and the general practice based upon that clause of the statute has been to incorporate in the decree an order which is equivalent to the rendering of such a judgment. Giving to section 426, L. O. L., the liberal interpretation to which it is entitled as a remedial enactment, the language there employed is not only aimed at all other clauses of the statute relating to the foreclosure of liens upon property, but is also directed to the procedure heretofore prevailing in Oregon, which is authorized by the sections of

the statutes referred to, that are in any manner inconsistent with the rule now prescribed for the foreclosure of a purchase-money mortgage, thereby impliedly amending the previous parts of the law contrary thereto. If that section of the statute is to be strictly construed, such interpretation would be equivalent to holding that the enactment made no alteration whatever in the prior statutes, regulating the foreclosure of liens, or changed in any manner the procedure relating thereto, except to necessitate a suit to foreclose the mortgage, and in case of a deficiency upon a sale of the incumbered real property, the maintenance of an action at law to recover such remainder, thereby entailing the costs and disbursements of two proceedings, when the expenses of only one was essential prior to the enactment of section 426, L. O. L.

The decree demanded by section 422, L. O. L., as modified by the subsequent enactment of section 426, Id., requires a court of equity in foreclosing a purchase-money mortgage, given to secure the payment of a promissory note, to determine the entire sum due upon the personal obligation. Since, however, the latter section of the statute inhibits that court from granting "a deficiency judgment on account of such mortgage or note or obligation," a judicial ascertainment of the amount so due is not equivalent to the giving of a decree for the recovery thereof, except only as the award is limited to the real property described in the mortgage. A sale of the incumbered land under the decree foreclosing a purchase-money mortgage necessarily exhausts the entire measure of power bestowed by the legislative assembly upon the court, and there is therefore no remainder due, after the sale of the land, upon which an execution can be issued.

[7] The amendment of section 3, art. 7, of the Constitution of Oregon, was adopted to facilitate the ultimate disposal of causes upon appeal, thus preventing the costs and disbursements which may be incurred by another trial. When, therefore, as in this instance, an execution cannot be legally issued upon a decree foreclosing a purchase-money mortgage, or any other determination necessarily follows from the conclusion reached, it is the duty of the court so to announce the law in order to curtail expenses and to promote the peace of society.

[8] It is a fact of which courts in Oregon should take judicial notice that in the year 1897, and for some time thereafter, great financial depression prevailed in the Pacific Coast states. Persons who had purchased real property in that territory, during the earlier flush times, by paying a part of the purchase price and giving a mortgage to secure the remainder, found it impossible, if they had not disposed of the premises prior to the monetary stagnation, to discharge their legal obligations, whereupon the foreclosure of liens became inevitable. As there

was no money then easily to be secured, the creditor, upon a sale of the premises pursuant to the decree, usually became the purchaser for almost a nominal sum and far below the mortgage debt, thereby obtaining a recovery over upon the personal obligation of the mortgagor for the remainder, thus taking all the property the debtor then had and jeopardizing his prospects of ever obtaining any more land. In order to prevent a repetition of such conduct on the part of a creditor, section 426, L. O. L., was enacted and made applicable to the foreclosure of mortgages thereafter executed. That such a statute was intended to be remedial cannot well be disputed. The enactment is in the nature of an appraisement law, fixing an upset price upon the sale of real property under a decree of foreclosure equal to the amount of the debt, costs, disbursements, etc., thereby permitting the mortgagee to retain the sum of money which he had received on account of the sale, and allowing him to be restored to his original estate in the premises.

It will be admitted that in some instances the mortgagee might practically be at the mercy of the mortgagor. Thus, if buildings upon the premises were burned, the land, particularly a city or village lot, might be inadequate security. Partial indemnity, however, might be obtained in such a case by stipulation, whereby the mortgagee could keep the structures insured for his benefit at the expense of the mortgagor, the premiums to be added to the lien, and if the sum given for the insurance were not promptly paid a foreclosure of the lien might be decreed.

In case of the purchase in this state of timber lands, the chief value of which depends upon the number and quality of sawlogs that can be cut and removed from the premises, the purchaser of such real property, by giving a mortgage thereof to secure a part of the consideration, might by his carelessness suffer a fire to destroy the growth upon the land, thereby rendering the security practically valueless, and for indemnity in such a case present insurance is not obtainable. The consequences adverted to might well appeal to the lawmaking power, but they cannot be considered by a court except possibly to determine the legislative intent as a means of construing a statute. Similar questions are commented upon in the case of *Dennis v. Moses*, 18 Wash. 537, 52 Pac. 333, 40 L. R. A. 302, where it was held that a statute of Washington providing:

"That in all proceedings for the foreclosure of mortgages hereafter executed, or on judgments rendered upon the debt thereby secured, the mortgagee or assignee shall be limited to the property included in the mortgage"

—was violative of the Constitution of that state, on the ground that it was an undue restraint upon the liberty of the citizen to contract with respect to his property rights.

In that case the mortgage contained stipulations on the part of the mortgagor waiving all benefits under the provisions of the enactment. The lower court found that a writing to that effect had been made, but that the attempted agreement was void; that there should be an appraisal of the land as demanded by the statute; and that the premises could not be sold for less than 80 per cent. of such estimated value. The Supreme Court determined, however, that as the privilege undertaken to be bestowed by the statute upon a mortgagor was personal, in which the public had no interest, he could waive all such benefits. The general conclusion thus reached, however, is very much impaired by the dissenting opinion of two justices of the court.

The decision of the majority of the court in that case is not in harmony with the early rule adopted to prevent parties from avoiding beneficent redemption on the foreclosure of a mortgage, in speaking of which an author observes:

"No sooner, however, was this equitable principle established, than the cupidity of creditors induced them to attempt its evasion, and it was a bold but necessary decision of equity that the debtor could not, even by the most solemn engagements entered into at the time of the loan, preclude himself from his right to redeem; for in every other instance probably, the rule of law, *modus et conventio vincunt legem*, is allowed to prevail. In truth it required all the firmness and wisdom of the eminent judges who successively presided in the courts of equity, to prevent this equitable jurisdiction being nullified by the artifice of the parties." Coote, *Mort.* *21.

In *Bradley Engineering, etc., Co. v. Muzzy*, 54 Wash. 227, 103 Pac. 37, 18 Ann. Cas. 1072, it was held that a decree foreclosing a chattel mortgage without giving a deficiency judgment, as required by the Washington statute, was *res judicata* as to the plaintiffs' right of recovery, and it could not afterwards bring a separate action for the deficiency, but its only remedy was to appeal from the decree of foreclosure to correct the omission therein. In Oregon, though the statute does not expressly provide for the giving of a deficiency judgment upon the foreclosure of a mortgage, the practice in courts of equity in this state, authorized by section 425, L. O. L., has been so universal to that effect as to acquire the force of a direct legislative enactment respecting procedure, and, this being so, the decision rendered in the case last cited is controlling herein, thereby making the decree given in *Wright v. Winberly*, 79 Or. 626, 156 Pac. 257, prohibitive of the maintenance of this action.

It follows from the conclusions reached in the foregoing opinion that the decree of the circuit court should be affirmed.

BEAN, J., concurs.

BENNETT, J. (specially concurring). The facts in this case have already been fully stated in the opinion of Chief Justice McBRIDE and in the opinions of Justices BURNETT and HARRIS.

I concur in the conclusion and in the general reasoning of former Justice MOORE, as adopted in the opinion of the CHIEF JUSTICE.

It seems to me that section 426, L. O. L., clearly intended to make the foreclosure of the purchase-money mortgage satisfy the debt, without regard to the amount for which the property was sold, and that it was intended to prohibit a judgment for any deficiency, either in the foreclosure proceeding or any other proceeding.

I also think the title to the act, by which section 426 was originally enacted, which was "To abolish deficiency judgments upon the foreclosure of mortgages to secure the unpaid balance of purchase price of real property," was sufficiently broad to come within the provisions of section 30, art. 4, of the Oregon Constitution.

I think the entire satisfaction of the debt and the prohibition of a deficiency judgment, either in the foreclosure proceeding or in an action at law, was "properly connected," within the meaning of that constitutional provision, with the subject indicated in the title.

It is urged that there was no deficiency judgment, under the provisions of our Code, prior to the adoption of section 426, *supra*, and that therefore the act of the Legislature abolishing deficiency judgments found nothing to abolish, and was nugatory and meaningless. I think such a construction of a solemn act of the Legislature should not be accepted, unless the argument therefor is very cogent and compelling.

It is reasoned that, according to the ancient practice, a judgment for the deficiency was a separate judgment, entered after the return of the execution upon the mortgage foreclosure, and that our judgment under section 422, L. O. L., prior to the adoption of section 426, was a general judgment against the defendant for the whole amount of the debt, and was not therefore a "deficiency judgment."

It is argued that the phrase "deficiency judgment" should be defined as a special judgment for a fixed amount, entered after the return on the execution sale, after fixing the exact amount of the deficiency. It seems to me we should not place too much importance upon a mere arbitrary definition of the term. The practice, as to personal judgments for the deficiency on a mortgage foreclosure, has not been uniform in the different states for a great many years. In some states the old practice was preserved and the personal judgments were not entered until after the mortgaged property had been sold and the

proceeds applied upon the debt. In others, a personal judgment was entered for the whole sum in the first instance; but execution against the defendant's property generally could not be issued until it was specially ordered by the court; and this special order would only be made upon a showing, after the sale of the property covered by the mortgage. In still others, as in our own state, a personal judgment for the whole sum was entered at the time of the adoption of the foreclosure decree; but execution was suspended until the mortgaged property was sold, and then the amount received was applied upon the debt and execution issued as a matter of course for the balance remaining unpaid. Jones on Mortgages, vol. 3, § 1709 (7th Ed.).

It seems to me that all of these are deficiency judgments, one as much as the other, since they all authorize a general execution against the defendants, for the deficiency after the mortgaged property had been sold and the money applied, and for that alone.

The words "deficiency judgment" have not, as far as I have been able to ascertain, ever attained the dignity of a dictionary definition. Neither do they seem to have been very often defined by the courts.

In Goldsmith v. Brown, 85 Barb. (N. Y.) 484, 492, there was a covenant to pay the deficiency after a foreclosure and sale; the court saying:

"This word 'deficiency,' as used in this contract, has a technical meaning, and signifies that part of the debt or sum of money which the mortgage was made to secure, and which is not realized and collected from the subject mortgaged."

In Bailey v. Block, 104 Tex. 101, 103, 134 S. W. 323, 325, the Supreme Court of Texas, after tracing all the different changes in the practice in regard to judgments for a deficiency, proceeds:

"To all of these practices one prominent requirement is common, and that is that the foreclosure sale is to be made, the proceeds applied, and the deficiency thus mathematically ascertained before any proceeding against the property of the debtor other than that mortgaged is allowed."

It seems to me that a "deficiency judgment" may fairly be defined as any judgment for the deficiency after the sale of the mortgaged property, and which can be enforced generally against the property of the defendant, after the receipts of the mortgage foreclosure have been applied.

And it seems to me that any such judgment would be equally a deficiency judgment, whether it was entered before or after the return of execution, and whether it was in form a general judgment for the whole sum, to be reduced by the application of the proceeds from the sale under the mortgage, or a

specific judgment for the particular amount left unpaid, entered after the foreclosure sale.

It is true that, under the law as it stood prior to the adoption of section 428, L. O. L., section 422 of the Code provided that in addition to a decree of foreclosure the court should, in case of a promissory note, etc., "decree the recovery of the amount of such debt against such person or persons, as the case may be, as in the case of an ordinary decree for the recovery of money." That is still the law as to ordinary foreclosures other than purchase price mortgages.

But that section must be construed together with section 425, which provides that an execution issue in the first instance, for the sale of the property covered by the mortgage, and that, when the property covered by the mortgage is not sufficient to pay the entire debt, "the decree may be enforced by execution as in ordinary cases."

This latter section is, of course, read into all personal judgments on the foreclosure of mortgages, and, when the two sections are construed together, we have a judgment in form against the defendants for the whole sum, and also a judgment or decree for the sale of the mortgaged property; but the judgment against the defendants personally can only be enforced after the mortgaged property has been sold, and then only for the amount of the deficiency.

To my mind, this is just as much a deficiency judgment as if the word "deficiency" was written into the decree, and that decree was entered after the sale of the property under the mortgage.

We think this is what has always been understood in this state as a deficiency judgment, and that it is the deficiency judgment prohibited by section 426, L. O. L.

This view seems to be recognized by this court in Stewart v. Templeton, 55 Or. 364, 104 Pac. 978, 106 Pac. 640, in which it is said:

"It is insisted, however, that, whatever view may be taken, a deficiency judgment cannot be had against the defendant; but, since it is not disclosed that the notes were given for the purchase price of the property mortgaged, we fail to see upon what grounds this contention can be upheld."

In Myer v. Beal, 5 Or. 130, the court says:

"The correct interpretation of this section is that when there is a covenant for the payment of a certain sum in the mortgage the remedy shall be against the land, and at the same time a personal judgment may be obtained to collect any amount which may remain unpaid after the proceeds of the sale of the mortgaged premises have been applied to the extinguishment of the judgment."

It is true that under the doctrine announced in Page v. Ford, 65 Or. 450, 131 Pac. 1013,

45 L. R. A. (N. S.) 247, Ann. Cas. 1915A, 1048, the holder of a purchase price note may still proceed at law upon the note and disregard the mortgage; but in doing so he waives his mortgage security, and I do not think that a court of equity would or ought to permit him to evade the statute by taking a personal judgment and then afterwards proceed in a court of equity to foreclose his mortgage.

I think it is a mistake to assume that he would receive the same advantages by proceeding at law on the note as he would by a foreclosure of the mortgage. It is true that he could have a general execution on his judgment against all of the property of the defendant, which might be levied upon the mortgaged property, the same as the remainder of defendant's property; but we may assume that the very purpose of taking a mortgage is to obviate some near or remote danger of the insolvency of the defendant. If it was certain that the debtor was solvent and would remain solvent, no one would think of taking a mortgage. If a party proceeds on the note generally, he may, when he gets his judgment and execution, find the property attached by other creditors; or a prior judgment of other creditors may have become a lien thereon; or the property may have been transferred or mortgaged by the debtor; or the debtor may claim it as a homestead exemption.

In nine cases out of ten, and probably in ninety-nine cases out of a hundred, the creditor would rather proceed on the mortgage, even if it extinguished his debt to do so, than to waive his mortgage and commence an action at law upon the promissory note. It was no doubt the insolvent, or nearly insolvent, debtor the Legislature was particularly trying to protect, and not the one who had plenty of means outside of the mortgaged property. It might be of but little advantage to the creditor to take a personal judgment over and above his mortgage against an insolvent or nearly insolvent debtor; and yet such a judgment might be a millstone hanging around the neck of such a debtor, discouraging thrift and industry, and leaving no room or hope for future prosperity.

It may be true that, if the mind of the Legislature had been directed toward possible actions at law against a purchase price debtor upon the promissory note, it would have prohibited such action also. The fact that it did not do so, and did not complete a perfect scheme for the protection of the debtor under such circumstances, ought not to take away such relief and protection as has been given by the act.

Under the doctrine of *Page v. Ford*, supra, the creditor still has his option to proceed on the mortgage to foreclose, or to proceed on the promissory note at law; but the Legislature had a perfect right to say that he could not do both.

As to future contracts and in pursuance of what it considers a correct public policy, the Legislature has a right to prohibit any contracts which may be injurious to the general public good, or it may stop with rendering such contracts unenforceable. This has been too often held to be any longer questioned. The usury law prevents the contract of the parties for a greater than a given rate of interest. Again, it is generally held that a party cannot make a contract in advance to waive his right of redemption or his privilege of exemption. Hundreds of other illustrations could be cited, but these are enough.

I think the statute should be liberally construed in the interest of the purpose intended by the Legislature. It is true that arguments can be adduced pro and con, as to whether or not such a law would be in the interest of a good public policy; but the very fact that there are such arguments both ways, and considerations to be weighed on each side, makes the question pre-eminently one for the Legislature. And it having declared what it believes to be public policy, in regard to the matter, we must accept that as good public policy and liberally construe the law for the purpose of carrying out its intention.

JOHNS, J., concurs.

HARRIS, J. (concurring). L. Wimberly and Cora Wimberly purchased a tract of land from O. C. Jones. They paid a part of the purchase price and gave to Jones their promissory note for the balance, and they secured the note by executing a mortgage on the land so purchased by them. The note was dated January 28, 1910, and was for the sum of \$3,000, payable on or before ten years after date with interest at 6 per cent. per annum, payable annually. Neither the note nor the mortgage made reference to the fact that either paper represented a part of the purchase price of the land. Jones sold the note and mortgage to G. H. Carter, who in turn transferred the instruments to the plaintiff, A. H. Wright. The makers of the note failed to pay the interest which became due on January 28, 1914, and on that account A. H. Wright commenced a suit in foreclosure on March 1, 1914, making L. Wimberly, Cora Wimberly, and others parties defendant. That suit in foreclosure terminated on November 7, 1914, in a decree which, in part, is as follows:

"It is ordered, considered, adjudged, and decreed that the plaintiff have and recover of and from the defendants L. Wimberly, Cora Wimberly, O. C. Jones, G. H. Carter, and each of them, the full sum of \$3,319.50 with interest from this 7th day of November, 1914, at the rate of 6 per cent. per annum, and the further sum of \$300 attorney's fees, and plaintiff's costs and disbursements herein taxed at \$31; but that no deficiency judgment be entered against defendants L. Wimberly or Cora Wimberly."

On December 1, 1914, a writ of execution was issued on the decree commanding the sheriff to sell the mortgaged real property to satisfy the amount specified in the decree. The property was sold by the sheriff in obedience to the writ, and the sum of \$2,500 was realized at the sale. The costs and disbursements of the suit and the attorney's fees were paid out of the proceeds of the sale, and the remainder was applied on the amount due on the decree. Afterwards on June 23, 1916, A. H. Wright began this action against L. Wimberly and Cora Wimberly and demanded judgment against them for the sum of \$3,000, with interest from January 28, 1913, less the sum of \$1,909, which had been applied on the debt out of the proceeds derived from the sale of the mortgaged premises. The facts heretofore detailed, as well as other facts, were narrated in the complaint.

I concur in the conclusion that the judgment appealed from should be affirmed, but my conclusion is based upon reasons which are radically different from those given in the opinion approved by a majority of the court. We should remind ourselves at the very outset of the discussion that section 426, L. O. L., must be viewed in the light of the decision which was rendered in *Page v. Ford*, 65 Or. 450, 131 Pac. 1013, 45 L. R. A. (N. S.) 247, 35 Ann. Cas. 1048; for it was there held that in despite of section 426, L. O. L., the holder of a purchase-money note and mortgage can, if he wishes, ignore the mortgage, commence an action at law on the note, obtain a judgment against the maker for the amount due on the note, and then by execution levy upon and sell any of the available property of the judgment debtor. In other words, under the ruling made in *Page v. Ford*, an action of law on the purchase-money note can be prosecuted to a final judgment and full and complete payment of the judgment can be enforced precisely as any other money judgment can be enforced; for under the doctrine of that precedent section 426, L. O. L., does not place any limitation whatever upon the judgment creditor, but upon the contrary he can compel full payment of the debt by levying upon both the mortgaged property and any other property which the judgment debtor may own exactly as in the case of an ordinary judgment. The ruling in *Page v. Ford* permits full payment by compulsory process if the holder of the purchase-money note ignores the mortgage and sues on the note. The defendants argue that, if the holder of the note and mortgage declines to ignore the mortgage and if he prosecutes a foreclosure suit, he is in that event limited to the mortgaged property and cannot compel the payment of any deficiency remaining after the sale of the mortgaged property, either in the foreclosure suit or in any other proceeding.

Section 426, L. O. L., was enacted in 1903. The statute is entitled an act "to abolish deficiency judgments upon the foreclosure of mortgages to secure the unpaid balance on the purchase price of real property." Laws 1903, p. 252.

This statute will first be considered in the light of the words found in it and of the language employed in certain sections of the Code which were in force when the act of 1903 was adopted. The question of the intention of the Legislature will be discussed later.

Every section of the Code, except section 426, to which we shall direct attention, was adopted as a part of the Civil Code in 1862; and it will be seen from an examination of the Code that at no time since 1862 has there been a statute permitting a deficiency judgment. Section 422, L. O. L., reads as follows:

"A lien upon real or personal property, other than that of a judgment or decree, whether created by mortgage or otherwise, shall be foreclosed, and the property adjudged to be sold to satisfy the debt secured thereby by a suit. In such suit, in addition to the decree of foreclosure and sale, if it appear that a promissory note or other personal obligation for the payment of the debt has been given by the mortgagor or other lien debtor, or by any other person as principal or otherwise, the court shall also decree a recovery of the amount of such debt against such person or persons, as the case may be, as in the case of an ordinary decree for the recovery of money."

By the express terms of section 422, L. O. L., a suit on a note and mortgage results in a decree: (1) Foreclosing the lien of the mortgage and directing a sale of the mortgaged property "to satisfy the debt secured thereby;" and (2) adjudging "a recovery of the amount of such debt against" the debtor, whether such debtor be the mortgagor or any other person. In brief, the statute plainly directs the court to decree a foreclosure of the lien, and also commands that "the court shall" enter a personal decree against the debtor for the amount of the debt. The decree against the debtor is not a part of the debt, but it must be for the whole amount of the indebtedness, and it must be "as in the case of an ordinary decree for the recovery of money." We now turn to sections 196 and 413, L. O. L., for the purpose of acquainting ourselves with "an ordinary decree for the recovery of money." Section 196, L. O. L., directs that all judgments shall be entered by the clerk in the journal "and shall specify clearly the amount to be recovered." Section 413, L. O. L., makes section 196, L. O. L., applicable to suits in equity. By force of the plain terms of section 196, L. O. L., an ordinary decree for the recovery of money would specify the amount to be recovered; and since under the provisions of section 422, L. O. L., the amount to be recovered is the whole amount of the debt, it necessarily and inevitably follows that the amount to be specified in the decree

is the full amount due on the note. This personal decree is a full and complete decree for the amount of the debt. The note is merged in the personal decree, and the latter becomes a bar to another suit or action. 23 Cyc. 1110.

We turn to section 425, L. O. L., and there read:

"When a decree of foreclosure and sale is given, an execution may issue thereon against the property adjudged to be sold;" and "when the decree is also against the defendants or any one of them in person, and the proceeds of the sale of the property upon which the lien is foreclosed is not sufficient to satisfy the decree as to the sum remaining unsatisfied, the decree may be enforced by execution as in ordinary cases."

It will be observed that in all cases of foreclosure an execution is issued against the property adjudged to be sold, and, if the proceeds of the sale are not sufficient to pay "the decree" which has already been entered against the person, then that same decree may be enforced "by execution as in ordinary cases." We next inquire how decrees in ordinary cases are enforced by execution.

By the terms of section 415, L. O. L., the provisions of sections 213 to 220, L. O. L., inclusive, and sections 227 to 258, L. O. L., inclusive, "apply to the enforcement of decree so far as the nature of the decree may require or admit of it."

Title III of the Code includes sections 213 to 258, L. O. L., inclusive, and regulates "the enforcement of judgments in civil actions" by making ample provision for executions, levy and sale under execution, and redemption. Section 213, L. O. L., declares that—

"The party in whose favor a judgment is given, which requires the payment of money, * * * may at any time after the entry thereof have a writ of execution issued for its enforcement."

There are three kinds of executions, one of which is against the property of the judgment debtor. Section 214, L. O. L. "The writ of execution shall be issued by the clerk and directed to the sheriff," and "it shall require the sheriff to satisfy the judgment, with interest, out of" the property of the judgment debtor. Section 215, L. O. L. The writ of execution shall be returnable, within 60 days, after its receipt by the sheriff, "to the clerk's office from whence it issued." The writ is executed by the sheriff who "shall levy on the property of the judgment debtor sufficient to satisfy the judgment," and when property has been sold "he shall pay the proceeds thereof, or sufficient to satisfy the judgment, to the clerk by the day which the writ is returnable." Section 233, subs. 3 and 5. The notice of sale, and the time, place, and manner of sale, are all regulated by statute. Sections 237 and 238, L. O. L. When real prop-

erty is sold, the sale is subject to confirmation by the court, but the judgment creditor "shall be entitled" to an order of confirmation unless objections are filed; and even though objections are filed and sustained the court "shall * * * direct that the property be resold, in whole or in part, as the case may be, as upon an execution received of that date." The sheriff pays the proceeds of sale to the clerk, and he in turn "shall then apply the same" on the judgment. Section 241, L. O. L.

When a decree is given in a suit, unless otherwise ordered by the court, it shall be entered by the clerk within the day it is given. Section 413, L. O. L. It is provided in section 206, L. O. L., that, immediately after the entry of a judgment in any action, the clerk shall docket the same in the judgment docket; and from the date of docketing a judgment it shall be a lien upon all the real property of the defendant within the county where the judgment is docketed during the time an execution may issue thereon. The provisions of section 206 are made applicable to suits by the express terms of section 413, L. O. L.

It must be remembered that the purpose of the act of 1903 (section 426, L. O. L.), as declared in its title, is to abolish deficiency judgments; and, hence, if the procedure established by our Code neither provided for nor contemplated a deficiency judgment, then the act of 1903 accomplished nothing. The words "deficiency judgment" have a well-understood meaning when used in connection with mortgage foreclosures, for their genesis is not shrouded in doubt; and consequently when the Legislature spoke of "deficiency judgments" we have a right to assume that the words are to be accorded their generally accepted meaning. In one of its earliest forms a mortgage was made upon definite terms of forfeiture; and if the covenants were not strictly kept the title passed absolutely to the creditor, for the common law offered no redress whatever to the debtor. The severity of the common-law rule was alleviated upon the appearance of courts of equity, and in course of time the common-law courts waived their former exclusive jurisdiction, and courts of equity assumed complete jurisdiction over mortgages; the "equity of redemption" finally became a definite right in every mortgagor; and no mortgage could be enforced without a decree of the chancellor. 1 Wiltse on Mortgage Foreclosure (3d Ed.) § 2. A suit for the foreclosure of a mortgage was in the nature of a proceeding in rem. 1 Wiltse on Mortgage Foreclosure (3d Ed.) § 8; 3 Jones on Mortgages (7th Ed.) § 1711. Its sole purpose was to enforce a charge on property, and the remedy was and is purely equitable. 1 Pom. Eq. Jur. (3d Ed.) § 171; 4 Pom. Eq. Jur. (3d Ed.) § 1413. Indeed, there was a time in the history of the law of mortgages when the sole remedy avail-

able to a mortgagee was a proceeding in rem against the land; but, with the development of the law of mortgages and the establishment of the principle that a mortgage was only a security, bonds and notes came into use in connection with mortgages, or sometimes, instead of using a bond, a covenant to pay the debt was incorporated in the mortgage (1 *Wiltse on Mortgage Foreclosure* [3d Ed.] §§ 215, 216); and hence the use of bonds and notes and covenants introduced a personal obligation into the transaction.

From the time when equity jurisprudence was first established courts of equity avowed and usually exercised the right to terminate litigation by settling the whole controversy and awarding full and final relief to the litigants; and hence one might reasonably expect to find courts of equity exemplifying the fundamental conception of equity jurisprudence by awarding a judgment on the personal obligation and decreeing a foreclosure of the mortgage in a single proceeding. A suit to foreclose a realty mortgage, however, furnished an exception to this general rule, for it was held that the jurisdiction of a court of equity was confined to the mortgage itself, and the litigant was therefore relegated to a law court for the enforcement of his legal right arising out of the note or bond or covenant. The suit on the mortgage was a proceeding in rem while the action on the note or bond or covenant was in personam. The equity of redemption, the interest of the mortgagor in the land, was equitable in its nature and foreclosable only in a court of equity; but the obligation of the mortgagor to pay the debt was purely legal and cognizable only in a court of law. The mortgagee could exhaust his right on the mortgage and if, after applying on the debt the mortgaged property or the proceeds derived from a sale of the mortgaged property, a deficiency existed, the mortgagee could commence and prosecute an action in personam in a law court for the deficiency; and hence when we speak of a deficiency judgment we mean a judgment for whatever of the debt remains unpaid after applying the proceeds of the mortgaged property. The utmost power exercisable by a court of equity was, not to render a personal judgment, but to ascertain the amount of the indebtedness and decree a sale of the mortgaged property. In order, therefore, to enlarge the jurisdiction of courts of equity and to enable them to settle the legal as well as the equitable rights of the parties in a single proceeding in conformity with a fundamental principle of equity jurisprudence, statutes have been enacted conferring upon courts of equity power to award judgments for any deficiency remaining after a sale of the mortgaged realty; and this power of a court of equity to render a deficiency judgment does not exist in the absence of statutory authority. *Noonan v. Lee*, 2 Black, 499, 509, 17 L. Ed. 278; *Orchard v. Hughes*, Wall. 73, 77, 17 L. Ed. 560; Jan-

uary v. January, 7 T. B. Mon. (Ky.) 542, 18 Am. Dec. 211; *Cobb v. Duke*, 36 Miss. 60, 72 Am. Dec. 157; *Frank v. Davis*, 135 N. Y. 275, 31 N. E. 1100, 17 L. R. A. 306; *Anderson v. Pilgram*, 30 S. C. 499, 9 S. E. 587, 4 L. R. A. 205, 14 Am. St. Rep. 917; 2 *Wiltse on Mortgage Foreclosure* (3d Ed.) §§ 733, 737. It must not be understood that the mortgagee was obliged to resort to his remedy on the mortgage before commencing an action on the note or bond; for the mortgagee could if he wished, pursue both remedies concurrently. *Colby v. McClintock*, 68 N. H. 176, 40 Atl. 397, 73 Am. St. Rep. 557; 1 *Wiltse on Mortgage Foreclosure* (3d Ed.) § 11; 19 R. O. L. 512.

Statutes providing for deficiency judgments are by no means uniform in their provisions, but the general result is that in a proceeding to foreclose a mortgage a judgment against the mortgagor may be rendered for any residue of the debt remaining unsatisfied after applying the proceeds derived from the sale of the mortgaged property. Usually, a judgment for a deficiency is allowed only after a sale has been completed and the exact amount of the deficiency ascertained. 8 *Jones on Mortgages* (7th Ed.) § 1709a; *Crisman v. Lanterman*, 149 Cal. 647, 87 Pac. 89, 117 Am. St. Rep. 167, 171; *Parmelee v. Schroeder*, 61 Neb. 553, 85 N. W. 562, 87 Am. St. Rep. 466. The territorial Code which became effective on May 1, 1854, contained a section providing for a pure deficiency judgment; and this section of the territorial Code continued to be the law of this jurisdiction until the adoption of the Civil Code in 1862. State Constitution, art. 18, § 7. The territorial Code is found in the Laws of 1853 and a reprint appears in the Laws of 1855. The section governing mortgage foreclosures reads as follows:

"When a bill shall be filed for the foreclosure or satisfaction of a mortgage, the court shall have power not only to decree and compel the delivery of the possession of the premises to the purchaser thereof, but on the coming in of the report of sale, the court shall have power to decree and direct the payment by the mortgagor of any balance of the mortgage debt that may remain unsatisfied after a sale of the premises, in the cases in which such balance is recoverable at law; and for that purpose, may issue the necessary executions, as in other cases, against other property of the mortgagor." Laws 1853, p. 181, § 57; Laws 1854-55, p. 203, § 57.

When construing section 422, L. O. L., we must remember that the territorial Code provided for a genuine deficiency judgment, and hence we are entitled to presume that section 422, L. O. L., was adopted by the Legislature with knowledge of the prior statute and for the purpose of effecting whatever changes may have been wrought by section 422, L. O. L. (36 Cyc. 1146); and, moreover, this presumption is rendered especially emphatic when we are reminded that the sections of the territorial Code which provided for the procedure in actions at law and suits in equity were

prepared by James K. Kelly, who was one of the three commissioners selected to prepare the territorial Code and was also one of the three commissioners who framed the Civil Code of 1862. 4 Oregon Historical Society Quarterly, 185.

It must be understood, throughout the discussion, that no attempt is here made to decide whether or not a mortgagee can foreclose a mortgage by a pure proceeding in rem, without asking for a personal decree for the amount of the debt. See *Eubanks v. Leveridge*, 4 Sawy. 274, 278, Fed. Cas. No. 4544. In some jurisdictions the statute provides that a personal judgment may be rendered conditionally at the time of decreeing a foreclosure or absolutely after the sale and ascertainment of the balance due. *Springer v. Law*, 185 Ill. 542, 57 N. E. 435, 76 Am. St. Rep. 57. In some states the plaintiff is not entitled to an execution for a deficiency unless he obtains permission of the court after having applied to the court for permission upon notice to the defendant. 3 Jones on Mortgages (7th Ed.) § 1709a.

Generally, a judgment for a deficiency cannot be docketed until after the ascertainment of the amount of the deficiency, and usually a personal decree for a deficiency does not have the force and effect of a judgment at law and become a lien upon the real property of the debtor until the excess of the debt over the proceeds derived from a sale of the mortgaged realty has been ascertained and a subsequent judgment docketed. 2 Wiltzie on Mortgage Foreclosure (3d Ed.) §§ 754 and 755; 8 Jones on Mortgages (7th Ed.) § 1720.

The manifest purpose of section 422, L. O. L., was to simplify the procedure by permitting a recovery on the debt and a foreclosure of the mortgage in a single proceeding in which could be rendered a single decree covering both the note and mortgage. We should view section 422 with reference to the statute which was in force prior to 1862; and it must be remembered that such prior statute provided for pure deficiency judgments, and that section 422, L. O. L., changed the procedure by eliminating deficiency judgments. The territorial Code permitted deficiency judgments, but the Civil Code abolished them by providing for a complete and unconditional judgment; and therefore when in 1903 the Legislature enacted what has since been codified as section 426, L. O. L., it did nothing more than to declare that the holder of a purchase price note and mortgage could not have what the Legislature had already said he could not have, because provision had been made for an absolute, full, and complete judgment, rather than a deficiency judgment. Section 426, L. O. L. was framed on the assumption that a deficiency judgment could be obtained, but that assumption was unwarranted. There was no such thing as a deficiency judgment in this jurisdiction. To say that section 426, L. O. L.,

abolishes deficiency judgments, is to say that it abolishes what had already been abolished; but to say that a holder of a purchase price note and mortgage cannot have a decree for the recovery of money as provided for by section 422, L. O. L., or that he cannot have an execution for the enforcement of that decree as permitted by sections 213 and 425, L. O. L., is, in the opinion of the writer, to legislate judicially by saying that section 426 contains language not found there. Section 426 does not say that a personal decree shall not be entered, and it does not say that an execution shall not issue on the personal decree. It necessarily and inevitably follows that a personal decree shall be entered in obedience to the express command of section 422, L. O. L., and that an execution must be issued whenever called for by the judgment creditor under the provisions of sections 213 and 425, L. O. L.

Inasmuch as the power of a court of equity to render a personal decree for money in a foreclosure proceeding is statutory, we must look to our own statutes, not only for the manner in which the power shall be exercised, but also for the results which flow from its exercise. If we again turn to the provisions of our Code, it will be seen that a personal decree rendered in the foreclosure of a real estate mortgage is in every particular exactly like any other personal decree in a suit or judgment in an action and is accompanied with all the incidents which attend any other decree or judgment for money, with the single exception that the mortgaged land must be sold before an execution can be issued against other property owned by the debtor. When the decree of foreclosure is rendered, the court "shall" award a personal decree for the whole amount of the debt. This is the one and only personal decree which the court is allowed to make. The clerk must enter this decree in the journal just as he must enter any other personal decree; he must docket this personal decree the same as he docket any other personal decree; and when docketed this decree is a lien on all the real property owned by the debtor within the county. It is true that the law requires that the mortgaged property shall be sold first, but it is also true that the proceeds of sale are then applied on the personal decree which has been rendered for the whole amount of the debt; and, if the amount of the personal decree exceeds the amount of the proceeds of the sale, the creditor is entitled to enforce payment of "the decree by execution as in ordinary cases"; and the issuance of this writ of execution is not a judicial function, but it is a purely ministerial act. The law and not the court determines the kind of execution to be issued. Leave of the court is not necessary, but the writ of execution, prescribed by the law, must be issued when the creditor requests it. *Banning v. Ray*, 47 Or. 119, 82 Pac. 708, 114 Am. St. Rep. 908; *In re Barker*, 83 Or. 702, 710, 164 Pac. 382; *Lane v. Ball*, 83 Or. 404, 428, 160

Pac. 144, 163 Pac. 975. It must be borne in mind, too, that—

"The proceedings sanctioned by statute with reference to the confirmation of the sale relate to the title of the property and cannot be confounded with those agencies that work an extinguishment of the judgment." *Vaughan v. Canby Canal Co.*, 68 Or. 566, 568, 137 Pac. 784, 785.

The fact that the Code requires that, when a personal decree for money is entered in a foreclosure suit, the mortgaged premises must be sold and the proceeds applied on the decree before execution can be issued against other property owned by the debtor, does not make the personal decree conditional in any respect whatever. The decree, to the extent that it provides for the recovery of money, is absolute and unconditional and as much so as an ordinary money judgment rendered in an action at law. All persons will, no doubt, concede that a money judgment obtained in an action at law is absolute and unconditional; and yet, when the holder of that money judgment attempts to compel payment by a writ of execution, he must obey the mandate of section 215, L. O. L., and satisfy the judgment, with interest, out of the personal property of such debtor. But, of course, if sufficient personal property cannot be found, the creditor can then look to the real property of the debtor. Now it is manifest that the fact that the law requires the mortgaged premises to be applied on a personal decree in a foreclosure suit before other property can be levied upon and sold does not make such personal decree conditional any more than does the fact that the law requires the personal property of the debtor to be applied on an ordinary money judgment, obtained in an action at law, before the real property of the debtor can be levied upon and sold, makes such money judgment conditional. The money judgment in an action at law is absolute and unconditional; and so, too, a personal decree in a foreclosure suit is absolute and unconditional.

In brief, at no time since 1862 have we had in this jurisdiction such a thing as a deficiency judgment or a judgment in the nature of a deficiency judgment. It is of no avail to say that it has been the practice, general or otherwise, of members of the profession to ask for and of trial courts to enter deficiency judgments; for the Code is the law and must prevail. It may be conceded that it is the duty of the court so to construe the statute as to give it effect if it can be done without resorting to judicial legislation; but it is impossible to give any effect to the act of 1903 without resorting to judicial legislation. The statute does not say that no personal decree shall be rendered at all; but it plainly contemplates that some sort of a personal decree shall be entered, and the only decree provided for is the one specified

in section 422, L. O. L., and that decree so provided for is an absolute and unconditional decree for the full amount of the debt and is unhampered by any limitations whatsoever, except the single limitation that the mortgaged property shall constitute a primary fund for the payment of the decree. This limitation does not affect the character or form or amount of the decree itself, but it only fixes the order in which certain property shall be sold in satisfaction of the personal decree. To say that the act is to be construed to mean that an execution shall not issue as provided for in sections 213, 215, and 425, L. O. L., is to introduce into section 426, L. O. L., words which cannot be found there. It was ruled as already stated, in *Page v. Ford*, 65 Or. 450, 131 Pac. 1013, 45 L. R. A. (N. S.) 247, Ann. Cas. 1915A, 1048, that the language of section 426, L. O. L., did not prevent the holder of a purchase price note, which was secured by a real estate mortgage from waiving the mortgage and prosecuting an action on the note to a judgment for the full amount of the debt; and hence if by resorting to judicial legislation language not found in section 426 can nevertheless be injected into it so as to enable the court to say that section 426 means that if a mortgagee brings a suit in equity to foreclose a mortgage he can only look to the mortgaged realty for payment of the debt, then we shall have a situation presenting two possible alternatives; one where the holder of the note and mortgage can waive the mortgage, sue on the note, obtain a judgment, enforce payment of that judgment in full by levying upon and selling the real estate which has been mortgaged as well as any other property not exempt from execution; and the other where the holder of the note and mortgage can maintain a suit to foreclose the mortgage but under penalty of being confined to the mortgaged property for payment of the debt.

The conditions which prompted the adoption of the act of 1903 are well known to all. Many tracts of land had been sold when the realty market was active for more than the land was really worth, the purchaser making a partial but substantial payment on the purchase price and giving his note and a mortgage on the land for the remainder, with the result that when real estate values slumped many purchasers found themselves unable to pay their maturing debts, and consequent mortgage foreclosures ended with the mortgagees retaining initial payments, reacquiring the lands, and not infrequently holding judgments for a part of the purchase price of the land. This was the evil which the act of 1903 was designed to remedy; and consequently, when we read the act in the light of the motive which prompted its passage, can it be said that the Legislature intended to impose a penalty upon a suit to foreclose a

mortgage by confining the mortgagee to the land for his pay, and at the same time leave him unhampered in the event he elected to waive the mortgage and prosecute an action at law on the note?

In *Page v. Ford*, counsel for F. F. Williams and Floyd W. Williams, two of the defendants, contended in their printed brief that—

"It was clearly the intention of the Legislature to limit the holder of the purchase-money note and mortgage to the property itself." 297 Or. Briefs (part I) 144.

The same view is apparently entertained by counsel for the defendants here, for in their brief they state:

"We make bold to say that in our opinion the decision in *Page v. Ford* is not in harmony with the true spirit and intent of section 426."

If it were permissible and competent for the members of the Legislature, who participated in the adoption of the act of 1903, to testify, their testimony, or at least the testimony of most of them, would be precisely as is asserted in the two briefs just mentioned, that the real intention was to confine the holder of a purchase-money note and mortgage to the mortgaged lands for the satisfaction of the debt and to prevent him from enforcing payment in any proceeding whatever, whether by a suit in foreclosure or an action at law, out of any other property than the mortgaged lands. It is true that this intention may not be expressly manifested by the language of the statute. The statute was no doubt framed upon the mistaken theory that the Code provided for deficiency judgments, and that the creditor could not ignore the mortgage and sue on the note, but that he would be obliged to prosecute a suit in foreclosure; and this erroneous view of the law evidently accounts for the language employed in the statute. And yet if the statute is read in the light of the evil which prompted its passage, it is just as reasonable, if not more so, to say that the purpose of the act was absolutely to confine the holder of the note and mortgage to the mortgaged land for his pay, as it is to say that the Legislature intended that every suitor who enters a court of equity with a purchase-money note and mortgage does so at the risk of losing part of the money justly due him, but if he enters a court of law he can have all the money justly due him. A suit in equity is only a form of procedure; an action at law is likewise a form of procedure. The Legislature did not look upon a suit in equity as an evil and an action at law as a virtue, for each is only a form of procedure designed to accomplish a result.

Under the Code as it existed at the time of the adoption of the act of 1903 and as it was afterwards construed in *Page v. Ford*, the holder of the purchase-money note and mortgage could sue in a court of equity, re-

cover a personal decree for the full amount due on the note, and he could collect that personal decree in full by levying upon and selling all the available property of the debtor, including the mortgaged premises; and so, too, the same creditor could, if he preferred, ignore the mortgage and prosecute an action on the note in a court of law and recover a judgment for the full amount due on the note, and then he could afterwards collect that judgment in full by levying upon and selling all the available property of the debtor, including the mortgaged premises. Now the result was substantially the same whether the creditor made use of an action at law or a suit in equity. The result accomplished was the collection of the debt by applying upon it, not only the mortgaged premises, but also other property then owned or afterwards acquired by the debtor. The evil aimed against was furnished by the result produced by a proceeding for the collection of the debt whether such proceeding was an action at law or a suit in equity. If it was an evil to take more of the debtor's property than the mortgaged premises when suing in a court of equity, it was just as much an evil to take more of the debtor's property than the mortgaged premises when suing in a court of law. If it is just and right to confine the creditor to the mortgaged premises and unjust to permit him to take additional property to satisfy the debt owing to him in a suit in equity, it is likewise just and right to confine the creditor to the mortgaged premises and unjust to permit him to take additional property to satisfy the debt owing to him in an action at law. If then we view the statute in the light of the evil which it was designed to remedy: Is it reasonable to hold that the lawmakers intended to say to the holder of a purchase-money note and mortgage:

"If you go into a court of equity and prosecute a suit in foreclosure, you will be confined to the mortgaged land for your pay, even though the mortgaged land is not sufficient to pay the debt in full; while, on the contrary, if you ignore the mortgage and go into a court of law and sue on the note, you are not confined to the mortgaged property for your pay, but you can collect the debt in full by taking, if necessary, all the property owned by the debtor, including the mortgaged property."

As already stated, the act of 1903, was no doubt framed upon the mistaken theory that the Code provided for deficiency judgments, and that the holder of a note and mortgage had, under the then existing provisions of the Code, as his only remedy a suit in foreclosure, and that he could not prosecute an action at law on the note; and hence we are justified in saying that this mistaken view accounts for the wording of the statute. The writer makes no attempt to dissent from the ruling in *Page v. Ford*, for he believes that

the holding in that case was clearly right, because, notwithstanding the real intention of the Legislature, the court could not have carried out that intention without resorting to judicial legislation and writing into the statute words which were not written there by the Legislature. If, on the other hand, it be assumed that the Legislature intended to impose a penalty upon a creditor if he humbly submitted his claim to a court of conscience, but to give him free rein if he boldly demanded his pay in a court of law, still, notwithstanding such assumed intention, it will be impossible to carry out that assumed intention without resorting to judicial legislation and arbitrarily saying that words appearing in the statute mean what they do not and cannot mean, and by inserting words which the lawmakers did not write in the statute. We are confronted with a statute which, if effective at all, is either completely effective or only partially effective. If it is completely effective, it will confine the holder of a purchase-money note and mortgage to the mortgaged lands, whether he sues on the note and mortgage in a court of equity or prosecutes an action on the note in a court of law. This construction would carry out what was in truth the intention of the framers of the statute; but such a construction cannot be given to the enactment without straining and distorting the words found in it, nor without resorting to judicial legislation, a function which the judiciary cannot rightfully exercise. If the statute is made partially effective, it will confine the holder of the note and mortgage to the mortgaged lands only in the event he enters a court of equity and prosecutes a foreclosure suit to a final decree. This construction, however, cannot be given to the statute without likewise straining and distorting the words found in the enactment, nor without resorting to judicial legislation; and, besides, this construction imposes a possible penalty upon every holder of a purchase-money note and mortgage who enters a court of equity and does not impose a like penalty upon him if he enters a court of law, a result not contemplated or intended by the legislative mind. So long as the decision rendered in *Page v. Ford* stands as an authoritative precedent, section 426, L. O. L., cannot apply to an action at law brought upon a purchase-money note; and the statute ought not to be held to apply solely to a suit in foreclosure especially when this construction cannot be given to the statute without judicial legislation, and when it is not in harmony with the real purpose of the Legislature, and when it imposes a possible penalty upon every person who enters a court of equity and does not subject the same person to the same or any penalty at all if he enters a court of law.

When the plaintiff prosecuted the foreclosure suit to a decree, he was entitled to a personal decree for the full amount due, and

the note became merged in that decree so that he could not afterwards prosecute an action at law on the note. Indeed, the decree which was rendered adjudges that the plaintiff recover from the defendants the full amount due on the note, and it therefore constitutes a personal decree for the entire amount of the debt. The recital in the decree "that no deficiency judgment be entered against defendants" ought to be declared void, and the decree given the same effect as any other decree for the payment of money. Having reduced the note and mortgage to a personal decree, and the proceeds derived from the sale of the mortgaged premises not being sufficient to satisfy the decree, the plaintiff ought to be permitted to enforce payment as in the case of any other personal decree or judgment for the payment of money. The judgment should be affirmed.

BENSON, J., concurs.

BURNETT, J. (concurring specially). It was settled by the opinions in the former case that, when the plaintiff bought a note secured by mortgage of even date therewith, he was charged with what knowledge he might have obtained by inquiry prompted by the contents of the public records to which his attention was directed by the fact that the mortgage was recorded and that he could not excuse himself under these circumstances for having failed to learn that the obligations covered part of the buying price of realty. The matter, therefore, about his having purchased in good faith, and the like, is not available in aid of his action. As to the attorney fee, the makers of the note promised to pay "such additional sum," which means but one attorney fee. It has been allowed in the foreclosure suit to recover on the note, and the record discloses that it has been paid out of the proceeds of the resulting sale. That portion of the obligation to pay, contingent though it was, has been fulfilled. Having thus liquidated the single sum promised in that behalf, the defendants are not liable to further action on that account.

We come now to the consideration of the demurrer to the complaint. The question presented for our decision is whether the foreclosure of a purchase-money mortgage exhausts all remedy which the plaintiff has for the collection of the debt represented by a promissory note given for such a liability and thus secured. Both parties appear to treat the decree in the foreclosure suit as having merely the legal effect to subject the land to the payment of the debt; the plaintiff contending that the application of the proceeds of sale under foreclosure, which were less than the amount of the claim, must be considered as so operating only pro tanto, while the defendants maintain that it worked out a full satisfaction of the debt. Without regard to the mere wording of the former de-

cree, we will treat the question as presented by the parties and determine whether or not the holder of such a negotiable instrument is precluded by the former decree from collecting a deficiency remaining after the application of the proceeds of the sale towards the discharge of the debt. If nothing else appears, the rule is that in a foreclosure suit a personal decree must be rendered against the maker or other person liable upon a promissory note or other personal obligation secured by the mortgage sought to be foreclosed. L. O. L. § 422. This statutory precept has always been qualified by section 429, L. O. L., reading thus:

"During the pendency of an action at law for the recovery of a debt secured by any lien mentioned in section 422, a suit cannot be maintained for the foreclosure of such lien, nor thereafter, unless judgment be given in such action that the plaintiff recover such debt or some part thereof, and an execution thereon against the property of the defendant in the judgment is returned unsatisfied in whole or in part."

A further modification was annexed by the Act of February 24, 1903 (Laws 1903, p. 252), entitled "An act to abolish deficiency judgments upon the foreclosure of mortgages to secure the unpaid balance of purchase price of real property," reading thus:

"When judgment or decree is given for the foreclosure of any mortgage, hereafter executed, to secure payment of the balance of the purchase price of real property, such judgment or decree shall provide for the sale of the real property, covered by such mortgage, for the satisfaction of the judgment or decree given therein, and the mortgagee shall not be entitled to a deficiency judgment on account of such mortgage or note or obligation secured by the same."

This statute was codified as section 426, L. O. L.

Based upon the title, which exercises a controlling influence over the body of the act, it is plain that the enactment refers only to suits in equity and cannot affect other litigation which might theretofore have been lawfully employed for the collection of the debt. This is the doctrine of *Page v. Ford*, 65 Or. 450, 131 Pac. 1013, 45 L. R. A. (N. S.) 247, 35 Ann. Cas. 1048. In that case it was decided in substance that, notwithstanding a note was secured by mortgage on real property, the holder was not restricted exclusively to his remedy by foreclosure in equity but might maintain an action at law upon the note itself independent of the mortgage.

The effect of section 429, L. O. L., is that if a mortgagee begins on the law side of the court he cannot, during the pendency of the action nor thereafter until execution on his judgment has been returned unsatisfied in whole or in part, resort to equity. His right to relief in chancery is suspended until he exhausts his legal remedy. Correspondingly,

by section 422, if he begins in equity he must work out that process to its end, and, as by that section he obtains a personal decree for what is due on the promissory note or other personal obligation involved, there is no occasion for his going into the law court to obtain a judgment for what is lacking of complete satisfaction of his debt. The claim is merged in the personal decree, and complete relief may be had on execution issued thereon. There cannot be two judgments for the same demand, in the same court, between the same parties.

The resultant of the varied legislative acts relating to debts secured by mortgage is further to separate the procedure at law from that in equity in litigation to recover the purchase price of realty, payment of which is secured, not only by the direct personal promise of the debtor, but also by a collateral mortgage upon the land bought. As to that class of debts, its effect is confined to the procedure to realize upon them and does not alter the right of the buyer to agree to pay for the property a certain sum of money absolutely and at all events. Respecting purchase price liability, the concurrency of the remedies is restricted, on one hand, to the extent that, if a judgment at law has been rendered, a foreclosure suit cannot be maintained until the law execution has been returned unsatisfied in whole or in part; while, on the other, in such cases, the chancellor properly may not invade the province of the law court by rendering afterwards and in addition to the personal decree required by section 422, L. O. L., a deficiency judgment upon which an execution, as at law, would issue as formerly for the satisfaction of a balance remaining after applying to the liquidation of the debt the proceeds of sales under execution issued on the original decree. In other words, the two remedies in such instances, the one by action at law on the note and the other by suit in equity for foreclosure, are made successive rather than strictly concurrent. The common-law rule that both proceedings may be carried on simultaneously is thus modified as to procedure, but the right ultimately to recover the entire debt is not impaired. That these statutes, being in derogation of the common law, must be strictly construed, is to follow a well-established canon of interpretation.

Besides all this, the title to the act of 1903 relating to deficiency judgments confines its operations to foreclosure suits. It makes no allusion to actions at law and does not pretend to restrict the theretofore established right to sue at law for the recovery of the debt. A "deficiency judgment" is one rendered in the foreclosure suit, but only after sale of the mortgaged realty has been effected and the proceeds found to be insufficient to discharge the debt secured. 1 Words and Phrases, Second Series, p. 1271; 3 Jones on Mortgages (7th Ed.) § 1709a. Under sec-

tion 422, L. O. L., requiring in mandatory language that the court "shall also decree a recovery of the amount of such debt against such person" who gave a note or other personal obligation for the payment of the debt, there never can be a deficiency judgment in the true sense of the term. Suppose, after the return of the sheriff reporting the sale of the land under foreclosure, the plaintiff should apply to the equity court to render a judgment for what was lacking of full satisfaction, the answer would be:

"You already have a personal decree for your whole debt. You cannot have another in the same suit. Look to your execution for relief."

Section 426, L. O. L., against deficiency judgments, is only declaratory in negative form of what has always been the rule derived from the plain meaning of section 422, L. O. L.

According to the writer's observation of the practice in this state under section 422, extending over a period of more than 40 years, the procedure is to take a personal decree for the debt evidenced by the note or other like obligation and an additional decree for the sale of the property and the application of the proceeds to the satisfaction of the debt. There is no occasion for inserting in the decree a clause granting an execution for the remainder. That follows by operation of law under the second subdivision of section 425, L. O. L., reading thus:

"When the decree is also against the defendants or any one of them in person, and the proceeds of the sale of the property upon which the lien is foreclosed is not sufficient to satisfy the decree as to the sum remaining unsatisfied, the decree may be enforced by execution as in ordinary cases. * * *"

This is in consonance with section 415, L. O. L., making the general statute on executions applicable to the enforcement of decrees so far as the nature of the decree may require or admit of it.

The two remedies, the one at law and the other in equity, are not inconsistent, but, on the contrary, supplement each other. While there can, of course, be but one satisfaction, neither remedy impairs the efficacy of the other to the end that the fulfillment of the lawful promise of the debtor to pay absolutely and at all events may be accomplished. If the term "waiver" properly may be applied to the act of the creditor in commencing a suit instead of an action, or vice versa, it is only a temporary waiver in the light of the statutes and loses its force with the exhaustion of the remedy first chosen without full satisfaction of the debt.

The rule on that subject is thus enunciated in 19 R. C. L. p. 509, § 305:

"As a general rule, the taking of collateral security for the payment of a debt does not

afford any implication that the creditor is to look to it only or primarily for the payment of the debt. The obligation of the debtor to respond in his person and property is the same as if no security had been given. This is the settled rule at law. Therefore, a creditor holding a note secured by a mortgage may ignore his security and bring an action on the note. The promise to pay as evidenced by a promissory note is one distinct agreement, and, if couched in proper terms, is negotiable, while the pledge of real estate to secure that promise as evidenced by a mortgage is another distinct agreement which is not intended to affect in the least the promise to pay, but only to provide a remedy for the failure of performance."

The precept is thus taught in 27 Cyc. 1758:

"Where the proceeds of a foreclosure sale are not sufficient to satisfy the mortgage debt, and plaintiff did not recover a deficiency judgment in the foreclosure suit, or was prevented from doing so by want of authority in the court to grant it, want of jurisdiction over the defendant, or other cause, he may thereafter maintain an action at law against the person liable for such deficiency, basing his action either on the note or bond secured by the mortgage or on the foreclosure judgment, or simply on the indebtedness arising from the foreclosure, and the failure of its proceeds to extinguish the original debt or claim."

It is clearly lawful for one to buy land from another and give his promissory note in payment of the whole or a part of the purchase price without executing any mortgage or other security in connection therewith. It is equally as competent for the buyer of such realty to give a mortgage upon it, so conditioned that it shall be void upon the payment of a certain sum of money, representing part of the purchase price, but without assuming any personal liability. Each contract, the one personal and the other by pledge, is lawful and is not inconsistent with the other. All that our statute has said is that, if the creditor begins the exercise of either remedy, he must pursue it to exhaustion. In short, the legislation of this state has not gone to the extreme of saying that giving of collateral security by mortgage impairs the obligation voluntarily assumed by the debtor of paying absolutely, and at all events the purchase price of realty. *Colby v. McClintock*, 68 N. H. 176, 40 Atl. 397, 73 Am. St. Rep. 557, and other like cases, are precedents sustaining the right to use both remedies so far as necessary to collect the whole debt.

Even in states where it is provided that there shall be but one form of action for the foreclosure of a mortgage and the collection of a debt secured thereby, the practically universal holding is that the effect of such legislation is merely to require the creditor to exhaust the mortgage security before proceeding at law as he may properly do to recover any deficiency in the payment of the debt. *Boucofski v. Jacobsen*, 36 Utah, 165, 104 Pac. 117, 26 L. R. A. (N. S.) 898; *Clark v. Pad-*

dock, 24 Idaho, 142, 132 Pac. 795, 46 L. R. A. (N. S.) 475; Sacramento Bank v. Copsey, 133 Cal. 663, 66 Pac. 8, 205, 85 Am. St. Rep. 242; Blumberg v. Birch, 99 Cal. 416, 34 Pac. 102, 37 Am. St. Rep. 67; 2 Jones on Mortgages (7th Ed.) §§ 1215, 1218, 1220, 1221, 1222, 1227, 1228.

The legislative department of government by its enactments mentioned has not made the promissory note in question an unlawful contract. Neither has it stigmatized with illegality the mortgage to secure the same, and until it has done so those who voluntarily execute such contracts must comply with them according to their terms.

The argument is fallacious to the effect that section 426, L. O. L., should be liberally construed in favor of those who would acquire homes and give mortgages for some, if not all, of the purchase price. The practical result of that doctrine would be to obstruct the acquisition of homes, for if it be understood that the would-be purchaser lawfully may repudiate his direct promise to pay the contract price absolutely and at all events, as evidenced by his promissory note, property owners will not deal with him. Taken in connection with the rule established in *Page v. Ford*, 65 Or. 450, 131 Pac. 1013, 45 L. R. A. (N. S.) 247, Ann. Cas. 1915A, 1048, another consequence of the construction for which the opinion of the late Mr. Justice MOORE contends would be to drive mortgagees to the law side of the court in the first instance to recover judgment, with its attendant costs and expenses. This would not release the mortgage, and while it might delay, yet it would not preclude its foreclosure by a subsequent suit as allowed by section 429, L. O. L., quoted above. Especially in cases where the debtor resides in one county and the mortgaged land is in another, judgment might be taken, an execution issued in the law action in the county of his residence and returned unsatisfied, leaving the way open to the foreclosure in the other county at the additional expense, and burdening the debtor with two proceedings where one would answer the purpose. Such a result cannot be avoided without judicial legislation incorporating in the statute terms not included by the lawmaking power.

In the case at bar the circuit court had before it a complaint which discloses that the plaintiff already has a personal decree for the full amount of his debt, the unsatisfied portion of which can be collected by execution as in ordinary cases, by authority of sections 415 and 425, L. O. L. No appeal from this decree seems to have been taken by the defendants. Right or wrong in the first instance, it is at this juncture valid because rendered by a competent tribunal having jurisdiction of the litigants and of the subject-matter. The plaintiff's demand was

merged in that decree both as against the debtors themselves and as against the mortgaged realty. He has no present cause of action on that claim. He could get nothing more by an additional judgment. The matter is *res judicata*. His remedy is by the issuance of an execution on that decree "as in ordinary cases." Hence the circuit court was right in sustaining the demurrer to the complaint, and its decision should be affirmed.

(76 Okl. 172)

WYMAN v. CHICAGO, R. I. & P. RY. CO.
(No. 7922.)

(Supreme Court of Oklahoma. Oct. 31, 1916.
On Rehearing, Oct. 14, 1919.)

(Syllabus by the Court.)

1. MASTER AND SERVANT ¶123—LIABILITY FOR LATENT DEFECTS IN BRIDGE UNKNOWN TO MASTER.

Where the servant in an action against the master avers in his petition, and supports the same by evidence, that the injuries received are due to latent defects in a bridge which collapsed, the master is not liable for negligence unless such latent defects were known to the master or would have been discovered in the exercise of reasonable diligence.

2. MASTER AND SERVANT ¶285(5, 9)—BURDEN OF PROOF ON SERVANT TO SHOW MASTER'S FAILURE TO INSPECT CAUSED INJURY.

The proposition that an inspection would have discovered the latent defects in the bridge is an affirmative one, and the burden of proof rests upon the servant. The doctrine of *res ipsa loquitur* does not apply between master and servant, and in case of accident to an employé the fact of accident carries with it no presumption of negligence, and it is an affirmative fact for the injured employé to establish that the accident was the result of negligence of the employer.

3. MASTER AND SERVANT ¶278(1)—NEGLIGENCE ¶56(1)—IT MUST BE ALLEGED AND PROVED THAT ACTIONABLE NEGLIGENCE WAS PROXIMATE CAUSE OF INJURY.

To constitute actionable negligence, it must be averred and proved that the negligence complained of was the proximate cause of the injury received. It is not sufficient for the employé to show that the employer may have been guilty of negligence; the evidence must point to the fact that he was.

4. MASTER AND SERVANT ¶286(14)—EVIDENCE INSUFFICIENT TO SHOW ACTIONABLE NEGLIGENCE OF MASTER.

The evidence in this case carefully examined, and held, that it does not disclose actionable negligence on the part of defendant, and that the demurrer to the evidence was properly sustained.

Commissioners' Opinion, Division No. 1.
Error from District Court, Blaine County;
Thomas A. Edwards, Judge.

Action by James A. Wyman against the Chicago, Rock Island & Pacific Railway Company. Defendant's demurrer to the evidence sustained, and judgment entered for it; plaintiff's motion for a new trial overruled, and he brings error. Affirmed.

Wm. O. Woolman and R. J. Puderbaugh, both of Watonga, for plaintiff in error.

Foose & Brown, of Watonga, C. O. Blake and R. J. Roberts, both of El Reno, W. H. Moore, of McAlester, J. G. Gamble, of Des Moines, Iowa, and Keaton, Wells & Johnston, of Oklahoma City, for defendant in error.

COLLIER, C. This is an action brought by plaintiff in error against defendant in error to recover damages for personal injuries received by the collapse of a bridge spanning the South Canadian river, due to the alleged negligence of defendant in error.

Hereinafter the parties will be styled as they were in the trial court.

The negligence alleged in the petition is:

"That the south portion of said bridge was constructed of timbers and embankments, and that the portion of said bridge over the main channel of said stream was of steel and concrete and apparently a safe and substantial bridge and structure, and apparently a safe place to be and perform the work assigned; still, notwithstanding the apparent stability of said bridge, there was a latent defect in the construction of the same and the abutment and approach at either end of the steel portion of said bridge, in this, that while the abutment and piers were of concrete it was so negligently and carelessly constructed by the defendant that they failed, in this, that instead of the abutment being solid and reinforced concrete, which should have been under the circumstances and conditions, the same was so negligently and carelessly constructed that the upper part of said concrete work was separated from the lower part, by the careless and negligent allowing or permitting the lower part to set, become solid and hard before the top part of the concrete was placed thereon; that in each and all of the piers and abutments the same were not reinforced and had not been reinforced, which defect was negligent and careless and showed negligent and careless building of the same.

"Plaintiff further states that the defendant herein had knowledge of the defective construction of said bridge at the time that it was made, but notwithstanding this knowledge, and notwithstanding the defective condition of the construction of the same, the said defendant through its authorized agents, officers and representatives, carelessly, negligently and willfully ordered this plaintiff thereon, informing him that the same was a safe place to work, when in truth and in fact it was not a safe place to work, all of which facts was well known to the defendant, and which facts were absolutely unknown to the plaintiff.

"That if the defendant had built and constructed said bridge, abutment and approaches as it should have been built, the said bridge would not have become broken, washed out, went down or become destroyed.

"That said defects were hidden from view

and could not have been seen by this plaintiff, and he knew nothing of them, but believed them to be perfect and sufficient and trusted and relied on the special knowledge or the supposed special knowledge and information of the said W. F. Werner as such master carpenter, superintendent or foreman, and relying thereon and believing said bridge to be safe this plaintiff went upon said bridge and performed his work under the orders and directions of the said W. F. Werner as such master carpenter, superintendent and foreman, at said time.

"Plaintiff further states that had it not been for the defective concrete work as hereinbefore set forth said abutment, approaches and piers would not have given way or gone out, nor would the bridge have been wrecked, nor would the injuries received by this plaintiff have occurred."

The answer of the defendant denies all the material allegations of the petition and pleads assumption of risk, contributory negligence on the part of the plaintiff, and the act of God.

The uncontradicted evidence discloses that an unprecedented flood existed in the South Canadian river, across which was a bridge supported by two piers and an abutment, a pier on the south side, and a pier in the center of the stream, and an abutment—also designated as a pier—on the north side of the stream; that plaintiff was in the employ of the defendant; that quantities of driftwood coming down the river had lodged against the piers of said bridge; that the plaintiff was directed by a vice principal of the defendant to go upon the bridge and aid in dislodging the drift which was accumulating against the center pier; that prior to plaintiff going upon the bridge he was assured by the vice principal of defendant that the bridge was safe; that the plaintiff went upon the bridge about 1:30 p. m. and aided in freeing the pier from the drift which was accumulating against it, and so continued until about 5:30 p. m., at which time the entire bridge collapsed, and plaintiff was thrown into the water, received serious injuries, drifted down the river about two miles, lodged against an island, from which he was not rescued until about 7 o'clock the next morning. The evidence further discloses that the bridge was not built by the defendant, but was purchased by the defendant from another road; that on inspection of the north pier or the abutment, after the disaster, it was found to be broken off near the water line; that the indications were that the lower part of said pier had been permitted to set prior to the addition of the upper part, and that consequently the two parts of said pier did not adhere; that said pier was not reinforced. There is no evidence tending to show that the other piers—on the south side and in the middle of the stream—were improperly constructed, or that there was a defect in the bridge which would have been disclosed by

any inspection that might have been made by the defendant, or that the defendant knew, or ought to have known, that the condition of the bridge, or any part thereof, was defective. It was also shown by the evidence that by the collapse of the bridge the plaintiff suffered serious, and possibly permanent, injuries.

Upon the conclusion of the evidence the defendant interposed a demurrer to the evidence, which was sustained, and judgment entered for the defendant, to which the plaintiff duly excepted.

Within the statutory time plaintiff duly moved for a new trial, which was overruled and excepted to, and to reverse said judgment this proceeding in error is prosecuted.

The only error assigned in the trial of the cause is that the court erred in sustaining a demurrer to the evidence of the plaintiff and rendering judgment for the defendant.

[1, 2] In order to entitle plaintiff to recover, the burden is upon him to show by a preponderance of the evidence that the negligence averred and proved was the proximate cause of the injury; and this, we think, he has clearly failed to do.

"In every case involving negligence, three elements are essential to constitute actionable negligence, when the wrong charged is not willfully and intentionally done, viz.: (1) The existence of a duty on the part of the master to protect the servant from injury; (2) the failure of the master to perform that duty; and (3) injury to the servant approximately resulting from such failure. * * * When these elements are brought together, they unitedly constitute actionable negligence, and the absence of any one of these elements renders the complaint bad, or the evidence insufficient." *Midland Valley R. R. Co. v. Williams*, 42 Okl. 444, 141 Pac. 1103, 29 Cyc. 419; *St. L. & S. F. R. R. Co. v. Snowden*, 48 Okl. 115, 149 Pac. 1083; *C. R. I. & P. Ry. Co. v. Foltz*, 54 Okl. 558, 154 Pac. 519; *C. R. I. & P. Ry. Co. v. Nagle*, 55 Okl. 235, 154 Pac. 687.

"The doctrine of *res ipsa loquitur* does not apply between master and servant." *M. O. & G. Ry. Co. v. French*, 52 Okl. 222, 152 Pac. 591; *M. O. & G. Ry. Co. v. West*, 50 Okl. 521, 151 Pac. 212; *St. L. & S. F. Ry. Co. v. Clamplitt*, 55 Okl. 686, 154 Pac. 40.

In *Solts v. Southwestern Cotton Oil Co.*, 28 Okl. 706, 115 Pac. 776, Judge Turner, speaking for this court, adopts what is said by the Supreme Court of the United States in *Patton v. Texas, etc., Co.*, 179 U. S. 658, 21 Sup. Ct. 275, 45 L. Ed. 361, in which case that court said:

"The fact of accident carries with it no presumption of negligence on the part of the employer, and it is an affirmative fact for the injured employé to establish that the employer has been guilty of negligence. * * * It is not sufficient for the employé to show that the employer may have been guilty of negligence; the evidence must point to the fact that he was. * * * If the employé is unable to adduce suf-

ficient evidence to show negligence on the part of the employer, it is only one of the many cases in which the plaintiff fails in his testimony."

[3, 4] It is true that the expert evidence introduced on the trial and which is uncontradicted shows that the use of reinforcements in the construction of piers would enable the building of smaller piers of equal strength of those not reinforced; but the size of piers in question is not shown, nor is there any evidence whatever to show that the said piers and abutments were improperly constructed or insufficient in size, other than the said latent defect in said pier on abutment on the north side of the river. It is not only pleaded, but the evidence sustains the plea, that the defect was a latent defect, and if the defect in the north pier of the bridge be admitted to be the cause of the destruction of the bridge—which we do not hold—there was no evidence that such latent defect could have been discovered by proper inspection, or that the defendant had, or by the use of ordinary care and diligence would have had, knowledge of any defect in the construction of any part of said bridge.

"A master is not liable for injuries resulting to a servant by reason of latent defects of which he was ignorant, and which could not be discovered in the exercise of reasonable care and diligence." 28 Cyc. 1145e, and the many authorities therein cited.

"The proposition that an inspection of appliances would have discovered the defect is an affirmative one to be shown by the evidence, and the burden of proving it rests upon him who asserts it." *Colfax Coal & Mining Co. v. Adolph Johnson*, 52 Ill. App. 383.

If it be admitted that the accident was not due to an act of God, as pleaded by the defendant, which we deem unnecessary to determine, and that the declaration of the vice principal to the plaintiff that the bridge was safe relieved the plaintiff from the assumption of the risk incident to his going upon the bridge and from being guilty of contributory negligence—questions which we deem unnecessary to determine—we are unable to say that the defendant was guilty of actionable negligence.

We are of the opinion that the court properly sustained the demurrer to the evidence, and that this cause should be affirmed.

PER CURIAM. Adopted in whole.

On Rehearing.

PER CURIAM. Upon consideration of the arguments, briefs, and record in this case, it is the opinion of the court the cause was properly disposed of in the opinion prepared by Commissioner COLLIER and filed October 31, 1916.

Therefore the opinion is adhered to, and the judgment of the lower court affirmed.

(76 Okl. 69)

BAILEY v. BANK OF MEEKER.
(No. 10163.)(Supreme Court of Oklahoma. Oct. 7, 1919.
Rehearing Denied Nov. 4, 1919.)*(Syllabus by the Court.)***APPEAL AND ERROR §—638—DISMISSAL, CASE-
MADE NOT SHOWING FIRST ORDER OR JUDG-
MENT.**

A case-made which does not contain a copy of any judgment or final order rendered by the trial court, and which fails to affirmatively show that any order was rendered by the trial court, presents nothing that may be reviewed by the Supreme Court, and upon motion of the appellee to dismiss for said reason, when appellant makes no effort to amend or correct said case-made, the appeal will be dismissed.

Appeal from District Court, Lincoln County; Chas. B. Wilson, Jr., Judge.

Action between Mary Elizabeth Bailey and the Bank of Meeker. Judgment for the latter, and the former appeals. Dismissed.

Cox & Cox, of Chandler, for plaintiff in error.

Mark Goode, of Shawnee, for defendant in error.

McNEILL, J. The plaintiff in error attempted to appeal by case-made. The case-made contains no judgment of the court, but simply a statement that the judgment would be for plaintiff. There is a motion for a new trial, but there is no mention of the motion for new trial being overruled by the trial court. The case-made does contain what purports to be a copy of entries made on the appearance docket by the court clerk which discloses that a journal entry of judgment was filed, and the motion for new trial overruled, but the journal entry of judgment, nor the order of court in overruling the motion, is not made a part of case-made.

The defendant in error filed a motion to dismiss the appeal for the reason that no copy of the judgment is included in the case-made. Second. That the case-made does not disclose that any judgment or order was entered overruling the motion for new trial. Third. That the case-made does not show or include any order made by the court or judgment extending the time in which to make and serve case-made. Fourth. That the case-made was not filed within six months from the time of the rendition of the judgment complained of.

The plaintiff in error has not attempted to, or made application to, correct the record to include copies of the judgment rendered in the case-made. Under the rule adopted by this court in the case of *Olentine v. Powell*, 23 Okl. 363, 100 Pac. 556; *Mobley v. Chicago, R. I. & P. Ry. Co.*, 44 Okl. 788, 145 Pac. 321, wherein the court stated:

"Where the case-made to be reviewed by this court fails to show that a judgment or final order was rendered by the trial court or fails to contain a copy of such judgment or final order, such case-made presents nothing to this court for review and cannot be considered."

For the reasons stated, the appeal will be dismissed.

**OWEN, C. J., and RAINEY, KANE, JOHN-
SON, PITCHFORD, and HIGGINS, JJ., con-
cur.**

(76 Okl. 211)

TAYLOR v. FREEMAN, Judge. (No. 10249.)

(Supreme Court of Oklahoma. Oct. 21, 1919.)

*(Syllabus by the Court.)***PROHIBITION §—3(2)—WILL NOT LIE FOR ER-
RONEOUS APPLICATION OF LAW TO FACTS.**

Where an inferior court has jurisdiction of the subject-matter and the parties to an action, and an appeal will lie to the Supreme Court from the order of said inferior court, prohibition will not issue, though the trial court may make an erroneous application of the law in the determination of the issues therein.

Original petition for writ of prohibition by Joe T. Taylor against W. F. Freeman, Judge of the Eighth Judicial District, State of Oklahoma, sitting in Carter county. Denied.

Champion & George and Moore & West, all of Ardmore, for plaintiff.

OWEN, C. J. Taylor filed an original petition in this court, praying writ of prohibition against Hon. W. F. Freeman, judge of the district court of Carter county, to prohibit such judge from granting or considering a motion for an order directing the county clerk and secretary of the county election board to produce the records in their possession of an election held in certain precincts in Carter county, together with the ballot boxes and pollbooks of such election to be examined in open court, in an election contest pending in such court, and to which contest Taylor was a party.

The principal reasons urged for this writ of prohibition are: That the petition in the election contest failed to state a cause of action against Taylor; and that the district court was without jurisdiction to grant the relief sought to be obtained by the motion.

It appearing the court had jurisdiction to try the election contest, and jurisdiction of the parties, the writ of prohibition must be denied under authority of *Harrah v. Oldfield*, 171 Pac. 335, where it was said:

"Where an inferior court has jurisdiction of the subject-matter and the parties to an action, and an appeal will lie to the Supreme Court from the order of said inferior court, prohibition will not issue, though the trial court may

make an erroneous application of the law in the determination of the issues therein."

The writ of prohibition is denied.

PITCHFORD, McNEILL, HIGGINS, and BAILEY, JJ., concur.

(76 Okl. 233)

MILLER et al. v. KIMMEL et al. (No. 10355.)

(Supreme Court of Oklahoma. Sept. 30, 1919.
Rehearing Denied Nov. 4, 1919.)

(Syllabus by the Court.)

1. APPEAL AND ERROR ⇐1009(4)—DECREE CONCLUSIVE UNLESS AGAINST WEIGHT OF EVIDENCE.

In an equitable action, the judgment of the trial court will not be set aside unless it is clearly against the weight of the evidence.

2. CONTRACTS ⇐10(1)—BASED ON CONSIDERATION NOT INVALID FOR WANT OF MUTUALITY.

When there is an agreement founded on a consideration, it is not invalid for want of mutuality because one party has an option while the other has not; or, in other words, because it is obligatory on one and optional with the other.

3. VENDOR AND PURCHASER ⇐18(1)—OPTION TO PURCHASE BASED ON ADEQUATE CONSIDERATION.

\$100 is an adequate consideration for an option to purchase within six months an undivided one-half interest in a tract of land for \$30,000.

4. DEEDS ⇐211(1)—EVIDENCE TO SUSTAIN JUDGMENT FOR GRANTEE IN SUIT TO CANCEL DEED.

Evidence in this case examined, and the judgment of the trial court held not to be clearly against the weight thereof.

Error from District Court, Creek County; Mark L. Bozarth, Judge.

Action by Ambrose Miller and another against J. D. Kimmel and others. Judgment for defendants, and plaintiffs bring error. Affirmed.

W. H. Kornegay, of Vinita, and C. N. Simon, of Tulsa, for plaintiffs in error.

Carroll & Mason and A. B. Honnold, all of Tulsa, for defendants in error.

RAINEY, J. On July 2, 1914, for and in consideration of the sum of \$100 to him in cash paid, Ambrose Miller executed to J. D. Kimmel an option to purchase, within six months for \$30,000, an undivided one-half interest in Miller's allotment of land in Creek county, Okl., and on the 7th day of November of the same year Ambrose Miller and Alice Miller, his wife, conveyed to the said J. D. Kimmel an undivided one-fourth

interest in and to the same land. On June 21, 1917, thereafter, Ambrose Miller and Alice Miller, as plaintiffs, instituted this action against J. D. Kimmel to cancel and set aside and declare null and void said deed. R. H. Fitzgerald, F. E. Stephens, and Fred S. Clinton were also made parties defendant in that action. The plaintiffs, in their petition, in substance, alleged that the plaintiff Ambrose Miller was, at the time of the transactions had with the defendant Kimmel, and had many years prior thereto been, a confirmed drunkard; that plaintiff's land had become very valuable, but that through the long use of intoxicating liquors his mind had become so weakened that he did not appreciate the value of money or property, and he would sign anything for any one in whom he had confidence, or to get money or whisky; that the defendant Kimmel knew the value of said land, knew the weakness of Ambrose Miller, had gained his confidence, and through drink and intoxicating liquors had secured the six months' option to buy the land at the price above stated; that thereafter, for the purpose of securing the land for nothing, the said Kimmel entered into a conspiracy with Fred S. Clinton to secure an interest in Miller's allotment, and, as a result thereof, procured the signatures of the plaintiffs to a deed and contract for an undivided one-fourth interest in said land; that at the time of procuring said deed the said plaintiff was in an intoxicated condition; and that his intellect and mind were so weakened through the use of intoxicating liquors that he did not know what he was doing or what he was about. It was further alleged that Kimmel had conveyed some interest to Fitzgerald and Stephens, and that they had knowledge of, or with the exercise of due diligence could have ascertained, the circumstances under which Kimmel obtained his title. It is also alleged that Fred S. Clinton claimed some right, title, or interest in and to the land. The prayer was for a cancellation of the contract and deeds of record and for a judgment decreeing the title to be in the plaintiff, and for an accounting.

The defendant Clinton did not file an answer. The defendants Kimmel, Fitzgerald, and Stephens, by way of answer, admitted that Ambrose Miller was a member of the Creek Nation of one-eighth Indian blood, according to the enrollment records; that the land in controversy was his allotment; that on or about July 2, 1914, the defendant Kimmel secured from the plaintiff a six months' option to buy a one-half interest in the land for \$30,000, said conveyance to be subject to the prior oil and gas lease on said lands then owned by C. B. Schaeffer; that thereafter the plaintiffs executed to the defendant Kimmel a warranty deed for an undivided one-fourth interest in the land; that said deed was made subject to the prior oil and gas

leases thereon; that the consideration for the execution of said deed moving from the defendant Kimmel to the plaintiff was the defendant Kimmel's quitclaiming, releasing, and relinquishing his option on the premises, as evidenced by a written contract of July 2, 1914, and the further consideration of \$12,500, which was to be paid plaintiffs by causing to be paid over and delivered to them the one-eighth part of all proceeds of all royalties accruing upon said oil and gas mining lease. The defendants denied that the defendant Kimmel drew all the royalties from said land, but alleged that, under the terms of the written agreement between the plaintiffs and the defendant Kimmel, one-eighth of the royalties was paid to the plaintiffs until March 28, 1916, at which time, at the special request of the plaintiff Ambrose Miller, defendant Kimmel drew one-fourth of said royalties, and, in accordance with his contract with the plaintiffs, promptly and immediately paid over to the plaintiffs one-half of the royalties so received by him, and that up to the time of bringing this action the defendant Kimmel had received and retained for himself and the defendants Fitzgerald and Stephens about \$7,300, and that a like amount of royalties had been paid to and received by the plaintiffs. The answer also admitted that Kimmel duly conveyed to the defendants Fitzgerald and Stephens an undivided one-sixteenth interest in and to the lands described in the petition. The answer further denied that either Paul Clinton or Fred S. Clinton ever acted as the agent of J. D. Kimmel or of defendants Fitzgerald and Stephens; denied that Kimmel, or any of the answering defendants, ever entered into any conspiracy with Paul Clinton or Fred S. Clinton, or any other person or persons, to secure the warranty deed above mentioned. They expressly denied that any of said instruments were procured through fraud, or without consideration, or by the exercise of any undue influence by any of them, and denied that Ambrose Miller was so weakened in mind that he did not fully comprehend the effect of his contract with defendant Kimmel, and alleged that at all times during the transactions he fully comprehended and understood the force and effect of said instruments. They further specifically denied the affirmative allegations in plaintiffs' petition, except those which were admitted. The answer further alleged that the plaintiffs were guilty of laches, for the reason that, though plaintiffs understood and comprehended the facts attending the execution and delivery of said deed and contract, they did not make any demand upon, or indicate to, said defendants any desire or intention to rescind said contracts and deed within a reasonable time; that they had ratified the same, both directly and indirectly, and asked that the plaintiffs' cause of action be dismissed at their costs.

By way of amended reply plaintiffs alleged that O. R. Howard was in a conspiracy with defendants to obtain the plaintiff's allotment, and that the transaction by which Howard, the Clintons, and Kimmel obtained an interest in said allotment were all part of one transaction, and that each depended and was conditioned upon the other.

The cause was tried to the court, without a jury, and at the conclusion of the trial the court made the following findings of fact and conclusions of law:

"The court finds that at the time that J. D. Kimmel obtained his option to purchase the lands in controversy from Ambrose Miller in so far as the consideration is concerned as appears from the testimony in this case it was sufficient and said option was valid and binding upon the parties thereto for the term that it was to run; that at the time of executing said option Ambrose Miller was in a position and condition to know, and did know, the consequences of his acts.

"The court finds that at the time the defendant J. D. Kimmel released his option and received a consideration therefor the sum of \$1,000.00 and an undivided one-fourth interest in the land in controversy that said land had increased materially in value subsequent to taking the option, and that the increase in value was an adequate consideration for the execution of said deed from Ambrose Miller and wife to J. D. Kimmel conveying an undivided one-fourth interest in the premises; that at the time said conveyances were made plaintiff Ambrose Miller knew and apprehended his acts and was familiar with the terms and conditions under which said transactions were had as evidenced by correspondence introduced in evidence which took place soon after said transactions were made in which the said Ambrose Miller directed the payment of the royalty interests according to the terms as agreed upon between him and Kimmel; that the said Miller accepted the royalties under the terms of the conveyances had between him and Kimmel during all the time from the time of the execution of said deed up and until just a short time before the filing of this suit which covered a long period of time after he had been cured from the drink habit and at a time which the testimony shows conclusively that he was competent to transact his own business.

"The court further finds that no conspiracy existed as between the defendants J. D. Kimmel, F. E. Stephens, and R. H. Fitzgerald, and Fred Clinton, Paul Clinton, and O. R. Howard to defraud the plaintiff Ambrose Miller in this transaction; that the conveyance made to Kimmel by Ambrose Miller was separate and apart from the Howard and Clinton transactions with Ambrose Miller and was free from any taint of fraud between Ambrose Miller and J. D. Kimmel.

"The court finds there was no relation of confidence existing at the time of procuring the deed between Kimmel and Ambrose Miller.

"The court finds that plaintiff Ambrose Miller, for a number of years prior and up unto the transaction of the conveyances herein referred to and subsequent thereto, was addicted to the drink habit; that he had been placed in a hospital at one time at Cushing, and Dr. Duke's Sanitarium, at Guthrie, and the Keely Institute,

at Kansas City, for treatments for the liquor habit, but that his mind was not so affected or clouded by drunkenness that he did not understand business transactions and was thoroughly conversant with the terms of the conveyances at the time they were executed as complained of in this action.

"The court does not find it necessary to answer plaintiffs' request for special findings mentioned in No. 5 and ending with No. 13 for the reason the court found that there was no collusion or fraud practiced between J. D. Kimmel, Paul Clinton, Fred S. Clinton, and O. R. Howard as against the plaintiff Ambrose Miller.

"The court finds that the issues in this case are with the defendants J. D. Kimmel, F. E. Stephens, and R. H. Fitzgerald, and against the plaintiff Ambrose Miller."

Counsel for plaintiffs requested the court to make 13 special findings of fact. The court made findings in response to the first, second, third, fourth, and thirteenth requests, but found it unnecessary to answer plaintiffs' requests for other special findings, for the reason stated in the general findings.

[1, 4] This being an equitable action, we have carefully examined the record, weighed the evidence, and are of the opinion that the findings of fact of the trial court are not only not clearly against the weight of the evidence, but are in accord with the preponderance thereof. *Schock v. Fish*, 45 Okl. 12, 144 Pac. 584; *Crump v. Lanham*, 168 Pac. 43. While the evidence shows that the plaintiff Ambrose Miller, about the time and prior to the transactions complained of, was frequently drunk, and at such times his ability to transact business was impaired, it also shows that he was not always drunk, but was a periodical drunkard, and the testimony of a number of plaintiffs' witnesses, as well as that of the defendants, is to the effect that when sober he fully comprehended the nature of his transactions and understood what he was doing. Many letters written by him (some in his own handwriting) were introduced in evidence, which support the judgment of the trial court that his mind, although impaired, was not impaired to the extent that he did not thoroughly understand the nature of his transactions and the consequences of his acts. On the contrary, these letters and other evidence show that he had a bright mind and that he thoroughly understood these transactions. The great weight of the evidence is to the effect that at the time plaintiffs signed the option and executed the deed and contract Miller was not intoxicated, and that he thoroughly understood what he was doing. The evidence also shows that, at the time the option was secured for \$100 to purchase an undivided one-fourth interest in the land for \$30,000, the \$30,000 was equal to, if not in excess of, the true value of the one-half interest in the land.

[2, 3] But counsel for plaintiffs contend that as a matter of law the \$100 considera-

tion for the option was inadequate and was so small as to constitute of itself a badge of fraud, and assert that, there being no adequate consideration, the contract, being optional as to one of the parties thereto, is optional as to both. In *Rich v. Doneghey et al.*, 177 Pac. 86, this court, speaking through Mr. Justice Milley, said:

"Strictly speaking, a unilateral contract is one in which there is a promise on one side only, the consideration on the other side being executed. Evidently the term was not used in that sense by the trial court, for such contracts are not void, but are equally as valid as bilateral contracts, consisting solely of mutual promises to do some future act, in which the consideration of the promise of one party is a promise on the part of the other. The term 'unilateral' is often used to express absence of mutuality. In the case of contracts made up solely of mutual promises, each the consideration for the other, where the promises of one party are so expressed as not to be absolutely binding on him, but to be performed only if such party so wills, or a promise on but one side and no consideration therefor, the one who makes the absolute promise in the one case, or the sole promise in the other, is not bound to perform. The reason sometimes given is that the contract is unilateral, or void for the want of mutuality. The real reason is that there is not a sufficient consideration for the promise. 'Consideration is essential; mutuality of obligation is not, unless the want of mutuality would leave one party without a valid or available consideration for his promise.' 6 R. C. L. 686. Therefore, what the trial court no doubt meant was that the lessee neither gave nor made a binding promise of anything of value for the grant of the right to explore the land and produce the oil or gas, if any found thereon. In other words, that there was not a sufficient consideration for the grant. In this the court erred.

"It is provided by statute in this state that a written instrument is presumptive evidence of a consideration. Section 934, Rev. Laws 1910. Also, that the burden of showing a want of consideration lies with the party seeking to invalidate it."

In 13 *Corpus Juris*, p. 836, the author of the text says:

"When there is an agreement founded on a consideration, it is not invalid for want of mutuality because one party has an option while the other has not, or in other words because it is obligatory on one and optional with the other. Hence want of mutuality cannot be set up as a defense by the party who has received the benefit simply because it was left optional with the other party as to whether he would enforce his right, and the option to relinquish a right acquired under a contract will not render it unilateral. An option founded on a consideration is a unilateral agreement binding, from the date of its execution, on the party who executes it; and it becomes a contract *inter partes* when exercised according to the terms. In such a transaction two elements exist: (1) The offer on the one side which does not become a contract until accepted upon the other, and (2) the completed contract to leave the offer open for a specified time."

See, also, *Heyward v. Bradley*, 179 Fed. 325, 102 C. C. A. 509; *Johnston v. Tripp* (C. C.) 33 Fed. 530; *Watts v. Kellar*, 56 Fed. 1, 5 C. C. A. 394; *Waterman v. Waterman* (C. C.) 27 Fed. 827; *Willard v. Tayloe*, 8 Wall. 557, 19 L. Ed. 501; *Estes v. Furlong*, 59 Ill. 298; *Perkins v. Hadsell*, 50 Ill. 216; *Guyer v. Warren*, 175 Ill. 328, 51 N. E. 580; *Hayes v. O'Brien*, 149 Ill. 403, 37 N. E. 73, 23 L. R. A. 555; *Smith's Appeal*, 69 Pa. 474; *Hawralty v. Warren*, 18 N. J. Eq. 124, 90 Am. Dec. 613; *Schroeder v. Gemeinder*, 10 Nev. 355; *Aiple-Hemmelmann Real Estate v. Spelbrink*, 211 Mo. 671, 111 S. W. 480, 14 Ann. Cas. 652.

Therefore, an option contract based upon an adequate consideration is not voidable on the ground that one party is bound and the other is not.

Was \$100 an adequate consideration for the option contract? There are cases which hold that a nominal consideration, such as 50 cents and \$1, is inadequate; but the weight of authority seems to be that \$1 is an adequate consideration for an option to run a reasonable period in the absence of fraud or undue influence. Twenty-five dollars has been held to be a sufficient consideration for an option to purchase real estate within four weeks for \$4,975. *Mueller v. Nortmann*, 116 Wis. 468, 93 N. W. 538, 96 Am. St. Rep. 997; *Guyer v. Warren*, 175 Ill. 328, 51 N. E. 580. In *Guyer v. Warren*, the consideration expressed in the option was \$1; the real consideration was \$50 to purchase in one year a farm for \$8,000, which was held adequate. The court having found on sufficient evidence that Mr. Kimmel had not entered into any conspiracy to deprive Ambrose Miller of his land, that he practiced no undue influence on him, and that Miller was sober and knew what he was doing at the time he and his wife executed the option, we are of the opinion that \$100 was an adequate consideration therefor.

Subsequent to the giving of the option and at the time of the execution of the deed by Miller and his wife to the defendant Kimmel for the undivided one-fourth interest in the land, it appears that there was a probability of finding the Bartlesville sand on Miller's land, which created a demand for it and rendered it, in the opinion of oil men, much more valuable. The surrender of the option, then, certainly had a cash value of several thousand dollars, and, in the absence of fraud and undue influence, the release of this option, together with the consideration to be paid Miller out of the oil royalties, was an adequate consideration in law to support the deed.

Finding no reversible error in the record, the judgment is affirmed.

All the Justices concur, except HARRISON, J., absent, and PITCHFORD, J., not participating.

(76 Okl. 195)

MISSOURI, K. & T. RY. CO. v. WOLF. (No. 9155.)

(Supreme Court of Oklahoma. Oct. 14, 1919.)

(Syllabus by the Court.)

1. NEGLIGENCE ⇐2—ELEMENTS IN GENERAL.

To constitute actionable negligence, where the wrong is not willful and intentional, three essential elements are necessary: (1) The existence of a duty on the part of the defendant to protect the plaintiff from injury; (2) failure of the defendant to perform that duty; and (3) injury to the plaintiff proximately resulting from such failure.

2. NEGLIGENCE ⇐186(9)—QUESTION FOR JURY WHERE REASONABLE MEN MIGHT DIFFER.

Where the evidence on the primary negligence of the defendant is such that reasonable and intelligent men might differ as to the facts and inferences to be drawn therefrom, the case is one for the jury.

3. RAILROADS ⇐370, 372(5)—CARE REQUIRED WHERE PERSONS ON TRACK MAY BE EXPECTED.

It is a sound and wholesome rule of law, humane and conservative of human life, that, without regard to the question whether the person killed or injured in the particular case was or was not a trespasser or a bare licensee upon the track of the railway company, the company is bound to exercise special care and watchfulness at any point upon its track, where people may be expected upon the track in considerable numbers, as where the roadbed is constantly used by pedestrians. At such places the railway company is bound to anticipate the presence of persons on the track, to keep a reasonable lookout for them, to give warning signals, such as will apprise them of the danger of an approaching train, to moderate the speed of its train so as to enable them to escape injury; and a failure of duty in this respect will make the railway company liable to any person thereby injured, subject, of course, to the qualification that his contributory negligence may bar a recovery.

4. RAILROADS ⇐376(1)—CARE REQUIRED AS TO PERSONS ON TRACK ACCUSTOMED TO USE IT AS PATHWAY.

Where deceased was walking along the railroad track, in broad daylight, in a well-settled community, near but not on a public crossing, where, to the knowledge of the railway company, the public has been for a long time prior thereto accustomed to using the track for their own convenience as a pathway, and where the track was so situated that deceased might have been clearly visible for a considerable distance ahead of the train, the duty rested upon the railway company to use such degree of care for the safety of deceased as was commensurate with the probability that some person might be using the track as a pathway, or, differently stated, to use reasonable and ordinary care to avoid injury to persons whose presence on its premises was known, or whose presence it might reasonably have anticipated; and a failure to use such care, resulting in injury and death to deceased, will make the railway company liable therefor.

5. RAILROADS — 356(4)—INJURY TO LICENSEE ON TRACT.

Nor does the fact that the defendant had placed signs along its right of way, and handed out printed cards to pedestrians, warning the public against trespassing thereon, absolve it from the duty imposed by the custom of the public which had ripened into a license, where it appears that no evidence was introduced that the injured man had ever seen one of the cards, and that this custom of the public had continued unabated after the placing of said signs and the giving out of said cards.

6. NEGLIGENCE — 136(25)—PROXIMATE CAUSE QUESTION FOR JURY.

In a suit for personal injuries, the question of whether or not defendant's negligence is the proximate cause of the injury sustained should be left to the jury, where the evidence is conflicting, or where men of ordinary intelligence might differ as to the effect of the evidence on such issue.

7. RAILROADS — 356(1), 397(7), 401(1)—TRIAL — 260(1) — NEGLIGENCE — INSTRUCTIONS AS TO PERSONS ON TRACK NOT PREJUDICIAL.

Instructions examined, and found that no material or prejudicial error has been committed therein.

Error from District Court, Washington County; R. H. Hudson, Judge.

Action by Nancy J. Wolf against the Missouri, Kansas & Texas Railway Company. Verdict and judgment for plaintiff, and defendant brings error. Affirmed.

Clifford L. Jackson, W. R. Allen, and M. D. Green, all of Muskogee, for plaintiff in error.

A. O. Harrison, of Bartlesville, for defendant in error.

RAINEY, J. This action was commenced in the district court of Washington county, Okla., by Nancy J. Wolf, widow of Charles Wolf, deceased, to recover \$10,000 as damages on account of the death of Charles Wolf, who was killed by being struck by one of the railroad company's trains near Bartlesville, Okla., on the 26th day of April, 1915. The parties will be designated as they appeared in the trial court.

The petition states, in substance, that about 6 p. m., on or about the 26th day of April, 1915, the said Charles Wolf was walking north on one of the defendant company's railway tracks at the point where Eleventh street crosses said track, and while on said crossing and within said highway, and while in the exercise of due care and caution for his own safety, was struck by one of defendant's north-bound passenger trains and instantly killed; that the point where deceased was struck was in a populous district in the suburbs of said city, and within the yard limits of said city, and that a large number of people use said track at said

point daily as a footpath, with full knowledge and consent of defendant; that, on the occasion when deceased met his death, the engineer in charge of said north-bound passenger train was running said train at a rapid and dangerous rate of speed, far in excess of that allowed by law and the rules of said defendant at said point; that no warning signal, either by whistle or bell, was given as provided by law for said Eleventh street crossing; that the only warning given the deceased was by four short whistles when the train was within a few feet of him, and too late for him to escape from said track; that the deceased did not know of the approach of said train; that the track approaching said point is on an upgrade and almost straight, with no obstructions, so that deceased was in plain view of the engineer on said train, and could easily have been seen by said engineer for more than a half mile before reaching the point of said accident; that the engineer in charge of said train saw, or by the exercise of reasonable and proper diligence could have seen, the deceased in ample time to have given timely warning, and to have stopped said train and thereby avoided said accident; that the death of said Charles Wolf was due directly and proximately to the carelessness, negligence, and wanton and willful acts of said engineer, while in the due course of his employment, in driving said train at an excessive and dangerous rate of speed at said point, his failure to give the statutory signal of warning when approaching said public crossing, his failure to give deceased any warning of the approach of said train until too late for him to escape from said track, and his failure to make any effort to stop said train until within 30 feet of the deceased, when it was too late to save the life of deceased; that deceased was a sober, industrious, and hard-working man, at the time of his death earning \$57 per month as wages; that he provided well for his family, spending all his wages in their behalf; that he was 63 years of age, in robust health; and that his life expectancy was 12 years.

The defendant company's answer consisted of a general denial and a plea of contributory negligence. The cause was tried to a jury, which returned a verdict for plaintiff in the sum of \$3,000. Judgment was rendered accordingly, from which the railway company has appealed to this court.

Defendant, in its brief, specifies 20 assignments of error, but we think that all the questions raised on appeal may be adequately disposed of upon a determination of the following questions: (1) Did the court err in overruling defendant's demurrer to plaintiff's evidence, and in refusing to instruct the jury to return a verdict in favor of defendant? (2) Did the court err in its instructions to the jury?

[1] It is a well-settled rule of law that to constitute actionable negligence, where the wrong is not wilful and intentional, three essential elements are necessary; (1) The existence of a duty on the part of the defendant to protect the plaintiff from injury; (2) failure of the defendant to perform that duty; and (3) injury to the plaintiff proximately resulting from such failure. *C., R. I. & P. Ry. Co. v. Foltz*, 54 Okl. 556, 154 Pac. 519; *Clinton & C. W. Ry. Co. v. Dunlap*, 56 Okl. 755, 156 Pac. 654; *C., R. I. & P. Ry. Co. v. Penix*, 159 Pac. 1141; *Lusk v. Wilkes*, 172 Pac. 929, *L. R. A.* 1918E, 513.

[2] Where the evidence is such that reasonable and intelligent men might differ as to the facts and inferences to be drawn therefrom, the case is one for the jury. *Littlejohn v. Midland Valley R. Co.*, 47 Okl. 204, 148 Pac. 120; *New York Plate Glass Ins. Co. v. Katz*, 51 Okl. 713, 152 Pac. 353; *C., R. I. & P. Ry. Co. v. Felder*, 56 Okl. 220, 155 Pac. 529; *C., R. I. & P. Ry. Co. v. Schanda*, 57 Okl. 688, 157 Pac. 349. Taking plaintiff's evidence, together with all reasonable deductions and inferences therefrom, can it be said that reasonable and intelligent men would agree that the defendant company was not negligent under the circumstances? To answer this question we must first determine what duty, if any, the defendant company owed the deceased under the facts of this case.

[3-5] Concerning the duty which a railroad company owes to a person walking on its tracks under circumstances similar to those in the instant case, and as to whether such a person is a trespasser or bare licensee, the different state courts are in hopeless conflict. Many cases support the view favored by *Elliott on Railroads* (2d Ed.) § 1250, which is that a bare licensee, such as the deceased in the case at bar, takes his license subject to the "concomitant risks and perils," and occupies substantially the position of a trespasser, and that the company owes him no duty of active vigilance to discover him, but only owes him the duty of exercising ordinary care not to injure him after discovering him in a place of peril. On the other hand, there are many authorities supported by sound reason which take the contrary view, which is well stated in *Thompson on Negligence* (2d Ed.) § 1726, as follows:

"It is a sound and wholesome rule of law, humane and conservative of human life, that, without regard to the question whether the person killed or injured in the particular case was or was not a trespasser or a bare licensee upon the track of the railway company, the company is bound to exercise special care and watchfulness at any point upon its track, where people may be expected upon the track in considerable numbers, as, for example, in a city where the population is dense, even between streets where the track has been extensively used for a long time by pedestrians, or where the roadbed is constantly used by pedestrians; or at a bridge in a thickly settled community which the

public, in considerable numbers, have used for many years. At such places the railway company is bound to anticipate the presence of persons on the track, to keep a reasonable lookout for them, to give warning signals, such as will apprise them of the danger of an approaching train, to moderate the speed of its train so as to enable them to escape injury; and a failure of duty in this respect will make the railway company liable to any person thereby injured, subject, of course, to the qualification that his contributory negligence may bar a recovery."

The earlier decisions of this court, it seems, inclined somewhat toward the views expressed in *Elliott on Railroads*, but our later decisions have so construed and modified these earlier decisions as to make the present weight of authority in this jurisdiction substantially in accord with the above-quoted views of Mr. Thompson.

In *Atchison, T. & S. F. R. Co. v. Cogswell*, 23 Okl. 181, 99 Pac. 923, 20 *L. R. A.* (N. S.) 837, a person went to the depot of a railway company to meet an incoming passenger with whom he had an engagement, for the purpose of continuing their business matters after their meeting at the train. In walking across the platform the plaintiff was injured by stepping into a hole in said platform, which the defendant had negligently covered by a loose and unnailed board. The court held that under the circumstances plaintiff was an invitee, and the railway company was liable for his injuries proximately resulting from its negligence. The opinion in that case contained language which is clearly dictum. It is as follows:

"A person who does not go upon the premises of a railway company as a passenger, servant, trespasser, or as one standing in any contractual relation to the corporation, but who is permitted by the company to come upon its premises for his own interest, convenience, or benefit, is upon the premises of such railway company as a licensee, and the railway company is liable only for wilful or wanton injuries which may be done to such licensee by the gross negligence of its agents or employees."

Counsel for defendant relies upon this expression to support their contention that under the circumstances of the case at bar the railway company was under no duty to exercise ordinary care to discover plaintiff in a place of danger and prevent injury to him.

In point of time, the next case upon which counsel for defendant rely is *Rogers v. C., R. I. & P. R. Co.*, 32 Okl. 109, 120 Pac. 1093. In that case the plaintiff, near midnight while standing on the railroad tracks, in the switchyards, not at a crossing or depot was struck by a train and injured. It was not shown that any servant of the railroad company knew of his presence on the track or of his position of danger or even that he received injuries. Some evidence was introduced that some of the hands working at a

compress about half a mile from town had occasionally used the track longitudinally, where the accident occurred, as a walkway to town; but there was not any evidence that the railroad company or any of its employees permitted or knew of such use. Neither was there any evidence that the track had been used by pedestrians for more than six or seven weeks, or that during said time travel was either continued or frequent or had existed to such an extent as to make a pathway, or to afford other means of notice of its use by pedestrians. Defendant demurred to the evidence, which demurrer was sustained. Obviously the case is not in point, since in the case at bar it is well established that the railway company did know of the custom of using the track as a walkway, and the accident occurred in broad daylight on a clear day, when the engineer, by the exercise of ordinary care, might have seen the deceased for a long distance ahead of the train, and did see him, before the accident.

C., R. I. & P. R. Co. v. Stone, 34 Okl. 364, 125 Pac. 1120, L. R. A. 1915A, 142, is also cited. In that case plaintiff was a trespasser riding on one of defendant's trains, who was injured by reason of defendant's gross negligence in allowing certain freight cars to run down a steep incline upon the main track and collide with the train. Defendant was held liable, and the rule was announced by the court that a trespasser can recover for gross negligence on the part of a railroad company where he is guilty of no contributory negligence, as disclosed by the facts of that case. The facts being so dissimilar, that case is not very helpful in the consideration of the instant case.

In *Gulf, C. & S. F. R. Co. v. Dees et al.*, 44 Okl. 118, 143 Pac. 852, L. R. A. 1918E, 396, plaintiff's intestate met the injury which resulted in his death in going across defendant's yards and climbing between the cars of a train. Plaintiff attempted to show that deceased was not a trespasser by reason of the fact that pedestrians were in the habit of crossing defendant's tracks just north of the stock pens where the old street had formerly crossed the right of way. The trial court rendered judgment on a verdict in favor of plaintiff, which was reversed. In the course of the opinion this court said:

"If the defendant had known, at the time it slightly moved its train, that the deceased was passing between its cars, and thus in a position of danger, a very different situation would be presented, involving principles of law not here involved. But this record is barren of such proof. If this had been an accident to a pedestrian at a crossing, and there had been sufficient proof that pedestrians for a long time had been crossing defendant's tracks at the place, continuously and in large numbers, and that the defendant knew of same, or that the circumstances were such as to impute knowledge, then the company would have been under the duty of looking out for persons, and of reasonably ex-

pecting them to be at such place; and the rules applying as between a carrier and a naked trespasser would be modified. But such is not this case."

It is thus clearly seen that the facts in that case were so different from those in the case at bar that a different rule of law was applicable; but the court indicates that under circumstances analogous to those presented in the instant case, a different rule would have been applied.

Defendant also cites in support of its contention the case of *Midland Valley R. Co. v. Littlejohn*, 44 Okl. 8, 143 Pac. 1. In that case the negligence consisted in leaving an iron flywheel, about 80 inches in diameter, and weighing about 865 pounds, on defendant's platform in such position that plaintiff, a boy 4½ years of age, in going upon said platform to play, and attempting to climb upon said flywheel, was injured. Judgment was rendered for plaintiff, which was reversed by this court, and the case remanded for a new trial upon the ground that plaintiff was a trespasser or bare licensee and should not have been allowed to recover without proof of either willfulness or wantonness on the part of defendant. Upon the second trial of the case, the court sustained a demurrer to the plaintiff's evidence, discharged the jury, and entered judgment for the defendant, and the case again came before this court in *Littlejohn v. Midland Valley R. Co.*, 47 Okl. 204, 148 Pac. 120, and was again reversed on the ground that, since the standard of duty in such cases varied according to the circumstances, it must be determined by the jury where there was sufficient evidence.

The question of the duty of a railroad company to a licensee came up squarely for decision in this court for the first time in *Wilhelm v. Missouri, O. & G. R. Co.*, 52 Okl. 317, 152 Pac. 1088, L. R. A. 1916O, 1029. In that case the deceased, while walking along a side track, which had been used for several years by persons living in a certain vicinity as a near cut in going from the east to the west part of the town and returning, was struck and run over and killed by some freight cars, which defendant's servants had switched upon the side track upon which the deceased was walking, with no one on or in control of said cars. A demurrer to the evidence was sustained by the trial court, which ruling was reversed by this court. It was there contended by plaintiff that under such circumstances deceased was a licensee, while defendant contended that he was a trespasser pure and simple. The court held that it was the duty of the court to have submitted to the jury the usage of the public in regard to the pathway, and to have left them, under proper instructions, to determine whether, under all the facts and circumstances, the deceased was a licensee, with the permission of the

railway company, express or implied, to use this track as a pathway, or was a mere trespasser. While the evidence disclosed facts which might amount to gross negligence on the part of the railway company, and in that respect the case is not on all fours with the case at bar, the facts showing deceased's relation to the defendant are practically the same as those in the case at bar, and the case is in point on the question we are now considering.

In *St. L. & S. F. R. Co. v. Hodge*, 53 Okl. 427, 157 Pac. 60, the plaintiff was injured by being struck by a caboose, which defendant suddenly and without warning bumped against with its engine just as plaintiff was crossing the track immediately behind the caboose. There was evidence that plaintiff, who was a boy 12 years of age, together with other boys of about the same age, was accustomed to going to the place where the accident occurred to play and to gather coal at a coal chute. The evidence was conflicting as to whether the servants of defendant had warned the boys to stay away. On the afternoon of the accident plaintiff testified he went to the coal chute where there were some other boys picking up coal, when he thought he heard some boys whistle across the track, and went over to find them. Not finding them, he attempted to return to the west side of the track within a few feet of the rear of the caboose, but as he stepped upon the track the engine struck the cars to which the caboose was attached, causing the caboose to hit him, knocking him off the track, the car running over his right leg and smashing his left foot. The plaintiff brought his action on the theory that he was a licensee, and defendant contended that he was a mere trespasser, and consequently the only duty it owed him was to exercise ordinary care not to injure him after his presence in the dangerous situation was discovered. This court, in the opinion delivered by Mr. Justice Sharp, recognizing that there was great conflict of opinion among the different courts in the United States, thoroughly reviews the authorities, and as a result thereof the rule announced in the line of authorities represented by the opinion in *Felton v. Aubrey*, 74 Fed. 350, 20 C. C. A. 436, was followed. This court quoted with approval from the opinion in the *Felton* Case, as follows:

"If the company has so long acquiesced in the continuous and open use of a particular place at a crossing as to justify the inference that it acquiesced in that use, it would seem to follow that it was bound to anticipate the presence of such licensees upon its track at the place where such crossing had been long permitted. In such a case it would not be consistent with due regard to human life, and to the rights of others, to say that such licensees are mere trespassers, or that the duty of the acquiescing company was no greater than if they were mere

trespassers. Nonliability to trespassers is predicated upon the right of the company to a clear track, upon which it is not bound to anticipate the presence of trespassers. It therefore comes under no duty to a trespasser until his presence and danger are observed. But if it has permitted the public for a long period of time to habitually and openly cross its track at a particular place, or use the track as a pathway between particular localities, it cannot say that it was not bound to anticipate the presence of such persons on its track, and was therefore not under obligation to operate its trains with any regard to the safety of those there by its license. This distinction between liability for the passive and active negligence of the owner of premises to licensees is recognized very clearly by the Court of Appeals of New York. *Barry v. Railroad Co.*, 92 N. Y. 290, 44 Am. Rep. 377; *Byrne v. Railroad Co.*, 104 N. Y. 863, 10 N. E. 539, 58 Am. Rep. 512."

The case of *Garner v. Turmbull*, 94 Fed. 321, 36 C. C. A. 361, is also cited with approval. In that case it was urged by the receiver of the railway company that the child was a trespasser on the track; hence that the train operatives owed it no duty until its presence was discovered, and they were under no obligation to anticipate its presence on the track, or to be on the lookout for it or other persons at the place where it was run over and killed. The opinion observes that there are some adjudicated cases supporting that view, but states:

"We are persuaded that it is not a correct rule, as applied to those portions of a railroad track which many people have been in the habit of using as a footpath for a considerable period, without objection on the part of the railway company, although without any express license to do so. Train operatives ought to be required to take notice of such usages and conditions which actually exist and to regulate their actions accordingly. A proper regard for the safety of persons and property intrusted to their charge, and for human life in general, should impel them to do so. When, therefore, for a considerable period, numerous persons have been accustomed to walk across a railroad track or along a railroad track between given points, either for business or pleasure, railroad engineers should take notice of such practice, and when approaching such places, should be required to exercise reasonable precautions to prevent injuring them. Knowing the usage which prevails, they may reasonably be required to anticipate the probable presence of persons on or near the track at such places, and to be on the lookout when their attention is not directed to the performance of their other duties. The natural impulses of a person who has a proper regard for the welfare of others would prompt him to thus act."

The court next reviews the Oklahoma cases, distinguishing *A. T. & S. F. R. Co. v. Cogswell*, 23 Okl. 181, 99 Pac. 923, 20 L. R. A. (N. S.) 837, *A. T. & S. F. R. Co. v. Jandera*, 24 Okl. 106, 104 Pac. 339, 24 L. R. A. (N. S.) 535, 20 Ann. Cas. 316, and *Rogers v. Chicago, R. I. & P. R. Co.*, 32 Okl. 109, 120 Pac.

1083, and approving and following the rule stated in *Wilhelm v. Missouri, O. & G. R. Co.*, 52 Okl. 317, 152 Pac. 1088, L. R. A. 1916C, 1029, heretofore mentioned.

The case of *A., T. & S. F. R. Co. v. Miles*, 170 Pac. 896, is not in point, since in that case there was no evidence to show that the track of the defendant company between Pawnee and Skeedee was commonly used by the public as a footpath, as alleged in the petition. Such being true, the plaintiff must be regarded as a mere trespasser, and a different rule of law applied than would have been the case had the allegations of the petition been supported by the evidence.

The facts in the cases of *St. L., I. M. & S. R. Co. v. Gibson*, 48 Okl. 553, 150 Pac. 465, and *K. C. S. R. Co. v. Langley*, 160 Pac. 451, clearly distinguish them from the case at bar, and will not here be specifically discussed.

In *C., R. I. & P. R. Co. v. Austin*, 163 Pac. 517, L. R. A. 1917D, 666, plaintiff was traveling across the yards and tracks of a railway company along a well-defined pathway, which had been constantly used by the public in large numbers for eight or ten years, and was seen by two of defendant's servants, but was given no warning, and was run against and injured. Upon this state of the record plaintiff was allowed recovery, this court stating:

"When it was made to appear that a well-defined pathway existed along the route which plaintiff was traveling, and this pathway had existed for a long period of time, and the use thereof by the public was continuous and in large numbers, these facts were sufficient to put the defendant company and its employees upon notice that persons were liable to be passing thereon and imposed upon them the duty to use that degree of care for the safety of human life that was commensurate with the circumstances; or, differently stated, to use reasonable and ordinary care to avoid injury to persons whose presence on its premises was known, or whose presence it might reasonably have anticipated; and, under the circumstances disclosed by the evidence, defendant was guilty of gross negligence rendering it liable for any injuries occasioned thereby.

"Nor does the fact that the defendant had placed signs along its right of way warning the public against trespassing thereon absolve it from the duty imposed by the custom of the public which had ripened into a license, where it appears that this custom had continued unabated after the placing of said signs."

In the case at bar the evidence discloses that deceased met his death while walking along the defendant company's railroad track, near but not upon the public highway, outside the city limits of Bartlesville but in a well-settled community; that the track from the direction whence the train was approaching was but very slightly curved, so that deceased and the defendant's servants upon the engine might have been visible to each other while the train was a considerable

distance up the track; that defendant had posted trespass signs along its right of way and had handed out some cards warning against trespassing on the right of way, but no heed was given to these warnings, of which fact defendant was fully aware, and no evidence was introduced that deceased had ever received or seen one of these cards. Some evidence was introduced to the effect that deceased was hard of hearing, though his wife testified that she had no trouble in making him understand, speaking in an ordinary tone of voice. Deceased gave no heed to the train nor indicated that he was aware of its approach until it was almost upon him, when he turned his head just as the train struck him. The evidence was conflicting as to what warning signals were given by the approaching train.

Upon this state of the record, in view of the authorities above set forth, it is our opinion that just and reasonable men would not agree that the defendant was not negligent under the circumstances, and the case was therefore one for submission to the jury under proper instructions.

[6] It is insisted that the defendant's alleged negligence was not the proximate cause of the deceased's injuries and death. In *Clinton & O. W. R. Co. v. Dunlap*, 56 Okl. 755, 156 Pac. 654, we said:

"In a suit for personal injuries the question of whether or not defendant's negligence is the proximate cause of the injury sustained should be left to the jury where the evidence is conflicting, or where men of ordinary intelligence might differ as to the effect of the evidence on the point."

This rule is too well settled to require the citation of the many other cases to the same effect in this and other jurisdictions. The instant case is clearly within this rule.

[7] The defendant complains of certain of the court's instructions to the jury. Instruction No. 10 was a general definition of a licensee. Defendant's objection to it is that it is abstract and calculated to mislead the jury. It appears to be in entire accord with definitions of that term heretofore approved by this court. Instruction No. 11 states that where a railroad track has been used for a long time as a common passageway by the public with the knowledge or tacit consent of the defendant, or where in the exercise of ordinary care it must have known of such use, a pedestrian so using said track is a licensee. We cannot see how the rights of the defendant could have been prejudicially affected by this instruction. Instruction No. 13 states the degree of care required of a railroad company under circumstances such as those in the case at bar, as laid down by *Thompson on Negligence* (2d Ed.) § 1726, and followed by this court in the *Wilhelm Case* and the *Hodge Case*. Defendant's requested instruction No. 23 was to the effect that

there was no evidence in the case that the railroad company acquiesced in the use of its tracks as a walkway in the vicinity of the accident. In view of our statement of the law and facts in this opinion, it is clear that the failure to give this instruction was not error. While instructions Nos. 2, 18, and 19, requested by the defendant and refused by the court, are doubtless correct statements of law, the failure to give them could not prejudice the rights of defendant, since they are covered in other instructions given by the court. Requested instruction No. 21 was to the effect that, if the defendant had posted the "no trespass" signs and had taken other means to notify persons not to use its tracks as a walkway, persons thereafter so using them were trespassers. The instruction was incorrect, since it did not take into consideration that continued use of a track as a pathway may place the additional burden on the railroad company to look out for any persons who are or may be on the pathway. The instruction was therefore properly refused. In view of the authorities heretofore cited, the failure to give requested instruction No. 22 was not error.

Instruction No. 14 was to the effect that the railroad company was under no duty to deceased to sound the statutory signals, but they might consider whether or not such signals were given in determining what warning was given deceased. This was not error. *Dickinson, Rec'r. v. Granbery*, 174 Pac. 776; *Lusk v. Haley*, 181 Pac. 727, decided May 25, 1919, but not yet officially reported. It covers practically everything asked for in requested instructions Nos. 4, 5, and 14.

Requested instruction No. 3 was to the effect that defendant had the right to operate its train at any rate of speed it desired consistent with the safety of the train and passengers. This is clearly contrary to the rule heretofore announced in this opinion, and the court did not err in refusing to give it. The correct rule was stated by the trial court in his instruction No. 13 and in instruction No. 15.

We have carefully examined the record and find no reversible error therein.

The judgment of the trial court is therefore affirmed.

OWEN, C. J., and KANE, McNEILL, JOHNSON, and HIGGINS, JJ., concur.

(76 Okl. 213)

FREAR et al. v. STATE ex rel. CALDWELL, Co. Atty., et al. (No. 7946.)

(Supreme Court of Oklahoma. Oct. 21, 1919.)

(Syllabus by the Court.)

1. JUDGES §37—PARTY PLAINTIFF IN ACTION ON BOND OF COUNTY JUDGE.

"State ex rel. County Attorney" is a proper party plaintiff in an action upon the official bond

of a county judge, to recover the unearned portion of deposits, received by him in civil and probate cases, which have not been properly accounted for by him.

2. REFERENCE §8(1) — IN ACTION AGAINST COUNTY JUDGE.

Under the provisions of sections 5018 and 5019 of Revised Laws of 1910, the court has authority, in proper cases, to make an order of reference, referring said case to a referee without the consent of the parties, or may do so over the objections of one or all of said parties.

3. NEW TRIAL §164 — SETTING ASIDE REPORT OF REFEREE CONSTITUTES GRANT OF NEW TRIAL.

Where a motion for new trial is sustained and the report of the referee is entirely set aside, the effect of the order is to grant a new trial, and it is erroneous for the court to make his finding of fact and render judgment thereon, until the case is resubmitted to him.

4. APPEAL AND ERROR §960(2)—PLEADING §367(6)—GRANT OF MOTION TO MAKE MORE DEFINITE IN DISCRETION OF COURT.

A motion to make more definite and certain is addressed largely to the discretion of the court; and the ruling thereon will not be reversed, except for the abuse of such discretion that results prejudicially to the complaining party.

5. LIMITATION OF ACTIONS §22(8)—ACTION ON BOND OF COUNTY JUDGE MAY BE BROUGHT WITHIN FIVE YEARS.

Section 4657 of Revised Laws of 1910 provides that an action upon an official bond may be brought within five years after the cause of action shall have accrued. Where neither the petition nor the evidence discloses that the cause of action did not accrue more than five years prior to the filing of the petition, it is not error to overrule the plea of the statute of limitation.

Error from District Court, Craig County; Preston S. Davis, Judge.

Action by the State of Oklahoma, on relation of C. Caldwell, County Attorney of Craig County, Oklahoma, and another against Theo. D. B. Frear and another. Judgment for plaintiffs, and defendants bring error. Reversed and remanded, with direction to grant defendants a new trial in accordance with opinion.

Theo. D. B. Frear and O. L. Rider, both of Vinita, for plaintiffs in error.

Willard H. Voyles, of Vinita, for defendants in error.

McNEILL, J. This action was commenced on the 12th day of March, 1912, by the state of Oklahoma on the relation of C. Caldwell, county attorney of Craig county, and James F. McCullough, clerk of the county court of Craig county, against Theo. D. B. Frear and Southern Surety Company, to recover the sum of \$1,784.66, claimed to be the unearned balances due from costs deposited in cer-

tain civil and probate cases in the county court of Craig county, Okla.

Parties are referred to as they appeared in the trial court.

The petition charges the defendant Frear was county judge of Craig county from the 16th day of November, 1907, until the 9th day of January, 1911, that he made and executed a bond to the state of Oklahoma with the Southern Surety Company as surety in the sum of \$5,000, conditioned upon the faithful performance of the duties of his office as provided by law; that while county judge he received certain deposits in civil and probate cases, and had failed to turn the unearned portion of the same over to his successor, but had converted the same to his own use.

The trial court made an order of reference, and referred the case to J. Howard Langley, who heard the testimony and reported the same with his findings of fact to the court. The report of the referee was in effect a finding in favor of the defendants. The plaintiffs and defendants both filed objections and exceptions to the report of the referee, and the plaintiffs filed a motion for a new trial. The trial court set aside the findings of fact as reported by the referee, and made his own findings, upon which the court rendered judgment against the defendants in the sum of \$383.36, and from which judgment the defendants appealed.

[1] It is first contended by the defendants that there is a defect of parties, that the "State of Oklahoma ex rel. County Attorney of Craig County and the Clerk of the County Court" are not proper parties plaintiffs, and have no authority to maintain this action.

Section 4681 of Revised Laws of 1910 provides:

"Every action must be prosecuted in the name of the real party in interest, except as otherwise provided in this article."

Section 4683 of Revised Laws of 1910 provides:

"An executor, administrator, guardian, trustee of an express trust, a person with whom, or in whose name a contract is made for the benefit of another, or a person expressly authorized by statute, may bring an action without joining with him the person for whose benefit it is prosecuted. Officers may sue and be sued in such name as is authorized by law, and official bonds may be sued upon the same way."

This court in the case of *State v. Rader*, 33 Okl. 350, 125 Pac. 728, held, in substance, where an official bond was executed to the state, as required by law, although the money sought to be recovered does not go to the state, but to the county, the State ex rel. County Attorney was the proper party to bring said action, following the case of *McColgan v. Territory*, 5 Okl. 567, 49 Pac. 1018.

It is further contended that the fees to be recovered belong to the individual who had deposited the same, and the state nor county had no interest therein, but with this we cannot agree. Section 3246, Revised Laws of 1910, provides as follows:

"It shall be the duty of the clerk of the court or justice, receiving any costs belonging to any other person, to hold the same, subject to the order of the person entitled thereto, and to pay the same over on request; and if such fees shall not be called for within one year after having been received, the officer shall pay the same into the county treasury, and take a receipt therefor."

At the time the county judge in this instance was receiving deposits in the different cases, he was acting as his own clerk, and it became his duty if said unearned portion of the deposits were not called for by the parties when the cases were settled, or within one year after they became entitled to the same, to pay the same to the county treasurer.

The deposits received are protected by the bond, and the bond running to the state, the county attorney on behalf of the state was the proper person to maintain said action, although the money recovered, if any, would go to the county, for the use and benefit of the people who had deposited the same, and the court did not commit error by so holding.

[2] The second contention of the defendants is that the court erred in referring said case and appointing a referee without the consent of the parties and over the objection of the defendants. Section 5018, Revised Laws of 1910 provides as follows:

"All or any of the issues in the action, whether of fact or of law, or both, may be referred, upon the written consent of the parties, or upon their oral consent in court, entered upon the journal."

Section 5019 in part provides:

"When the parties do not consent, the court may, upon the application of either, or of its own motion, direct a reference in either of the following cases."

This court has held that it was not error to refer a proper case to a referee even over the objection of the parties to the suit. *Hale v. Marshall*, 52 Okl. 688, 153 Pac. 167; *Conley v. Horner*, 10 Okl. 277, 62 Pac. 807; *Van Trees v. Territory*, 7 Okl. 353, 54 Pac. 495.

The petition shows on its face that the action required the examination of the records of the county judge, covering a period of four years, and items of numerous cases, which made this a proper cause for reference.

[3] The third assignment of error is that the court erred in setting aside the findings of fact made by the referee, and made findings of its own, upon which he rendered

judgment. In this the court committed error. The findings of fact of the referee have the force and effect of a special verdict of a jury. If the court refuses to approve the findings of fact of the referee, he may set the same aside, and when he does, it has the same effect as if he set aside a special verdict of a jury. He grants a new trial. Such is the holding of this court in *James v. Coleman*, 166 Pac. 210, wherein the court stated as follows:

"Where a motion for new trial is sustained and the report of the referee entirely set aside, the effect of an order is to grant a new trial, and it is erroneous for the court to make other findings of fact and render judgment thereon."

To the same effect is the holding of the court in the case of *Hale v. Marshall*, supra. The findings of fact of the referee was a finding for the defendants. The court set their findings of fact aside, and made a finding of his own, and found for the plaintiffs for the amount of the judgment. This was error. When he set aside the findings of fact, he granted a new trial, and could not render judgment until the cause was re-submitted.

[4] The defendants next contended that the court erred in overruling the motion to make the petition more definite and certain. The rule adopted by this court on the overruling of a motion to make more definite and certain is as follows:

"A motion to make more definite and certain is addressed largely to the discretion of the court; and its ruling thereon will not be reversed, except for the abuse of such discretion that results prejudicially to the complaining party." *City of Chickasha v. Looney*, 36 Okl. 155, 128 Pac. 136.

The petition in the case at bar set out each particular case in which it is claimed that there was a balance of the deposits, collected by the judge, unearned and unaccounted for and the amount of the same. This was sufficient to advise the defendants of the nature of the action and the items involved.

[5] It is next contended that the court erred in not holding that the cause of action was barred by the statute of limitations. The petition does not disclose, nor does the evidence disclose, that any of the items became due and payable five years prior to the commencement of this action. Therefore the action was not barred by the statute of limitations. For the reason stated, the judgment of the district court will be reversed and remanded, to grant the defendants a new trial in accordance with the views herein expressed.

OWEN, C. J., and PITCHFORD, HIGGINS, and BAILEY, JJ., concur.

MILLER et ux. v. HOWARD et al.
(No. 10177.)

(Supreme Court of Oklahoma. Sept. 30, 1919.
Rehearing Denied Nov. 4, 1919.)

(Syllabus by the Court.)

1. APPEAL AND ERROR ⇨1009(4)—REVIEW OF WEIGHT OF EVIDENCE IN EQUITABLE ACTION.

In an equitable action, the judgment of the trial court will not be set aside unless it is clearly against the weight of the evidence.

2. APPEAL AND ERROR ⇨1058(1)—HARMLESS ERROR IN EXCLUSION OF EVIDENCE.

The action of the trial court in excluding a letter offered in evidence is not reversible error, where the record shows that a copy of the letter was read to the witness who received it, and said witness testified to the correctness of its wording.

3. DEEDS ⇨68(5)—MENTAL WEAKNESS OF GRANTOR A TEST.

In an action to set aside a deed on account of the mental weakness of the grantor, the test which is applied is the same as in other forms of mental derangement, namely, that the deed or contract is voidable if the person, at the time of its execution, was so far under the influence of intoxicants as to be unable to understand the nature and consequences of his act and unable to bring to bear upon the business in hand any degree of intelligent choice and purpose.

4. DEEDS ⇨211(1)—EVIDENCE OF MENTAL WEAKNESS OF GRANTOR.

Evidence in this case examined, and held not to meet this requirement.

5. DEEDS ⇨211(1)—EVIDENCE OF MENTAL WEAKNESS OF GRANTOR.

All the evidence in the case examined, and the judgment of the trial court held not to be clearly against the weight thereof.

Error from District Court, Creek County; Ernest B. Hughes, Judge.

Action by Ambrose Miller and wife against O. R. Howard and Fred S. Clinton, to set aside and cancel a deed on the ground of fraud. Judgment for defendants, and plaintiffs bring error. Affirmed.

W. H. Kornegay, of Vinita, and C. N. Simon, of Tulsa, for plaintiffs in error.

W. D. Abbott and Poe & Lundy, all of Tulsa, for defendant in error Howard.

RAINEY, J. On October 31, 1914, Ambrose Miller, an enrolled member of the Creek Nation, of one-eighth Indian blood, entered into a written agreement with O. R. Howard to convey to the said O. R. Howard, for and in consideration of the sum of \$28,000, an undivided one-half interest in and to his allotment of land in Creek county, Okl., consisting of 162.85 acres. By the terms of the agreement \$500 was to be paid upon execution and delivery of the contract, \$12,000 to

be paid in cash on or before five days from the date thereof, and the remaining \$15,500 was to be payable "only out of the said oil as the same is produced, run, and sold." Pursuant to other terms of the contract Ambrose Miller and his wife, Alice Miller, executed to O. R. Howard a warranty deed conveying an undivided one-half interest in and to said land, which was placed in escrow in the National Bank of Commerce of Tulsa, Okla., to be delivered to O. R. Howard when the \$12,000 provided by the agreement was paid to Miller and his wife. The contract further provided that the \$12,000 to be paid by Howard at the bank should be applied on any and all outstanding liens or incumbrances which might be found to exist, to the end that the undivided one-half interest in the land agreed to be conveyed should be free and clear of all liens or incumbrances whatsoever, except an oil and gas mining lease on said property then being operated by C. B. Schafer. The deed was delivered to Mr. Howard pursuant to said contract and placed of record by him. On June 31, 1917, thereafter, this action was instituted by Ambrose Miller and Alice Miller, his wife, to set aside and cancel said deed, on the ground of fraud. Plaintiffs' petition alleged, in substance, that through the long use of intoxicating liquors Ambrose Miller's mind had become so weakened that he did not realize his allotment had become valuable, and did not appreciate the value of money or the value of property, so that he would sign any papers or do anything for any one in whom he had confidence, or to get money or whisky; that the defendant Howard knew the value of said land, and the plaintiff's weakness, and had gained plaintiff's confidence; that for the purpose of securing the land for an inadequate consideration Howard entered into a conspiracy with Dr. Fred S. Clinton, the family physician of the plaintiff, to procure an undivided one-half interest in said land for an inadequate consideration; that pursuant to said conspiracy, and while Ambrose Miller was in an intoxicated condition, Howard secured the contract of October 31, 1914; that during the transactions for the sale of said land Miller's mind was in such a weakened condition, on account of the use of intoxicating liquors, that he did not know what he was doing; and that plaintiff's wife, Alice Miller, signed the deed and contract because of fear of her life at the hands of her husband. It was further alleged that for the purpose of further defrauding the plaintiffs, defendant Howard conspired to secure the \$15,500, payable to them out of the royalties produced from said land; that pursuant to said conspiracy, and while the said Ambrose Miller was in an intoxicated condition, and while his mind was so weakened by the use of intoxicating liquors that he did not know what he was doing, O. R. Howard and Dr.

Fred S. Clinton induced the plaintiff to sign a release of said royalties for the sum of \$5,000 in cash. The petition also alleged that Fred S. Clinton claimed some right, title, or interest in and to the land by virtue of the Howard deed, asked that he be required to set out what interest he claimed, and that the same be declared to be null and void. The prayer was for a cancellation of the contract and deed, and for an accounting.

The defendant Howard, by way of answer, denied that he had entered into a conspiracy with Fred S. Clinton or Paul Clinton to procure the plaintiff's allotment; denied that they, or either of them, were his agents; and denied that Ambrose Miller was intoxicated at the time he executed the contract and deed sought to be canceled. The answer affirmatively alleged that at the time of entering into said contract and at the time of the execution of said deed the said Ambrose Miller was sober and was competent to understand the nature and character of the transactions, and that Miller knew the value of said land so far as an ordinary mind could know the value thereof. The defendant further alleged that he had carried out all the terms of said contract, and that the plaintiffs had ratified the same and had never complained of the transactions until the 31st day of June, 1917, when the petition was filed in this action. The defendant also alleged in his answer that on or about the 8th day of February, 1915, Miller approached him and entered into negotiations with him for the sale of the prospective royalties, and that they finally entered into a written contract for the sale of said prospective royalties for a cash consideration of \$5,000, which the defendant paid.

The cause was tried to the court without a jury. At the conclusion of the trial the court made findings of fact in favor of the defendants, and denied the relief asked by the plaintiffs. These findings are as follows:

"I have waited patiently through this entire case to find what connection, if any, it was going to be shown that Dr. Clinton had with this deal. There has been nothing in the testimony that has impressed me at all that he had any connection whatever with the deal between Ambrose Miller and Mr. Howard. It may be that he had some interest in what Paul Clinton was receiving, and that he was at the office of Mr. Abbott and Mr. Howard on the night this deal was consummated for the purpose of obtaining that. That may have been his purpose in coming there. So far as the testimony here is concerned, there is nothing that impresses me that he had anything to do with the deal.

"Now this contract is sought to be set aside—two contracts are sought to be set aside, the first contract dated October 31, 1914, and the second contract of February 8, 1915—on the ground of fraud. It is alleged that the plaintiff's mind had become weakened by drink. It is alleged that the weakened condition of the

plaintiff's mind was caused by the acts and procurement of the defendant.

"There is nothing in this testimony that would induce me at all to find that Paul Clinton ever at any time acted as the agent of Howard. There is nothing in this testimony to show who gave Ambrose Miller the whisky on which he had been accustomed to getting drunk. About the only thing I can recall, the only time he ever testified to where he got any whisky was that he got it out of his pocket after he had stepped out of the room; but suffice it to say that the testimony wholly fails to establish the allegation that O. R. Howard ever at any time had anything to do with furnishing liquor to the plaintiff.

"Now these two contracts are sought to be set aside primarily on account of the drunkenness and weakened condition of the plaintiff. Mr. Elliott in his work on Contracts lays down three propositions or conditions on which contracts in cases of this kind can be set aside: The first, where the drunkenness of the person seeking to set aside the contract is caused by the act or procurement of the opposite party; second, where the person seeking to set aside the contract was drunk at the time of the execution of the same, and that undue advantage was taken or fraud or undue influence was practiced upon him so as to induce him to execute the contract; and third, where the mind and understanding of the person seeking to set aside the contract are impaired to such extent that he is unable to understand the nature and consequences of his acts and the result and magnitude of the transaction. As to the first, there is absolutely no proof to establish that the plaintiff was drunk by the act or procurement of the defendant, so that does away with that proposition. As to the second proposition, the testimony does show that at the time of entering into this contract, and for a long time prior to entering into this contract, the plaintiff was addicted to the use of intoxicating liquors to excess; and I further find from the testimony that at the time these contracts were entered into his mind had become somewhat weakened by the long-continued use of alcoholic liquors. Now if his mind was weak at that time, from the use of intoxicating liquors, and the defendant knew it or had reason to know it, and he took any undue advantage of him or imposed upon him or practiced any fraud upon him, then the contracts ought to be set aside. Now what ground or allegations of fraud do you allege other than that he was drunk by the act or procurement of the defendant, which you don't sustain? You allege that the land was bought at such a grossly inadequate price as of itself shows fraud. The law is that where one party has a weak mind or is intoxicated, even though it might not be to such a degree that his judgment is impaired to such an extent that he doesn't understand the nature and consequences of his acts, yet if he makes a contract upon a consideration so grossly inadequate as to be of itself a badge of fraud, to be unconscionable, a court of equity will not permit such a contract to stand. That is one of your grounds of fraud that you allege. The allegation is not sustained by the evidence. Another is that Paul Clinton acted as agent for the plaintiff and defendant, in other words, a go-between; that Paul Clinton, without the knowledge of the plaintiff, received from the defendant a

commission. Now as to whether or not this property was purchased at a grossly inadequate consideration, I don't so find. There is nothing in this case to impress upon me the truth of the contention that this property was purchased by the defendant Howard at a grossly inadequate consideration. It is true that the testimony of opinion witnesses testifying in this case varies all the way from \$5,000 to \$50,000; I believe the highest placed it at \$50,000, as I recall the testimony, that is, for a one-half interest in the royalty; but the testimony of the witnesses varies exceedingly, as naturally always will where you depend upon opinion testimony. Most of the witnesses placed the value around \$15,000 or \$20,000. Some of the plaintiff's witnesses place the value at less than the defendant actually paid for it, in their opinion on the value of the property. In other words, some of the witnesses who testified on behalf of the plaintiff gave as their opinion that it was worth less than the actual cash price which the defendant paid for it. Now taking everything into consideration, the fact that at the time there were four wells in the Layton sand, producing about 100 barrels a day, maybe a little bit more, I believe the testimony showed in October about 100 barrels a day; that in the Wheeler sand there was a gas well. Taking into consideration also the further fact that at the time this first contract was consummated oil was selling at 55 cents a barrel, that is, that was the posted price by the large pipe line companies; taking into consideration the further fact that they were taking only 80 per cent. of the oil; taking into consideration the further fact that a great deal of oil was selling at 30 cents; taking into consideration the further fact that on the day the second contract was entered into the posted price went off to 45 cents a barrel, and that they were taking only 80 per cent. of it; taking into consideration the further fact that while a great many large Bartlesville wells had been drilled in just east of this property, yet in August, 1914, prior to the consummation of this deal, one well was drilled 2,000 or 3,000 feet west of the property, through the Bartlesville sand and through the Tucker sand, and it was dry, which, as the witnesses testified here, was an indication of the fact that the reasonable probability was that this property in controversy had no producing Bartlesville sand—it did, however, turn out that there was a small Bartlesville well come in at 150 barrels, which was so much less than the Bartlesville wells just east of the property, some as large as 10,000 barrels—it was a strong indication that the Bartlesville sand pinched out just east of the property in controversy. I say, taking into consideration all these conditions, I am of the opinion and so find that the price paid by the defendant to the plaintiff for that portion of the property which the plaintiff sold to the defendant was fair and reasonable. * * *

"There is another element which enters into the value of this property: The royalties actually received by the defendant from this property from October 31, 1914, to about February 1 or 8, 1915, at the time this second deal was consummated, were something like \$90. I don't remember the exact figures; the testimony will show it was less than \$100. Now should the second deal be set aside, the defendant required to do equity; that is, pay the balance of the

\$15,500? I think not. What I have said as to the first deal relative to the plaintiff's condition will apply also to the second deal. Now under all the circumstances surrounding that property at the time, and the fact that only about \$90 or \$100 worth of oil had been sold from that property from October 31st to February 8th, and that the plaintiff was to be paid \$15,500 in oil, contingent upon its being produced from the property and the fact that the property was then only producing about 100 barrels, and on that day a Bartlesville well came in at a flush production of about 150 barrels, and the fact of the price of the oil and that the pipe line companies were only taking a small portion, and that it was being sold at a great deal less than the posted price by the great many producers, the possibility of the plaintiff's receiving the entire \$15,500 was so uncertain and there was such a contingency connected with it that if he did receive it it would be over such a long period of time, the court cannot find other than that the \$5,000 paid for that contingent interest which the plaintiff had reserved from the oil to be produced from the land. I say I cannot find other than that that was a fair and reasonable consideration for that interest; that the plaintiff at the time of entering into the second contract was in no worse condition mentally than at the first. In other words, I conclude that at the time of entering into both contracts the plaintiff was under no undue influence, and that there was no fraud or undue influence practiced upon the plaintiff; that the defendant did not seek out the plaintiff to buy the property, but that the plaintiff sought out the defendant to sell him the property. I am absolutely unable to see that the fact that the defendant paid to Paul Clinton \$2,500 to clear this property of Paul Clinton's option is any indication of fraud on the part of the defendant. It occurs to me as natural and reasonable as could be expected from an ordinary and reasonably prudent business man. This property was at the time incumbered by an option recorded, given by the plaintiff to Paul Clinton, in consideration of \$100, whereby Paul Clinton had an option to purchase this property within a certain time for \$30,000. That to all intents and purposes and appearances was a valid and binding option; that is, it appeared to be a cloud upon the title. The defendant, through his attorney, acting as a reasonably prudent man would act, and the attorney acting as a reasonably prudent lawyer would under the circumstances, refused to permit his client to consummate the deal with Miller until the option was cleared from the property. In clearing that option he paid Paul Clinton \$2,500. It may be—I do not know whether it is so or not—that Ambrose Miller didn't know anything about that, but to my mind that is immaterial. Paul Clinton had a valid subsisting option upon the land so far as the records disclosed. Whether that was procured by Paul Clinton or some one else through fraud is immaterial so far as this case is concerned. There is nothing in this case to show that the defendant at any time was ever warned or had any knowledge of any contention that Paul Clinton had procured the option from Ambrose Miller by fraud or undue influence. In fact it is not so contended in this case by the plaintiff himself; and I say the fact that the defendant sought to remove Kimmel's option from the property, sought to remove Paul Clin-

ton's option from the property and to clear the title before he paid any money, does not, to my mind, indicate any fraud or undue influence on his part at all, but is merely consistent with the acts of a reasonably prudent business man under like circumstances. I am unable to conclude from the fact that they executed these deeds at 11 or 12 o'clock at night is any indication of fraud. It is seeking to place an interpretation upon the acts of the defendant and to draw conclusions therefrom which, to my mind, are entirely unjustified by the facts and circumstances surrounding the transaction. It reminds me somewhat of the famous case of *Bardell v. Pickwick*, wherein the attorney for the plaintiff, in quoting Mr. Pickwick's note to Mrs. Bardell, dwelt upon the words 'chops and tomato sauce,' and sought to draw the conclusion therefrom that Mr. Pickwick, being unduly fond of chops and tomato sauce, had therefore used these words as words of endearment to Mrs. Bardell, and that therefore he was justified in drawing the conclusion therefrom that there were, no doubt, offers of marriage from Mr. Pickwick to Mrs. Bardell, when in truth and in fact, as we all know, Mr. Pickwick had reference solely to what he wanted for supper. I don't mean to cast any reflections upon counsel. I merely give this as an illustration bearing upon the proposition that the conclusions sought to be drawn from the acts of the defendant surrounding this transaction are, to my mind, entirely unjustified. I don't see any indication or index of fraud in that circumstance. The fact that these deeds were placed upon record as they were and immediately after being executed, I see no indication of fraud in that. It is a matter of common knowledge that men receiving conveyances or property, immediately hasten to the register of deeds office and place their muniments of title on record. In fact a man who does otherwise does not show good business judgment. The fact that Dr. Clinton was present that night does not occur to me to be any indication of fraud on the part of Howard or his attorney; the fact that Paul Clinton was there that night does not occur to me to be any indication of fraud or undue influence on the part of Howard or his attorney; the fact that Paul Clinton and Ambrose Miller rode around in an automobile together does not occur to me to be any indication of fraud in this case; and it would be impossible for me to recite all the testimony from which I reach the conclusions I have reached in this case. There is so much of it, and very properly in cases of this kind it is very proper for attorneys to introduce every little circumstance that might bear out their contentions, because it is from all the little circumstances in the case that one finally makes up his mind; and I say this whole testimony brings me to the final impression that the deed, so far as O. R. Howard is concerned, was fair, square, open, and aboveboard, that a fair and reasonable consideration was paid for the property; that at the time Ambrose Miller knew what he was doing; that he realized the consequences of his acts; that his judgment was not so impaired that he didn't know he was selling his property; that his memory is now in such condition that he can relate and has related the circumstances of it; and the judgment of the court, therefore, is that the prayer of the petition be denied and judgment will be entered for the defendant."

The trial court also made special findings of fact on certain questions propounded by plaintiffs' counsel, which are substantially as follows: First. That the negotiations whereby the sale was finally consummated were had directly between O. R. Howard and Ambrose Miller, or between Howard's attorney, Mr. Abbott, and Ambrose Miller. Second. That the mind of Ambrose Miller had been impaired by reason of the use of strong drink. Third. That Ambrose Miller, in making the transfer to Howard, did not receive the true value of his land, but that Miller received "what appeared to men of prudence and skill and having knowledge of the reasonable market value of lands of the same kind and character as the lands in controversy to be the reasonable fair market value of the land at the time the transaction was entered into. By subsequent development and the subsequent increase in the price of oil from 55 cents a barrel to \$2.07 the true value of the land at the time is shown to be greatly in excess of the price paid by Howard." Fourth. There has been produced to the one-half interest in controversy the sum of \$38,303.48 in royalties up to this time, and the evidence does not show what it is still producing. Fifth. Mr. Abbott was the agent and attorney of Mr. Howard. Sixth. Ambrose Miller first suggested to Mr. Green, Mr. Howard's brother-in-law, that he desired to sell the property. Seventh. That Dr. and Paul Clinton were present when Mr. Howard paid the \$500 to Miller, and Dr. Clinton stated to Mr. Howard at the time that he was there for the purpose of seeing about getting part of the money that was coming to Paul under the deal. Eighth. Dr. Clinton secured a portion of the Ambrose Miller land, but the evidence in this case does not disclose what, if anything, he paid for it. Ninth. That Mr. Howard paid Paul Clinton, at the time of the first transaction with Ambrose Miller, the sum of \$2,500, which was in part consideration of Paul Clinton's releasing his option on the Ambrose Miller land, and that he paid him \$2,000 in pursuance of an agreement entered into at the time of the first transaction with Ambrose Miller, that, in consideration of Clinton's release of his option on the Ambrose Miller land, Howard would pay him the sum of \$2,500 immediately, and an additional \$2,000 if when the Bartlett well was drilled in on the land it had a production of more than 100 barrels. Tenth. The testimony does not disclose that Ambrose Miller knew of these payments until some time later.

[1] We have quoted thus fully from the findings of the trial court for the reason that the evidence is rather voluminous and it is impracticable to discuss it in detail in this opinion. This being an equitable action triable to the court, the court's findings of fact and the judgment will not be disturbed, un-

less, after weighing all the evidence in the record, we are of the opinion that such findings and judgment are clearly against the weight of the evidence. *Schock v. Fish*, 45 Okl. 12, 144 Pac. 584; *Crump v. Lanham*, 163 Pac. 43.

Counsel for plaintiffs in error, under the title "Brief of Authorities and Argument," contend that Paul Clinton was the agent of the defendant Howard in procuring the deed from Ambrose Miller to the undivided one-half interest in his allotment; that the said Paul Clinton was also the agent of Ambrose Miller, and received a commission from each party to the transaction; that his agency was well known to Abbott, Howard's attorney and agent; and that therefore Howard is charged with knowledge of the information obtained by Abbott. From this premise it is strenuously insisted that the proposition of law that where one acts as agent for both the seller and buyer the contract may be avoided by either principal governs this case. It is clear that this proposition of law is not applicable to this case. Although Paul Clinton received a commission from Ambrose Miller on account of the sale to Howard, the negotiations were carried on directly between Howard and the Millers, and the negotiations for clearing the title were carried on between Howard's attorney, Abbott, and the Millers. The evidence also shows that Howard did not know that Paul Clinton was to receive a commission from Miller until after the conclusion of the transactions, and Abbott did not learn of it until after the contract and deed were executed. Moreover, the trial court expressly found that Clinton was not the agent of Howard, and we think this finding is clearly in accord with the weight of the evidence. Mr. Howard, as stated by the court in his findings of fact, in order to clear his title and to secure an undivided one-half interest in the land free and clear of all liens, purchased the option which Mr. Abbott, his attorney, ascertained from an examination of the title Paul Clinton had on the land.

[2] During the trial of the cause the plaintiff offered in evidence a letter written by Dr. Fred S. Clinton to Dr. J. W. Duke, of Guthrie, Okl., and during his examination Dr. Duke refused to permit the letter to be read in evidence without first having secured Dr. Clinton's consent, and it is urged that the court erred in refusing to permit plaintiffs to introduce this letter in evidence. The record further shows that Dr. Duke later testified as to the substance of the letter and the attorney for plaintiff, during the trial, read a copy of the letter complained of in full, whereupon he asked Dr. Duke if that was the wording of the letter, and received an affirmative reply. From this it is evident that there is no merit in this assignment of error.

[3-5] Counsel for plaintiffs in error have

set out in their brief numerous quotations from the evidence, which they contend shows that the court erred in its special findings of fact Nos. 1, 4, 9, 14, 3-13, and 17, but after a careful examination of the evidence set out in the brief, together with the other evidence in the case, we are of the opinion that each and every finding of fact by the trial court is not only not clearly against the weight of the evidence, but, on the other hand, is amply supported by the evidence. The great preponderance of the evidence is that Ambrose Miller was not intoxicated at the time he executed the contract and deed to Mr. Howard. The most serious question in the case is whether by the long use of intoxicating liquors the mind of the plaintiff, Ambrose Miller, had become so diseased and weakened that he did not understand the nature of the transaction, and did not know what he was doing, and although the plaintiffs' evidence shows that Miller's mind had become slightly impaired by the excessive use of intoxicating liquors, there is abundant evidence in the record showing, as found by the trial court, that his mind had not become so impaired that he did not fully realize what he was doing and the consequences of his acts.

The authorities are not all in accord as to what degree of intoxication or mental weakness or debility caused from excessive use of intoxicants must be shown in order to rescind a contract made by a person so affected. Some of the cases hold that in order to set aside a contract the drunkenness must be so excessive as to utterly deprive the contracting person of his reason and understanding. Some of the decisions say that it must impair the mental faculties to such an extent as to render the party non compos mentis for the time being. Mr. Black, in his work on Rescission and Cancellation, § 278, says:

"The test approved by the great majority of the decisions is the same which is applied in other forms of mental derangement, namely, that the deed or contract will be voidable if the person, at the time of its execution, was so far under the influence of intoxicants as to be unable to understand the nature and consequences of his act and unable to bring to bear upon the business in hand any degree of intelligent choice and purpose." Wright v. Waller, 127 Ala. 557, 29 South. 57, 54 L. R. A. 440, and cases there cited; Coody v. Coody, 39 Okl. 719, 136 Pac. 754, L. R. A. 1915E, 465; Fish v. Deaver, 176 Pac. 251; Loman v. Paullin, 51 Okl. 294, 152 Pac. 73; Kuhlman v. Wieben, 129 Iowa, 188, 105 N. W. 445, 2 L. R. A. (N. S.) 866; Lee v. Ware, 1 Hill (S. C.) 313; Reynolds v. Dechaums, 24 Tex. 174, 78 Am. Dec. 101;

Johns v. Fritchey, 39 Md. 258; Taylor v. Purcell, 60 Ark. 603, 31 S. W. 567; Shackelton v. Sebree, 86 Ill. 616; Watson v. Doyle, 130 Ill. 415, 22 N. E. 613; Pickett v. Sutter, 5 Cal. 412; Wright v. Fisher, 65 Mich. 275, 32 N. W. 605, 8 Am. St. Rep. 886; Harbison v. Lemon, 3 Blackf. (Ind.) 51, 23 Am. Dec. 376; Belcher v. Belcher, 10 Yerg. (Tenn.) 121; Waldron v. Angleman, 71 N. J. Law, 166, 58 Atl. 568; Wells v. Houston, 23 Tex. Civ. App. 629, 57 S. W. 584.

Measured by the rule enunciated by Mr. Black and the authorities cited, the plaintiffs are not entitled to have the transaction set aside on account of any mental weakness of Ambrose Miller.

Viewed in the light of subsequent developments, it cannot be disputed that the consideration paid by Mr. Howard for the undivided one-half interest in the land was less than its true value, although equal to its speculative value, but the evidence clearly shows that the prospective value of the land was as well known to Miller as it was to Howard, and since there was no actual fraud practiced by Howard upon Miller in procuring the undivided one-half interest in the land, we would not be authorized to say that because subsequent development revealed the land to be of great value the transaction should be set aside, especially in view of the hazardous nature of the oil business. It is a well-known fact that land, on account of the discovery of oil on contiguous land, may appear to be of great value, and subsequent development prove it to be worthless, while on the other hand contiguous development may indicate the absence of oil or gas and subsequent development prove it to be there in great quantities. This court, in the case of Limerick v. Jefferson Life Ins. Co., 169 Pac. 1080, in an opinion by Mr. Justice Kane, stated the rule applicable to such transactions as follows:

"The general rule is that, whenever property of any kind depends for its value upon a contingency which may never occur, or developments which may never be made, opinion as to its value must necessarily be more or less of a speculative character, and no action will lie for its expression, however fallacious it may prove, or whatever the injury a reliance upon it may produce."

It does not appear, however, that Howard made any misrepresentations as to the value of the land.

The judgment denying plaintiffs' relief is therefore affirmed.

All the Justices concur, except HARRISON, J., absent, and PITCHFORD, J., not participating.

(76 Okl. 211)

OKLAHOMA CITY v. STEWART et al.
(No. 8736.)

(Supreme Court of Oklahoma. Oct. 21, 1919.)

*(Syllabus by the Court.)***1. APPEAL AND ERROR** \S 960(2)—**PLEADING** \S 367(6)—**RULING ON MOTION TO MAKE DEFINITE AND CERTAIN IN DISCRETION OF TRIAL COURT.**

A motion to make more definite and certain is addressed largely to the discretion of the court; and the ruling thereon will not be reversed, except for the abuse of such discretion, that results prejudicially to the complaining party.

2. MUNICIPAL CORPORATIONS \S 835—**LIABILITY FOR DIVERSION OF SURFACE WATERS BY CONSTRUCTION OF A SEWER.**

It is an actionable wrong for a municipal corporation to negligently construct or to maintain a sewer, whereby the surface waters are diverted from their natural course, and the surface and sewer waters permitted to collect in a body and be discharged on and across the property of a private individual, to his detriment.

3. APPEAL AND ERROR \S 1047(1)—**RULINGS ON EVIDENCE NOT CAUSE FOR REVERSAL UNLESS PREJUDICIAL.**

This court will not reverse a case for the reason the trial court admitted incompetent evidence, or rejected competent evidence, unless it appears that the same has prejudiced the rights of the parties thereto.

4. MUNICIPAL CORPORATIONS \S 845(7)—**INSTRUCTION AS TO DAMAGES FOR DIVERSION OF SURFACE WATERS.**

In an action against the city for constructing a sewer, alleging that it has caused the water to flow from its natural course, and failed to make any provision for taking care of said surface and sewerage waters, but permitted the same to flow down and across the premises of the plaintiffs, thereby injuring plaintiffs' buildings by breaking the walls and depositing large amounts of sand and debris on plaintiffs' lots, it was not error to instruct the jury that the measure of the damage was the cost to repair said building, and the difference in the value of the lots immediately before and immediately after the injury was sustained, if any, by reason of the deposit of sand, etc., upon said lots.

5. TRIAL \S 344—**VERDICT MAY NOT BE IMPEACHED BY TESTIMONY OF JURORS.**

Testimony of jurors will not be received for the purpose of impeaching the verdict, which they have solemnly made and publicly returned into court.

6. NEW TRIAL \S 140(3)—**EVIDENCE INSUFFICIENT TO SHOW QUOTIENT VERDICT.**

Evidence examined, and held insufficient to show that the verdict of the jury was a quotient verdict.

Error from District Court, Oklahoma County; John W. Hayson, Judge.

Action for damages by J. B. Stewart and another against the City of Oklahoma City, a municipal corporation. Verdict and judgment for plaintiffs, and defendant brings error. Affirmed.

B. D. Shear and A. T. Boys, both of Oklahoma City, and W. M. Howenstein, of Grandfield, for plaintiff in error.

D. K. Pope, of Oklahoma City, for defendants in error.

MCNEILL, J. This controversy arose by J. B. and Ora Stewart filing an action for damages against Oklahoma City, alleging in their petition that they were owners of certain lots, and that the city had constructed a storm sewer, which drained a large area of the city, and carried large quantities of water from its natural course, and emptied the same into Sixth and Everett streets, and across to Fifth street, and alleging that the city failed to make any provision for the disposition of the water coming from said sewer, but permitted the same to drain down and across plaintiffs' property, and damaged the walls of the plaintiffs' buildings, and deposited large quantities of sand and debris, on the lots of the plaintiffs, thereby damaging the plaintiffs in the sum of \$2,000. The defendant filed a general denial. On the trial of the case the jury returned a verdict for \$730, and judgment was rendered for said amount, and from said judgment the city has appealed. For convenience the parties will be referred to, the city as defendant, and the Stewarts as plaintiffs, the same position they occupied in the trial court.

[1] The first assignment of error is that the trial court erred in overruling the motion of defendant to require the plaintiffs to make their petition more definite and certain. While the defendant has set out the motion, and argued the same in its brief, it has cited no authority to support any contention made therein, nor to point out wherein it has been prejudiced thereby. This court in the case of *City of Chickasha v. Looney*, 36 Okl. 155, 128 Pac. 138, held as follows:

"A motion to make more definite and certain is addressed largely to the discretion of the court, and its ruling thereon will not be reversed, except for the abuse of such discretion, that results prejudicially to the complaining party."

From an examination of the motion, we do not think the court abused its discretion, nor has the defendant disclosed in what way it was prejudiced by the ruling thereon.

[2] The second assignment of error is that the court erred in overruling the demurrer of defendant to plaintiffs' petition. This is argued upon the theory that the mayor and city council are simply the agents of the state, exercising a governmental function,

and therefore not liable for the wrongful or negligent construction of a sewer. This court, in the case of *City of Chickasha v. Looney*, supra, laid down the following rule:

"It is actionable wrong for a municipal corporation to negligently construct or to maintain a sewer whereby surface waters are diverted and by artificial means collected in a body and discharged on growing crops of a private individual to his detriment."

The same rule is adopted in the case of *City of Ardmore v. Orr*, 35 Okl. 305, 129 Pac. 867, upon the question of what is a governmental function. See, also, *Oklahoma City v. Vetter*, 179 Pac. 475, and *Oklahoma City v. Hoke*, 182 Pac. 692.

[3] The third and fourth assignments of error are that the court erred in admitting irrelevant and incompetent evidence on behalf of the plaintiffs, and refusing to permit competent and material evidence to be introduced that was offered by the defendant. No authorities are cited to support this contention, nor does the plaintiff in error set out in what way it has been prejudiced by reason of said ruling of the court. From an examination of the record, we are satisfied that the court committed no error in permitting the evidence to be introduced, nor refusing the evidence offered by the defendant.

[4] The fifth assignment of error is that the court erred in giving instructions 5 to 15. The attorneys for plaintiff in error have set out all of these instructions in their brief, and argued some of the questions, but have cited no authority upholding their theory, except as to the giving of instruction 15. This instruction refers to the measure of damages the plaintiffs would be entitled to recover. This instruction is as follows:

"In determining what damages, if any, the plaintiffs have sustained to the store building, the damages would be the difference between the value of the store building at the time the injuries were sustained and the value of the same after the injuries were sustained; that is, the amount in money that it would take to repair the damages caused by the defendant, if any. And in determining the damages, if any, the plaintiffs have sustained to their real estate, the damages would be the difference between the value of said real estate that is the lots, at the time the injuries to said lots were sustained, if any, and the less value of such real estate immediately after such damages were sustained, if any, by reason of the deposit of sand, etc., upon said real estate."

It is the contention of the plaintiff in error that the true measure of damage to real property is the difference between the market value immediately before and immediately after the injury complained of. This is true, but this rule is subject to certain exceptions, as was stated in the case of *Armstrong v. May et al.*, 55 Okl. 539, 155 Pac. 238. The court stated as follows:

"The true measure of damages for injury to real estate is the difference in the market value of the same before and after the injury complained of; but this rule is subject to the exception that if that destroyed, although a part of the realty, has a value which can be ascertained without reference to the soil out of which it grows, or on which it stands, a recovery may be had for the value of the articles destroyed."

The plaintiffs in the case at bar were only permitted to recover, under the instructions, first, what it would cost to repair the building; second, the damage to the lots, which was the market value immediately before and immediately after the injury, said damage being caused by the sand and debris being deposited on said lots by the water flowing over their land. This instruction would permit the plaintiffs to recover only the actual damages suffered. Therefore we are unable to see how plaintiff in error could be prejudiced thereby, and there was no error in giving said instruction.

[5, 6] The plaintiff in error next complains for the reason that the verdict was a quotient verdict and should be set aside. Evidence was introduced before the trial court, and upon this question the trial court, after permitting jurors to testify, which evidence was incompetent under the rule adopted by this court in the cases of *Egan v. First National Bank of Tulsa*, 169 Pac. 621, *L. R. A. 1918C, 145*, and *Baumle v. Verde*, 50 Okl. 609, 150 Pac. 876, and after the court considered the incompetent testimony, the court found it insufficient to impeach the verdict. By eliminating the incompetent evidence, there would only be a suspicion left that the verdict was a quotient verdict, and that would be insufficient to set aside the finding of the trial court.

There being no material error in the record, the judgment of the trial court will be affirmed.

OWEN, C. J., and PITCHFORD, HIGGINS, and BAILEY, JJ., concur.

(78 Okl. 16)

(184 P.)

MCCRAY v. MILLER et al.
BLAND v. BLAND et al.
 (No. 10291.)

(Supreme Court of Oklahoma. Oct. 14, 1919.)

(Syllabus by the Court.)

1. MINES AND MINERALS ¶77—**TERMINATION BY LESSOR UNDER SURRENDER CLAUSE IN LEASE.**

The presence of a surrender clause in an oil and gas lease does not give the lessor the right to terminate the lease where the lessee has not breached its terms.

2. HOMESTEAD ¶32—**MEANING OF TERM.**

The word "homestead" has both a popular and a legal signification, and its popular and legal meaning is the same. In common acceptation of the term it means the residence of the family, the place where the home is, and it was employed in the common and popular apprehension of its meaning in that part of section 1, art. 12, of our Constitution pertaining to rural homesteads.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Homestead.]

3. HOMESTEAD ¶32—**FACT OF OWNERSHIP INSUFFICIENT IN ABSENCE OF RESIDENCE.**

Where the head of a family in this state is the owner of but one tract of land, not within any city, town, or village, consisting of not to exceed 160 acres, the fact of ownership alone does not constitute it a homestead. There can be no homestead right in land where the owner does not and never has resided thereon, and has made no preparation or evinced any intention of so doing.

4. CORPORATIONS ¶14(1)—**POWER TO ACQUIRE LEASE TO PROSPECT FOR OIL AND GAS.**

There is no inhibition in section 2, art. 22, of the Constitution, against a corporation acquiring a lease to prospect land for oil and gas.

Owen, C. J., and Kane, J., dissenting.

Error from District Court, Creek County; Mark L. Bozarth, Judge.

Action by W. S. McCray and Owen W. Bland against Ambrose Miller and others. Judgment against plaintiffs, and they bring error. Judgment against plaintiff Bland affirmed, and judgment against plaintiff McCray reversed and cause remanded, with directions to render judgment in accordance with opinion.

J. B. O'Meara, Chas. E. Bush, A. F. Moss, and Stuart, Cruce & Riddle, all of Tulsa, for plaintiffs in error.

W. H. Kornegay, of Vinita, and Owen Owen, W. V. Biddison, and V. H. Biddison, all of Tulsa, for defendants in error.

West, Sherman, Davidson & Moore, and Jesse H. Hill, John R. Ramsey and Horace H. Hagan, all of Tulsa, amici curiæ.

RAINEY, J. This is an equitable action for the cancellation of an oil and gas lease. At the request of all parties the trial court made separate findings of fact and conclusions of law, which are as follows:

"Findings of Fact by the Court.

"In this case the court finds the facts to be:

"(1) That the land involved in this suit and covered by the oil and gas lease in controversy is as described in the pleadings and consists of 160 acres of the allotment of one Owen W. Bland, who was a member of the Creek Tribe of Indians by blood.

"(2) The court finds that the said Owen W. Bland and the defendant Fern Bland were married on the 15th day of July, 1915, and that they separated on or about the 1st day of November, 1915, and never resided together as husband and wife thereafter.

"(3) That on the 24th day of November, 1915, the said Fern Bland filed suit for divorce and alimony, and that in said petition she alleged that said separation took place on the 1st day of November, 1915.

"(4) The court further finds that the said Owen W. Bland, as the owner of said land, never at any time during said marriage relation, or at any other time, designated or selected said land or any portion thereof as a homestead for himself and family, and never at any time had any intention of making said land the homestead of himself and family, nor did he have any intention at any time to improve the same for a homestead or live and reside thereon as such.

"(5) The court finds that on the 18th of November, 1915, the said Owen W. Bland executed and delivered an oil and gas lease covering the land involved, the same being the 160 acres allotment of Owen W. Bland, to one John H. Simmons, for a valuable consideration; that on the 16th day of November, 1916, said lease was, for a valuable consideration, assigned by the said John H. Simmons, the owner thereof, to the Ross Investment Company, an Oklahoma corporation organized for the purpose of producing oil and gas for commercial purposes; that said oil and gas lease was sold and transferred by the Ross Investment Company to W. S. McCray.

"(6) The court finds further that on January 11, 1916, and at all times thereafter, the plaintiff had constructive knowledge of the execution of a lease by the said Helen Fern Bland to Ambrose Miller covering the lands involved herein and of the intention of the said Helen Fern Bland to hold the plaintiff lessees to the performance of the covenants of development in the Simmons lease.

"(7) The court finds that on November 16, 1916, and after said Owen W. Bland had conveyed to Fern Bland the 80 acres in controversy, W. S. McCray paid to said Fern Bland \$80, the amount provided for in the lease covering the 80 acres described in the deed of conveyance, and the same was accepted by the said Fern Bland; that some time prior to November 15, 1917, the plaintiff made personal tender of \$80 due Fern Bland as rental on the 80 acres herein, which was refused by her; that on the 15th day of November, 1917, plaintiff W. S. McCray deposited in the First National

Bank of Tulsa, Okl., in pursuance to the provisions of said oil and gas lease, the sum of \$80, to the credit of the said Fern Bland.

"(8) The court finds that on or about the 1st of September, 1917, the plaintiff W. S. McCray started drilling operations for the purpose of drilling a well for oil and gas, upon the land in controversy; that the average time for drilling and completing a well in said vicinity was 30 days; that plaintiff encountered unforeseen trouble, and said well was not completed prior to the 18th day of November, 1917; that there was no oil being produced in paying quantities from said land on the 18th day of November, 1917, nor until some time thereafter; that said drilling operations and development were started and continued in good faith and due diligence by the plaintiff W. S. McCray, and continued until oil was found in paying quantities.

"(9) The court finds that at the time Owen W. Bland and Fern Bland were divorced that they freely and voluntarily entered into an alimony and property settlement and settlement of their property and marital rights; that by reason of such settlement Fern Bland received the 80 acres in controversy by a conveyance from Owen W. Bland, and that she released all interest in his property, both real and personal, and assumed the payment of one-half of a mortgage for \$3,500 against the entire allotment, and that said Owen W. Bland, in effecting said settlement and executing and delivering said deed of conveyance, acted freely and voluntarily and free from any duress, undue influence, menace, and compulsion.

"Conclusions of law.

"1. The court concludes as a matter of law that, from the facts found, the land in controversy and no part thereof was impressed with the homestead character and does not constitute the homestead of Owen W. Bland and Fern W. Bland, his wife.

"2. That the consideration for the Simmons lease was the covenants on the part of the lessee for the development of the property and the payment of prospective royalties, and that, by reason of the surrender clause contained therein, the said lease was subject to surrender by the lessee and therefore subject to be terminated at a given rental paying period, by the lessor, and constituted a contract for the one year only for which the rental was actually paid; that the first lease to Ambrose Miller by Helen Fern Bland, in January, 1916, constituted constructive notice to the lessees, by reason of its due recordation, of her intention to hold the lessees to the covenants of development; that, the rentals for the second year having been refused by defendant Fern Bland, the said plaintiff W. S. McCray failing to produce oil in paying quantities on said land on or before the 18th day of November, 1917, the lease thereby was terminated.

"3. The court further concludes that there is no sufficient allegation and no sufficient or competent proof offered or introduced of duress or menace; that there is no sufficient pleading or proof of threats of unlawful imprisonment and no sufficient allegation or proof of an effort to restore, as required by statute under proceedings to rescind.

"4. The court further concludes that the plaintiff Owen W. Bland has no right, title, or interest in and to the land involved in this ac-

tion, and that he and his privies should be forever enjoined from asserting any right, title, or interest in and to said land, and that the right, title, and interest of Helen Fern Bland in and to the fee-simple title should be decreed to be valid and perfect and quieted against the claim of all persons claiming by, through, or under the said Owen W. Bland.

"5. The court further concludes as a matter of law that the said Simmons lease is of no force or effect, and that the said lease to Ambrose Miller and his assignees is a valid and subsisting lease in the hands of the said Ambrose Miller and his assigns, and that the title thereto should be quieted against the claim of John H. Simmons and his assigns, and that the plaintiffs should be forever enjoined from asserting any right, title, or interest therein or thereto.

"6. A decree should be drawn in compliance with the findings of fact and conclusions of law herein made. Marz L. Bozarth,

"District Judge."

An examination of the record discloses that all the findings of fact are in accord with the weight of the evidence, which leaves for our consideration only questions of law.

[1] It will be noted that the court found in its second conclusion of law that by reason of the presence of the surrender clause the Simmons lease was subject to surrender by the lessee, and therefore was also subject to be terminated at any given rental paying period by the lessor, and counsel for defendant in error say in their brief that the instant case was decided in favor of their clients by the trial court upon the principles laid down in *Brown v. Wilson*, 58 Okl. 392, 160 Pac. 94, L. R. A. 1917B, 1184. That case has been overruled by this court in the case of *Rich v. Doneghey*, 177 Pac. 86, and we now hold in accord with the great weight of authority that the down payment, or cash consideration, in the lease supports all its covenants, and that an oil and gas lease is not subject to cancellation merely because of the presence of the surrender clause therein. *Northwestern Oil & Gas Co. v. Branine*, 175 Pac. 533; *Maud Oil & Gas Co. v. Bodkin*, 180 Pac. 959; *Magnolia Petroleum Co. v. Saylor*, 180 Pac. 861.

[2, 3] But in support of the judgment of the trial court it is urged that the judgment was right, for the reason that the proof shows Helen Fern Bland did not join in the lease executed by her husband, Owen W. Bland, to Simmons, and that when said lease was executed the said Owen W. Bland owned only 160 acres of land consisting of one parcel, and that section 1, art. 12, of the Constitution, impressed the said 160 acres covered by the Simmons lease with the homestead character, regardless of any intention or overt act on the part of the owner. The homestead provision of our Constitution is as follows:

"The homestead of any family in this state, not within any city, town, or village, shall consist of not more than one hundred and sixty

acres of land, which may be in one or more parcels, to be selected by the owner. The homestead within any city, town, or village, owned and occupied as a residence only, shall consist of not exceeding one acre of land, to be selected by the owner: Provided, that the same shall not exceed in value the sum of five thousand dollars, and in no event shall the homestead be reduced to less than one-quarter of an acre, without regard to value; and provided further, that in case said homestead is used for both residence and business purposes, the homestead interests therein shall not exceed in value the sum of five thousand dollars: Provided, that nothing in the laws of the United States, or any treaties with the Indian tribes in the state, shall deprive any Indian or other allottee of the benefit of the homestead and exemption laws of the state: And provided further, that any temporary renting of the homestead shall not change the character of the same when no other homestead has been acquired."

Section 3343, Rev. Laws of 1910, is almost identical with the above provision.

The finding of the trial court that Owen W. Bland, as the owner of said land, never at any time during the existence of the marriage relation with Helen Fern Bland designated or selected the tract of land in controversy, or any portion thereof, as a homestead for himself and family, and that he never at any time had any intention of making said land the homestead of himself and family, nor did he have at any time any intention to improve the same for a homestead or to live and reside thereon as such, being in accord with the weight of the evidence, the precise question presented for determination is: Does the fact of ownership alone by the head of a family in this state of but one tract of land (not within any city, town, or village) consisting of not to exceed 160 acres impress said land with the character of the homestead of the family within the meaning of section 1, art. 12, of the Constitution and section 3343, Rev. Laws of 1910, supra?

An examination of the opinions of this court in cases involving homesteads that have arisen subsequent to the adoption of the Constitution discloses that the court has assumed, in accordance with the almost universal rule, that premises of an owner do not constitute a homestead, unless they are actually occupied and used by him as a residence and home for himself and family, or unless there has been at least a bona fide intention to apply them to such use within a reasonable time. *Hyde v. Ishmael*, 42 Okl. 279, 143 Pac. 1044; *Laurie v. Crouch*, 41 Okl. 589, 139 Pac. 304; *American Surety Co. of New York v. Gibson et al.*, 166 Pac. 112; *Illinois Life Ins. Co. v. Rogers et al.*, 160 Pac. 56; *Davis v. First State Bank*, 166 Pac. 92; *Elliott v. Bond*, 176 Pac. 242; *McFarland v. Coyle*, 172 Pac. 87. And other cases also hold, in accordance with our Constitution and statute, that where land has once become impressed with the homestead character the homestead

right is not lost or impaired by any temporary renting of said homestead when no other homestead has been acquired. *German State Bank of Elk City v. Ptachek*, 169 Pac. 1094; *McCammon v. Jenkins et al.*, 44 Okl. 612, 145 Pac. 1163.

In most states occupancy of the premises, or a part thereof, is expressly required by the Constitution or statutes, both as to a rural homestead and an urban homestead. It will be noted that our Constitution expressly requires occupancy as to the urban homestead, but does not, in express terms, require occupancy as to the rural homestead. Then the question to be determined is: What signification should be given the word "homestead," as used in that part of our Constitutional provision pertaining to rural homesteads? The word has been many times defined, and it has been held that it has both a popular and a legal signification; that in its popular sense it signifies the place of the home, the residence of the family; and that it represents the dwelling house in which the family resides with the usual customary appurtenances including the outbuildings of every kind necessary or convenient for family use, and the lands used for the purposes. *In re Owings (D. C.)* 140 Fed. 739, 741; *Turner v. Turner*, 170 Ala. 465, 18 South. 210, 54 Am. St. Rep. 110; *Tumlinson v. Swinney*, 22 Ark. 400, 76 Am. Dec. 432; *Gregg v. Bostwick*, 33 Cal. 220, 91 Am. Dec. 637; *Ashton v. Ingle*, 20 Kan. 670, 27 Am. Rep. 197; *Linn County Bank v. Hopkins*, 47 Kan. 580, 28 Pac. 606, 27 Am. St. Rep. 309, and note; *Gallagher v. Smiley*, 28 Neb. 189, 44 N. W. 187, 26 Am. St. Rep. 319; *Phelps v. Rooney*, 9 Wis. 70, 76 Am. Dec. 244; *White v. Spencer*, 217 Mo. 242, 117 S. W. 20, 25, 129 Am. St. Rep. 547, 16 Ann. Cas. 598; *Elliott v. Thomas*, 161 Mo. App. 441, 143 S. W. 563, 564; *Palmer v. Sawyer*, 74 Neb. 108, 103 N. W. 1088, 1090, 12 Ann. Cas. 715; *Weatherington v. Smith*, 77 Neb. 369, 112 N. W. 566; *Cushman v. Davis*, 79 Vt. 111, 64 Atl. 456; *Matthews v. Jeacle*, 61 Fla. 686, 55 South. 865, 867; *Flowers v. United States Fidelity & Guaranty Co.*, 89 Ark. 506, 117 S. W. 547, 548; *Merrill v. Harris*, 65 Ark. 355, 46 S. W. 538, 41 L. R. A. 714, 67 Am. St. Rep. 929; *Calmer v. Calmer*, 15 N. D. 120, 106 N. W. 684, 686; *Moore v. Smead*, 89 Wis. 558, 62 N. W. 426; *Voelz v. Voelz*, 88 Wis. 461, 60 N. W. 707, 708; *Upman v. Second Ward Bank*, 15 Wis. 449; *Tillotson v. Millard*, 7 Minn. 513, 518 (Gil. 419) 82 Am. Dec. 112; *Morris v. Brown*, 5 Kan. App. 102, 48 Pac. 750. Webster's New International Dictionary defines it as:

"The land and buildings thereon occupied by the owner as a home for himself and his family, if any, and more or less protected by law from the claims of his creditors."

The Supreme Court of New Hampshire, in the early case of *Holtt v. Webb*, 36 N. H. 166, thus defines the word:

"The home place; the place where the house is. * * * It is the home, the house, and the adjoining land, where the head of the family dwells; the home farm."

And this definition is adopted by Bouvier's Law Dictionary.

In *White v. Spencer*, supra, it is said that the term "homestead" means that tract of land which, being within the statutory limitations as to quantity and value, is occupied and claimed as a homestead. The Arkansas courts say that a homestead necessarily includes the idea of a house for a residence, or mansion house, and includes that part of a man's property which is about or contiguous to the dwelling house; that this may be a mansion, cabin, or a tent, since either is sufficient to bring the land under the protection of the homestead law. *Flowers v. United States Fidelity & Guaranty Co.*, supra; *Merrill v. Harris*, supra; *Williams v. Dorris*, 31 Ark. 466. Similar language is used by many of the courts, and it has been held that it is not necessary that the homestead be in a compact body, but it may be intersected by highways, streets, or alleys, and that it is not limited in extent or quantity, unless made so by law. Whatever is impressed with the homestead character, being either necessary or convenient as the place of residence, constitutes the homestead, subject to the constitutional and statutory limits as to quantity and value.

In *Upman v. Second Ward Bank*, supra, the court says:

"The word 'homestead' itself means a place of residence, which again implies occupancy, possession."

Our constitutional and statutory provisions differ from most of the states, in that as to the rural homestead, as above stated, it does not contain express words requiring occupancy or intended occupancy, but there are several Constitutions and statutes which are similar to ours in this respect. Section 51, article 16, of the Constitution of Texas (1876) is as follows:

"The homestead not in a town or city shall consist of not more than two hundred acres of land, which may be in one or more parcels, with the improvements thereon; the homestead in a city, town or village, shall consist of lot or lots, not to exceed in value five thousand dollars at the time of their designation as the homestead, without reference to the value of any improvements thereon; provided, that the same shall be used for the purpose of a home, or as a place to exercise the calling or business of the head of a family; provided, also, that any temporary renting of the homestead shall not change the character of the same, when no other homestead has been acquired."

In a note to section 2, art. 12, in *Williams' Constitution*, it is said:

"All this section is taken from Texas (1876) 16, 50, except the clause providing for the mort-

gaging of the homestead, which is patterned after Kan. (1859) 15, 9. * * *"

In all probability section 1, art. 12, was likewise patterned after section 51, art. 16, of the Texas Constitution. This section has been many times construed by the Supreme Court of Texas, and it has been uniformly held that there can be no rural homestead in that state "unless the head of the family resides, or intends to reside, on some part of the land claimed." *Exall v. Security Mtg. & Trust Co.*, 15 Tex. Civ. App. 643, 39 S. W. 959; *Wilkerson v. Jones* (Tex. Civ. App.) 40 S. W. 1046; *Steves v. Smith*, 49 Tex. Civ. App. 126, 107 S. W. 141; *Johnson v. Burton*, 39 Tex. Civ. App. 249, 87 S. W. 181; *Murphy v. Lewis* (Tex. Civ. App.) 198 S. W. 1059; *Stanley v. Greenwood*, 24 Tex. 224, 76 Am. Dec. 106; *Franklin v. Coffee*, 18 Tex. 413, 70 Am. Dec. 292; *Houston & G. N. R. R. Co. v. Winter*, 44 Tex. 597. In the last-named case, in construing the constitutional provision of 1869, the court said:

"The Constitution exempts from forced sale 'the homestead of a family not to exceed two hundred acres of land.' Const. 1869, § 15, art. 11.

"It was first introduced in the Constitution of 1845, and has been reinserted in every Constitution adopted since that time.

"If the homestead is more than 200 acres of land, then only that quantity of it is secured; and, if it be that or less, then all of it is secured. It is not defined in any of the Constitutions, nor are its qualities, attributes, or shape expressed further than in the use of the words 'homestead of a family not to exceed two hundred acres.' That would imply that it was thought to be something that could be known without any further description. It is a definite, ostensible object, to the extent of being the place, which is made the home of the family. It has had some legislative interpretation. The act of 1839, in which it originated, described it as 'fifty acres of land, or one town lot, including his or her homestead and improvements, not exceeding five hundred dollars in value.' Hart. Dig. art. 1270. So, too, the act of 1866 describes it as 'two hundred acres of land, including his or her homestead.' Paschal's Dig. art. 6831. 'Homestead' is defined to be 'the place of the house,' 'the mansion house, with adjoining land.' Worcester's Dic.; Bouvier's Law Dic.

"It has received judicial interpretation in many respects. 'A man's homestead must be his place of residence; the place where he lives.' *Philio v. Smalley*, 23 Tex. 502. In the case of *Franklin v. Coffee*, Chief Justice Wheeler, in describing what is not a homestead, says: 'In this case there was no house or home upon the land. He had made no preparation or done no acts which would evince a fixed intention and purpose to select and appropriate the place as a home.' 18 Tex. 417 [70 Am. Dec. 292]. On the contrary, in the case of *Stone v. Darnell*, such acts were done as were said to indicate the intention to appropriate the place as a home, and although not a home literally when levied on but being such at the sale, it was exempt as a homestead. 20 Tex. 15. The use made of

the land may determine its character as part of a homestead or not, as well as its proximity to or remoteness from the residence or mansion house. *Pryor v. Stone*, 19 Tex. 373, 374 [70 Am. Dec. 341]; *Methery v. Walker*, 17 Tex. 594. Such use is an object of observation, which indicates and is notice of appropriation for homestead purposes."

The Constitution of the state of Florida (1885) art. 10, § 1, contained this provision:

"A homestead to the extent of 160 acres of land, or the half of one acre within the limits of any incorporated city or town, owned by the head of a family residing in this state, together with one thousand dollars' worth of personal property, and the improvements on the real estate, shall be exempt from forced sale under process of any court, and the real estate shall not be alienable without the joint consent of husband and wife when that relation exists."

It will be noted that this provision does not, in express terms, require occupancy; but in *Oliver v. Snowden*, 18 Fla. 823, 43 Am. Rep. 338, the court, after thoroughly discussing the meaning of the word "homestead," said:

"Our Constitution, speaking of a homestead and failing to define the word, leaves its definition to the ordinary rule of construction, which is that it is to be taken and applied according to the common and popular apprehension of its meaning, which is clearly given in the foregoing citations. It is scarcely possible that it can be misunderstood."

See, also, *Murphy v. Farquhar*, 39 Fla. 350, 22 South. 681, and *Matthews v. Jeacie*, 61 Fla. 686, 55 South. 865.

The homestead statutes of Alabama, prior to 1886, contained these words: "Owned and occupied by any resident of this state." This phrase was omitted by the codifiers in 1886, and it was contended in *Turner v. Turner*, 107 Ala. 465, 18 South. 210, 54 Am. St. Rep. 110, that, because of their omission, occupancy was dispensed with. The court held to the contrary, however, saying:

"Homestead ex vi termini means the family seat or mansion, and the change of verbiage in our statute by the codifiers, in compiling the Code of 1886, whereby they omitted from section 2507 the phrase 'owned and occupied by any resident of this state,' was not intended to affect the well-settled rule recognizing actual occupancy, except in the single case stated, as an essential condition of a valid homestead exemption."

In *Melsner v. Hill et al.*, 92 Neb. 435, 138 N. W. 583, the court, in the first paragraph of the syllabus, held:

"Our statute uses the term 'homestead' in its commonly accepted meaning—the house and land where the family dwells."

We deem it unnecessary to elaborate, if indeed it is possible, upon the meaning of the word "homestead," for we agree with the

184 P.—50

authorities which hold that it has both a popular and a legal signification; that its popular and legal meaning is the same, as hereinbefore defined; and that the word "homestead," as employed in section 1, art. 12, of our Constitution, is to be taken and applied according to the common and popular understanding of its meaning, which is in accordance with the ordinary rule of construction. Therefore it is our opinion that where, as in this case, the head of a family in this state is the owner of but one tract of land (not within the limits of any city, town, or village) consisting of not more than 160 acres, the fact of ownership alone is not sufficient to impress the land with the homestead character where said owner does not reside thereon, never has, and has made no preparation or evinced any intention of so doing. This conclusion is supported, we think, by the language of the last proviso of the section, to wit:

"That any temporary renting of the homestead shall not change the character of the same where no other homestead has been acquired."

In *Hedgpath v. Hudson*, 160 Pac. 604, it was held, and we think correctly, that this proviso obviously referred to both rural and urban homesteads. The language of this proviso clearly imports that the land claimed as a homestead must have been impressed with the homestead character, and that when so impressed any temporary renting thereof will not change such character when no other homestead has been acquired.

[4] Lastly, it is contended that under section 2, art. 32, of the Constitution, the Simmons lease is invalid. This provision of the Constitution prohibits the creation or licensing in this state of any corporation "for the purpose of buying, acquiring, trading, or dealing in real estate other than real estate located in incorporated cities and towns and as additions thereto," and further provides that no corporation doing business in this state shall "buy, acquire, trade, or deal in real estate for any purpose except such as may be located in such towns and cities and as additions to such towns and cities, and further except such as shall be necessary and proper for carrying on the business for which it was chartered or licensed; nor shall any corporation be created or licensed to do business in this state for the purpose of acting as agent in buying and selling land."

We do not think this section is susceptible of the construction that a corporation is prohibited from acquiring leases to prospect land for oil and gas, and since no authority is cited which, in our opinion, supports the contention, it cannot be sustained.

It follows that the judgment decreeing that Owen W. Bland had no right, title, or interest in and to the land involved in this action was correct and is affirmed; but that

part of the judgment canceling the lease of the plaintiff in error W. S. McCray was erroneous, and this cause is therefore reversed and remanded, with directions to the trial court to set aside that part of the judgment rendered against the said W. S. McCray and to render judgment in accordance with the views herein expressed.

HARRISON, PITCHFORD, JOHNSON, McNEILL, HIGGINS, and BAILEY, JJ., concur.

OWEN, C. J., and KANE, J., dissent.

(16 Okl. Cr. 718)

AUTRY v. STATE. (No. A-3189.)

(Criminal Court of Appeals of Oklahoma. Nov. 8, 1919.)

(Syllabus by Editorial Staff.)

CRIMINAL LAW §1159(3) — **CONVICTION ON CONFLICTING EVIDENCE AFFIRMED.**

Where the state's evidence in a prosecution for assault is sufficient to support a verdict of conviction and a judgment thereon, it was for the jury to decide the conflict in the evidence, and the judgment of conviction will be affirmed.

Appeal from District Court, Jefferson County; Cham Jones, Judge.

H. G. Autry was convicted of assault, and he appeals. Affirmed.

Bridges & Vertrees, of Waurika, for plaintiff in error.

S. P. Freeling, Atty. Gen., and W. O. Hall, Asst. Atty. Gen., for the State.

PER CURIAM. This judgment of conviction is sought to be reversed upon one ground alone, to wit, that the verdict is not sustained by sufficient evidence.

The defendant was indicted in the district court of Jefferson county, charged with the crime of assaulting one Lum Stroud with a shotgun with intent to kill him. The cause was tried to a jury, and a verdict returned, which by its terms finds the defendant guilty of a simple assault, and fixes his punishment at 15 days' imprisonment in the county jail.

The evidence on the part of the state shows that the defendant assaulted one Lum Stroud, and attempted to shoot him with a shotgun, and that the defendant would have done so had not defendant's wife and son interfered and prevented the defendant from inflicting any wounds upon the prosecuting witness. The evidence for the defense was directly in conflict with that for the state.

Where the evidence is conflicting, this court will not disturb a judgment of conviction unless the evidence for the prosecution, if believed, is entirely insufficient to support the judgment. In this case, the

state's evidence is sufficient to support the verdict and judgment, and it was for the jury to decide the conflict in the evidence. Having done so adversely to the defendant, the judgment of conviction must stand, and it is hereby affirmed.

(16 Okl. Cr. 485)

STATE v. WELCH. (No. A-2055.)

(Criminal Court of Appeals of Oklahoma. Nov. 4, 1919.)

(Syllabus by the Court.)

1. MINES AND MINERALS §73—**OIL AND GAS LEASE FOR A TERM AN INCORPOREAL HEREDITAMENT.**

A lease, granting oil and gas mining privileges for a term of years, is only a grant of an incorporeal hereditament, and such a lease grants no corporeal interest or hereditament.

2. CHAMPERTY AND MAINTENANCE §7(3)—**ADVERSE HOLDING NOT RENDERING OIL AND GAS LEASE FOR A TERM CHAMPERTEOUS.**

The execution of a lease, granting oil and gas mining privileges, for a term of years, on lands held adversely, by a third person or persons, is not a violation of section 2280, Rev. Laws 1910, defining the offense of champerty.

Appeal from County Court, Nowata County; Wm. F. Gillully, Judge.

Information against Frank Welch for champerty, and from a judgment sustaining a demurrer thereto, the State appeals. Affirmed.

J. E. Bennett, Co. Atty., and F. A. Calvert, Asst. Co. Atty., both of Oklahoma City, for the State.

C. Caldwell, of Vinita, for defendant in error.

DOYLE, P. J. This is an appeal by the state from a judgment of the county court of Nowata county, sustaining a demurrer to an information filed in said court, of which the charging part is as follows:

"That said Frank Welch did, in the said county and state, on the said date, unlawfully and maliciously sell, convey, and grant to C. Caldwell a pretended right or title to lands and tenements located and situated in Nowata county, state of Oklahoma, as follows: The northeast quarter of section 31, township 26 north, range 15 east, at a time and when neither the said Frank Welch, who made the said sale and grant, nor any other person by whom the said Frank Welch claims or claimed, have been in possession of the said lands, or of the reversion and remainder thereof, or have taken the rents and profits thereof for the space of one year prior to such grant, conveyance, or sale, and at such a time when G. W. Ellis, W. I. Ellis, J. A. Ellis, and Paul Lovell, either one or both, were in possession of the said lands, and had been in such possession continuously for the space of

one year and prior thereto, before the said grant of the said pretended right or title by the said Frank Welch to said C. Caldwell, a copy of which grant is hereto attached, marked 'Exhibit A,' and made a part of this information, contrary to," etc.

The demurrer to the information was on the ground that "the facts stated do not constitute a public offense."

It is the contention of counsel for the state that the execution of the oil and gas lease by the defendant is a violation of section 2260, Rev. Laws.

The defendant in error contends that it is not.

[1] The lease made a part of the information in its terms is the form in common use. It recites that it was given in consideration of \$1 paid to the lessor, and the covenant and agreements of the lessee therein set forth. It contains the usual words of grant and demise; runs to the lessee, Caldwell, his successors and assigns; describes the purpose for which it was given as that of mining and operating for oil and gas, laying of pipe lines, building tanks, and structures thereon to produce and take care of said products when produced, and the term which it was to endure is five years from its date, and as long thereafter as oil and gas or either of them is produced from the premises. The lessee covenants and agrees therein to deliver to the lessor, free of cost, in the pipe lines to which the wells may be connected, the equal one-eighth part of all oil produced and saved from the premises, and to pay \$150 each year in advance for the gas from each well. There is also a surrender clause to the effect that upon the payment of \$1, at any time, the lessee or his assigns shall have the right to surrender this lease for cancellation, after which all payments and liabilities thereafter to accrue under and by virtue of its terms shall cease and determine. Section 2260, Rev. Laws, is as follows:

"Any person who buys or sells, or in any manner procures, or makes or takes any promise or covenant to convey any pretended-right or title to any lands or tenements, unless the grantor thereof, or the person making such promise or covenant has been in possession, or he and those by whom he claims have been in possession of the same, or of the reversion and remainder thereof, or have taken the rents and profits thereof for the space of one year before such grant, conveyance, sale, promise or covenant made, is guilty of a misdemeanor."

It is settled by the decisions of our Supreme Court that a lessee of an oil and gas and mining lease acquires no title to the land, nor oil or gas while in the ground by reason of his lease.

In the case of *Kolachny v. Galbreath*, 26 Okl. 772, 110 Pac. 902, 38 L. R. A. (N. S.) 451, it is held that:

"Oil and gas, while in the earth, unlike solid minerals, are not the subject of ownership distinct from the soil, and the grant of the oil and gas, therefore, is a grant, not of the oil that is in the ground, but of such a part as the grantee may find, and passes nothing that can be the subject of an ejectment or other real action."

In the opinion it is said:

"The lease relied upon by the plaintiff does not vest in him the title to the oil and gas in said land, and is not a grant of any estate therein, but is simply a grant of a right to prospect for oil and gas, no title vesting until such substances are reduced to possession by extracting same from the earth—an incorporeal hereditament. *Payne et al. v. Neuval et al.*, 155 Cal. 46, 99 Pac. 476; *Richlands Oil Co. v. Morriss*, 108 Va. 288, 61 S. E. 762; *Rawlings et al. v. Armel et al.*, 70 Kan. 778, 79 Pac. 683; *Dickey v. Coffeyville Vitrified Brick Tile Co.*, 69 Kan. 106, 76 Pac. 398; *Emery v. League et al.*, 31 Tex. Civ. App. 474, 72 S. W. 603; *Detler et al. v. Holland*, 57 Ohio St. 492, 49 N. E. 690, 40 L. R. A. 266; *Wagner et al. v. Mallery et al.*, 169 N. Y. 501, 62 N. E. 584; *Kelly v. Keys et al.*, 213 Pa. 295, 72 Atl. 911, 110 Am. St. Rep. 547; *Toothman v. Courtney*, 62 W. Va. 169, 58 S. E. 915; *Carter v. County Court*, 45 W. Va. 906, 32 S. E. 216, 43 L. R. A. 725; *Thornton on Oil & Gas*, §§ 51-55."

In the case of *Duff v. Keaton*, 33 Okl. 92, 124 Pac. 291, 42 L. R. A. (N. S.) 472, it is held that:

"A lease granting oil and gas mining privileges for a term of years is a 'chattel real.' (a) A chattel real is 'personalty.'"

In the opinion it is said:

"We reach the conclusion that a lease for oil and gas or mining purposes is not a 'conveyance of real estate' within the purview of section 5314, supra."

[2] These decisions of our Supreme Court defining the nature of property in natural gas and oil contained in the earth, and the legal effect of instruments of the character here involved, and the holding that such a lease is only a grant of an incorporeal hereditament, and that such a lease grants no corporeal interest or hereditament, is decisive of the question here presented. In our opinion the legislative intent in enacting the statutes defining champerty (sections 2259, 2260, and 2261, Rev. Laws) was to prohibit the transfer of the fee or an interest in the fee under the conditions therein stated.

It follows that the execution of an oil and gas lease under the facts as alleged in the information is not a violation of section 2260, Rev. Laws. The demurrer to the information was therefore properly sustained. For the reasons stated, the judgment sustaining the demurrer is affirmed.

ARMSTRONG and MATSON, JJ., concur.

STATE ex rel. LOUNDAGIN v. DISTRICT COURT et al. (No. 4359.)

(Supreme Court of Montana. Feb. 13, 1919.)

Original application for writ of supervisory control against the District Court of Chouteau County and John W. Tattan, Judge thereof. On return day, February 10, 1919, respondents did not appear, relatrix presented her proof, and the cause was submitted for judgment and decision.

H. S. McGinley, of Ft. Benton, for relatrix.

PER CURIAM. This cause coming on for judgment and decision, it is now here ordered and adjudged by this court that a writ of supervisory control issue as prayed for, directing the district court of Chouteau county, and Hon. John W. Tattan, judge thereof, to set aside the order made on Friday, January 10, 1919, revoking the order made on January 8, 1919, transferring the cause entitled "Hazel Loundagin v. Herbert Buhl et al." to the district court of Cascade county for trial, and to enter an order retransferring said cause to Cascade county for trial. Costs herein to be taxed against respondents.

STATE ex rel. MILLER v. DISTRICT COURT et al. (No. 4292.)

(Supreme Court of Montana. Oct. 11, 1918.)

Original application for writ of review to the District Court of Yellowstone County; A. C. Spencer, Judge.

B. L. Price, of Laurel, and Dillavou & Moore, of Billings, for relator.

PER CURIAM. Application for writ of review herein was this day, after due consideration by the court, denied.

STATE ex rel. SATRANG v. DISTRICT COURT et al. (No. 4355.)

(Supreme Court of Montana. Jan. 24, 1919.)

Original application for writ of prohibition against the District Court in and for the County of Fergus, and Roy E. Ayers, a Judge thereof, to prohibit respondents from proceeding further in the cause entitled "Mary Satrang v. Helen L. Warr et al.," pending in said district court.

John A. Coleman, of Lewistown, for relatrix.

PER CURIAM. The petition of relatrix herein for a writ of prohibition against the

above-named respondents, presented to the court this day, is after due consideration denied.

STATE ex rel. STEWART et al. v. MARTIEN. (No. 4382.)

(Supreme Court of Montana. March 20, 1919.)

Original application by relators, as members of the State Board of Equalization of the State of Montana, for writ of mandate to compel the respondent, as Assessor of the County of Lewis and Clark, in listing, valuing, and assessing property for taxation in said county for the year 1919, to comply with the provisions of House Bill 30, passed by the Sixteenth Legislative Assembly and approved on February 28, 1919, and with the instructions and directions of the State Board of Equalization.

S. C. Ford, Atty. Gen., for relators.

PER CURIAM. The application of relators for writ of mandate herein was this day, after due consideration, denied.

TORRISON v. CASTLE et al. (No. 4299.)

(Supreme Court of Montana. Nov. 9, 1918.)

Appeal from District Court, Teton County.

Kotz & Molumby, of Great Falls, for appellant.

Norris & Hurd, of Great Falls, for respondents.

PER CURIAM. Respondents' motion to dismiss the appeal in the above-entitled cause is hereby granted, and the appeal accordingly dismissed.

In re WELLS' ESTATE. (No. 4155.)

(Supreme Court of Montana. May 31, 1918.)

Appeal from District Court, Carbon County; A. C. Spencer, Judge.

W. L. Walls, of Cheyenne, Wyo., E. E. Enterline, of Billings, and R. G. Wigenhorn, of Red Lodge, for appellant.

H. C. Crippen and Goddard & Clark, all of Billings, for respondent.

PER CURIAM. Upon motion of the appellant herein, the appeal in the above-entitled cause is this day dismissed.

WILLIAMS v. GREAT NORTHERN RY. CO. (No. 4385.)

(Supreme Court of Montana. March 24, 1919.)

Veazey & Veazey and W. L. Chitt, all of Great Falls, for appellant.

George D. Toole, of Butte, for respondent.

PER CURIAM. Pursuant to stipulation of the parties, the appeal herein is this day dismissed.**DOBBINS v. STATE** (No. A-3483.)

(Criminal Court of Appeals of Oklahoma. Nov. 29, 1919.)

Appeal from County Court, Cotton County; J. C. Nerman, Judge.

Walter Dobbins was convicted of a violation of the prohibitory liquor law, and he appeals. Appeal dismissed, and cause remanded, with direction.

J. A. Diffendaffer, of Lawton, for plaintiff in error.

PER CURIAM. Plaintiff in error, Walter Dobbins, was convicted in the county court of Cotton county on a charge of unlawfully conveying intoxicating liquors, and in accordance with the verdict of the jury was sentenced to be confined for 30 days in the county jail and to pay a fine of \$125 and the costs.

From the judgment he appealed by filing in this court on November 14, 1918, a petition in error with case-made. On this day he, by his counsel of record, has filed a motion to dismiss his appeal. The motion to dismiss the appeal is sustained, and the cause remanded to the trial court, with direction to cause its judgment and sentence to be carried into execution.

Mandate forthwith.

MENDENHALL v. CARTER, Sheriff. (No. A-3356.)

(Criminal Court of Appeals of Oklahoma. Dec. 8, 1919.)

Petition by L. M. Mendenhall for writ of habeas corpus to be admitted to bail. Bail denied, and writ discharged.

Tom W. Neal and White & Reid, all of Poteau, for petitioner.

S. P. Freeling, Atty. Gen., R. McMillan, Asst. Atty. Gen., Philos S. Jones, of Wil-

burton, and E. L. Taylor, of Poteau, for respondent.

PER CURIAM. This is an application of L. M. Mendenhall for writ of habeas corpus to be admitted to bail, in which the petitioner alleges that he is confined in the county jail of Le Flore county on a commitment issued out of the court of P. H. Green, justice of the peace, commanding the sheriff of Le Flore county, the respondent, to hold the petitioner without bail upon the charge of murdering one Alex Nowlan on the 30th day of March, 1918, in the town of Howe, Le Flore County, Okl.

As grounds for the issuance of the writ, the petitioner alleges that the proof of his guilt of the crime of murder is not evident, nor the presumption thereof great. The cause was submitted on the 14th day of May, 1918, on a transcript of the evidence taken at the examining trial of the petitioner, and in addition thereto certain affidavits and the answer of the respondent, admitting that he held said petitioner pursuant to such commitment, and further alleging that the said petitioner had been denied bail by Hon. W. H. Brown, district judge of the Fifth judicial district of the state of Oklahoma.

After a consideration of the evidence and the arguments of counsel on behalf of petitioner and respondent, it was the opinion of the court that bail should be denied and the writ discharged; and it was so ordered.

PALLIS v. KUSUMI et ux. (No. 15381.)

(Supreme Court of Washington. Dec. 2, 1919.)

Department 1.

Appeal from Superior Court, King County; John S. Jurey, Judge.

Action between Chris Pallis and J. T. Kusumi and wife. From a judgment for the former, the latter appeal. Affirmed.

J. H. Templeton, of Seattle, for appellants. Ryan & Desmond, of Seattle, for respondent.

PER CURIAM. The only point urged as entitling the appellant to a new trial is that respondent's counsel overstepped the bounds of propriety in asking certain questions of the appellants while on the witness stand. The record, in our judgment, shows nothing prejudicial to the appellants' interest to have occurred, and whatever irregularities there may have been were corrected by prompt and adequate instructions by the court to the jury.

Judgment affirmed.

(17 Okl. Cr. 155)

CLOWERS v. STATE. (No. A-3281.)(Criminal Court of Appeals of Oklahoma.
Nov. 1, 1919.)*(Syllabus by the Court.)***1. RAPE §52(1) — EVIDENCE TO SUSTAIN CONVICTION OF STATUTORY RAPE.**

In a prosecution for statutory rape, the evidence considered and conviction affirmed.

2. CRIMINAL LAW §444 — PREDICATE SUFFICIENT FOR ADMISSION OF LETTER.

In a trial for statutory rape, a note or letter was properly admitted, where the prosecutrix testified that she received the same from the defendant, and there was proof that the same was in his handwriting.

3. RAPE §4 — IMPROPER ACTS OF PROSECUTOR.

Proof that the female was guilty of improper relations with other men is no defense to the charge of statutory rape.

Appeal from District Court, Hughes County; Geo. C. Crump, Judge.

C. F. Clowers was convicted of statutory rape, and he appeals. Affirmed.

J. L. Skinner, of Holdenville, and Prulett, Sniggs & Patterson, of Oklahoma City, for plaintiff in error.

S. P. Freeling, Atty. Gen., and W. C. Hall, Asst. Atty. Gen., for the State.

DOYLE, P. J. C. F. Clowers was charged, in an information filed in the district court of Okfuskee county, with the crime of statutory rape, alleged to have been committed upon Alva Strain, a child under 16 years of age. On his application a change of venue was granted, and the case was duly transferred to Hughes county, where upon his trial he was convicted and his punishment fixed at imprisonment in the penitentiary for a term of 5 years. From the judgment rendered on the verdict, he appeals. The alleged errors will be considered in the order presented.

[1] First. It is contended that the evidence is insufficient to sustain the verdict and judgment of conviction. The record shows that at the time charged the defendant was principal of the school at Beardon; that he was a married man, about 29 years of age; that the prosecutrix attended said school, and at the time charged—March, 1917—she was under the age of 16 years, her fifteenth birthday being in February, 1917. The prosecutrix testified in substance as follows:

That she had been attending school at Beardon since she was old enough to go to school, and during the years 1916 and 1917 the defendant was principal or superintendent, and there were four other teachers; that before the close of the term in 1916 the defendant began taking liberties with her, such as hugging and kissing her, and then

soliciting her to permit him to have sexual intercourse with her, and she consented; that he arranged to have her meet him out in her father's orchard; that his first and second attempt to accomplish an act of sexual intercourse failed, because it hurt her; that the second week after school started in the fall of 1916 she met him by appointment in her father's barn, and that was the first time he accomplished an act of sexual intercourse; that after that he frequently had sexual intercourse with her in a closet in the schoolhouse and also in the lodge room on the third floor of the schoolhouse, and during that term of school this occurred sometimes every day, and then three or four times a week; that he always used "rubbers," and said he used them to prevent babies from coming; that R. A. Johnston, Will Hendrix, and Opal Frogge told her that they had been watching and knew of her relations with Prof. Clowers, and that it had better be stopped; that unless she would give them the same privilege that she had given him they would tell it; that she refused to do that; that she informed defendant as to what they had said, and he said he ought not to have been so careless, but could not help it now; that they could not prove anything, and, if they did, he could sue them for slander. She also identified an unsigned note as one that she had received from him. No man had ever had sexual intercourse with her, except the defendant. Will Hendrix came into the closet one time after Prof. Clowers had left, and asked her what she was doing in there, and said he came in for a baseball bat or something.

R. A. Johnston testified that he was 17 years of age; that he attended the Beardon school during the years of 1916 and 1917, and was in the same grade as Alva Strain; that some time between the 24th of March and the 1st of April, 1917, he, with Opal Frogge and Bill Hendrix, went into a closet under the stair steps of the school building and found a pallet, and he picked up a comb that he knew belonged to the defendant, so they watched and a day or so later found the door of the closet locked, and they went outside and looked in the window, but could not see anything; that they then went back up the stairway, where there was a hole inside the window; that they crawled into the hole one at a time, and when he looked C. F. Clowers and Alva Strain were having sexual intercourse; that they watched the door, and in five or six minutes Prof. Clowers unlocked the door and came out; then Bill Hendrix went into the closet to get a baseball bat, and Alva Strain was sitting in there on a box; that he saw her there, and Bill Hendrix spoke to her; that the next day, after the third period in the afternoon, he with the same two boys crawled into the

same place, one at a time, and he witnessed another act of intercourse, and watched and saw that it was the same two persons; about two days later he again witnessed the same act at the same place and about the same time; that usually before this happened Prof. Clowers left the schoolroom by one door and Alva Strain would leave by the other door; that after they had observed this conduct seven or eight times he in the presence of the other two boys told Miss Strain that they were aware of what was taking place between her and Clowers in the closet below the stairway and that they would like for her to stop this conduct, and she held her face in her hands and thanked us and told us she would. His cross-examination was in part as follows:

"Q. Didn't Prof. Clowers catch you up in the closet with Alva Strain? A. He did not.

"Q. And didn't he call you and Will Hendrix into his library room and tell you of it? A. He did not.

"Q. And didn't he tell you that if he was a mind to he could put you in the penitentiary for what you were doing? A. He did not."

Bill Hendrix testified that in the month of March, 1917, he was present when R. A. Johnston picked up the comb from the pallet in the closet under the stairs, and he knew the comb belonged to Prof. Clowers, and the boys agreed to watch the place. The very next day Alva Strain left the schoolroom, and about three minutes later Prof. Clowers left, and he and Johnston and Frogge followed him; that about halfway up the steps there is a window that leaves an opening, and he crawled into this opening and looked into the closet and saw Prof. Clowers and this girl having sexual intercourse. The other boys, one after another, looked through this opening. When Prof. Clowers came out, he went into the closet for a baseball bat, and Alva Strain was sitting in there. He asked her what she was doing down there, and she said, "Nothing; I have been down here since the history class; I got so sleepy up there." That the next day they watched, and the same thing occurred about the same period in the afternoon; that he with the other boys observed this conduct seven or eight times during the month; that later he saw the defendant hug and kiss Alva Strain in the lodge hall; that one day, while she was up there waiting for him, they told her what they had observed, and she began to cry, and said that Prof. Clowers led her into it. On cross-examination he was asked:

"Q. About the 15th of March, did Miss Lucile Pendleton catch you and Alva Strain in an act of intercourse in that closet? A. She did not.

"Q. Now, just a short time before school was out, did Prof. Clowers have you and R. A. Johnston in the library room talking to you in regard to Alva Strain? A. No, sir; he did not.

"Q. Didn't he tell you in the library room that Miss Pendleton had caught you having intercourse with Alva Strain, and that he caught R. A. Johnston, and that you were ruining yourselves and that girl? A. He did not."

The testimony of Opal Frogge was in substance the same as the witnesses Johnston and Hendrix. Other corroborating testimony was given, which we deem it unnecessary to state.

A number of witnesses were called, who testified to the defendant's good character. Miss Lucile Pendleton testified that she was one of the teachers at the Beardon school, where the defendant was superintendent; about the middle of March, 1917, she went upstairs to ring the bell at noon, and heard a noise, and looked into the middle room of the lodge hall, and saw Alva Strain lying on the floor with her dress up, and Bill Hendrix there with his trousers unbuttoned; that she said to them, "What does this mean?" and they never answered; and she said, "I am going to report this to Prof. Clowers;" that she did report it to Prof. Clowers that same evening; that after this she heard Prof. Clowers say to Will Hendrix and R. A. Johnston, "Boys, nothing like this can go in this school." On cross-examination she stated that she had never mentioned this occurrence to any other person.

Mrs. Clowers, wife of the defendant, testified that she had a conversation with the prosecutrix in reference to her conduct with Will Hendrix and R. A. Johnston, and told her that her husband had informed her that he caught R. A. Johnston having intercourse with her, and that Miss Pendleton had caught Will Hendrix having intercourse with her, and the prosecutrix cried and told her that it was true, and after the term ended the prosecutrix came to her house and stated to her that R. A. Johnston and Will Hendrix and Opal Frogge had tried to get her to agree to lay their misconduct with her on Prof. Clowers. On cross-examination she stated she did not tell any person other than her husband what the prosecutrix told her.

As a witness in his own behalf the defendant testified that he was superintendent of the Beardon school for five years; that on or about the 10th day of March, 1917, Miss Pendleton, a teacher in the high school, reported to him that she had caught Bill Hendrix and Alva Strain having improper relations in the lodge room, and that day he called Bill Hendrix in the library and told him what Miss Pendleton had reported, and that he had better stop such conduct as that in the school; that about the 25th of March he went to ring the bell, and observed R. A. Johnston and Alva Strain passing into an anteroom of the lodge hall, and he walked over and saw Alva Strain sitting on the floor, and Johnston, with his back to him, seemed to be unbuttoning his pants; that she jump-

ed up and hurriedly left; that he said to Johnston, "What does this mean? I am going to report you to your parents and take this matter up with the school board;" and he replied, "I am not in this;" and he asked him who was. Johnston said: "Bill Hendrix and Opal Frogge." After this he called the boys into the library and told them, "If this conduct is not stopped, you will ruin the life of this girl;" that he did not write the note introduced in evidence, and it was not in his handwriting. He denied ever having any improper relations with the prosecutrix.

The defense was made upon the theory that the defendant was the victim of a conspiracy entered into between the prosecutrix and these three schoolboys for the purpose of shielding the boys. While no objection was interposed by the state, we are inclined to think that the evidence given on the part of the defendant, tending to show that the prosecutrix was guilty of improper relations with other witnesses for the state, was incompetent and inadmissible. If the defendant had sexual intercourse with the prosecutrix at a time when she was under 16 years of age, the offense was complete, since under the law she was incapable of consenting to such an act. Had it been established beyond a reasonable doubt, it would have been no defense to this charge of statutory rape against the defendant.

There can be no doubt that the verdict of the jury is amply supported, if the jury believed the evidence given on the part of the state, and we find no sufficient reason for believing that the evidence given on the part of the state, so far as the material facts are concerned, is not worthy of belief. It is apparent that justice has been done, and the judgment ought to be affirmed, unless the court in the course of the trial committed some error prejudicial to the substantial rights of the defendant.

[2, 3] The next error assigned is:

"The court admitted incompetent and irrelevant evidence, prejudicial to the rights of the defendant."

The state, over the objection of the defendant, read in evidence the following letter or note:

"My dear darling sweet darling: It has been so long since I have written to you dear that

I must take the time. Dear I'm all blue over school. It seems that everything is going wrong and I'm afraid that we are going to have to go a little slow here for a few days until things settle down. I can't imagine why so many people are against the school and me. Dear I can't believe you will ever do or say a thing that will hurt me will you. Of course it would ruin us both. I have just placed absolute confidence in you and I still believe in you. Dear I know you could tell me lots of things if you had a chance. I would stay here another year if the people wanted me and would give me their support, but they are forcing me out you know that, and it hurts me, for I've done the best I could. I could gladly go if I had not become so fondly attached to you. Even though I do go it will not be the end of our relation if you remain to me a friend and confidant. If you do not, I will ever be to you. I sure hate to leave you and you know it. Dear tell me once more that you will stick to me. I can't help my attitude toward you for I have tried. Only you can stop me for I have fought that tendency like a demon. Answer to-day. Love and kisses."

Before the note was read in evidence, Alma Rogers testified she was 18 years of age; was a pupil at the Beardon school during the years 1916 and 1917; that she picked this note up from the floor in the library of the school and read it and kept it until the sheriff of Okfuskee county called for it; that she was familiar with the defendant's handwriting, and that the note is in his handwriting. The prosecutrix testified that it was one of the notes received by her from the defendant; that she knew his handwriting, and that this note is in his handwriting. Several other witnesses testified that they were familiar with the defendant's handwriting, and that this note was in his handwriting. While this note was not addressed to any one and was unsigned, we think that under the evidence offered it was clearly competent and was properly admitted in evidence.

The exceptions taken to certain instructions given by the court are not argued in the brief. We have, however, examined the instructions and find no error in them. They were as favorable to the defendant as he could have demanded.

Finding no prejudicial error in the record, the judgment is accordingly affirmed.

ARMSTRONG and MATSON, JJ., concur.

(16 Okl. Cr. 490)

ALLEN v. STATE. (No. A-3110.)

(Criminal Court of Appeals of Oklahoma. Nov. 8, 1919.)

*(Syllabus by the Court.)*1. RAPE ~~§~~52(1)—SUFFICIENCY OF EVIDENCE OF STATUTORY RAPE.

In a prosecution for statutory rape, the evidence considered, and conviction affirmed.

*(Additional Syllabus by Editorial Staff.)*2. RAPE ~~§~~4—DEFENSES TO STATUTORY RAPE.

In a prosecution for statutory rape, it is no defense that prosecutrix prior to the time charged had sexual intercourse with other men.

Appeal from District Court, Carter County; W. F. Freeman, Judge.

Bunk Allen was convicted of statutory rape, and he appeals. Affirmed.

J. B. Champion and W. F. Bowman, both of Ardmore, for plaintiff in error.

S. P. Freeling, Atty. Gen., and R. McMillan, Asst. Atty. Gen., for the State.

DOYLE, P. J. Plaintiff in error, Bunk Allen, was charged in an information filed in the district court of Carter county with the crime of statutory rape, alleged to have been committed upon one Beulah Kesterson, a female under 16 years of age. On February 7, 1917, a trial was had, which resulted in his conviction, fixing his punishment at imprisonment in the penitentiary for a term of five years. From the judgment rendered on the verdict he appeals.

[1] The material testimony in the case is in substance this: The prosecutrix testified that at the time charged her age was 14 years and four months; that she had lived near Wilson, Carter county, 11 years; that on the day in question she met the defendant in Wilson, and at his request went with him to a room over Brymer's store, and there had sexual intercourse with him; that Mr. Jones and Mr. Griffin entered the room while the defendant was having intercourse with her.

C. P. Jones testified that he was a constable of Pewitt township, and on the day charged saw the defendant in John Pruitt's rooming house, over Brymer's store in a room on the west side; that he went there with the city marshal of Wilson; that he kicked the door open, and found the defendant in bed with this little girl.

The defendant testified that he was 33 years of age, married, was engaged as driver of a service car in the town of Wilson; that he went upstairs with a friend to take a drink of whisky, and while there the prosecutrix came into the room; that his friend

left the room; that he and this girl went to bed, and about that time the officers came in; that he did not have sexual intercourse with her.

It is assigned as error that the court excluded competent proof offered on behalf of the defendant.

[2] The record shows that the only evidence excluded was that offered tending to show that the prosecutrix prior to the time charged had sexual intercourse with other men. Had this fact been established beyond a reasonable doubt, it would have been no defense to the charge in this case. The evidence excluded was incompetent and inadmissible for any purpose. If the defendant had sexual intercourse with the prosecutrix when she was under 16 years of age, the offense was complete.

As to the sufficiency of the evidence to support the verdict, it is only necessary to say that it is impossible to see how the jury could have arrived at any other conclusion.

Discovering no prejudicial error in the record, the judgment is affirmed.

ARMSTRONG and MATSON, JJ., concur.

(16 Okl. Cr. 507)

ERNST v. STATE. (No. A-2852.)

(Criminal Court of Appeals of Oklahoma. April 1, 1919. Rehearing Denied Nov. 17, 1919.)

*(Syllabus by the Court.)*1. CRIMINAL LAW ~~§~~507(1) — BANKS AND BANKING ~~§~~61—ILLEGAL LOAN BY OFFICER—STATUTE—ACCOMPLICE—INTERMEDIARY.

E., at a time when he was cashier and managing officer of a bank existing under the laws of this state, entered into an agreement with H. for H. to borrow money from such bank for the joint use of E. and H. H. executed to such bank his note for the money borrowed, and E. executed to H. his note for one-half of the money so borrowed in H.'s name, and the money so borrowed was used for the joint benefit of E. and H. *Held:* (1) That section 270, Revised Laws 1910, prohibits only an active managing officer, or other officer of a state bank, from borrowing or loaning to an officer of such bank the funds of such bank, and does not apply to an intermediary used by an officer of such bank in obtaining such illegal loan from such bank. (2) That an intermediary used by an officer of a state bank in securing a loan prohibited by said section 270, Revised Laws, is not guilty of a criminal offense, and is not in law an accomplice of the officer illegally borrowing money in violation of said section. (3) That an officer of a bank, who through the agency and in the name of an intermediary is beneficially interested in money borrowed from a state bank in the name of such intermediary, is guilty of the offense denounced by said section 270.

2. CRIMINAL LAW \S 381, 561(3)—**REASONABLE DOUBT—PREVIOUS GOOD CHARACTER—PUNISHMENT.**

Evidence of previous good character may generate a doubt of guilt, where without such evidence no such doubt would exist, and may also, upon conviction, tend to lessen the punishment awarded; but, where there is legal evidence taken together with such good character showing the guilt of a defendant beyond a reasonable doubt, such previous good character cannot legally work out an acquittal.

3. BANKS AND BANKING \S 62—**LARCENY—SUFFICIENCY OF EVIDENCE.**

The record in this case carefully examined, and found free from error, and that the evidence fully sustains the verdict and judgment rendered.

Appeal from District Court, Jackson County; Jesse M. Hachet, Judge.

J. E. Ernst was convicted of larceny under section 270, Revised Laws 1910, and he appeals. Affirmed.

E. E. Gore, of Altus, and Everett Petry, of Tulsa, for plaintiff in error.

S. P. Freeling, Atty. Gen., and R. McMillan and J. I. Howard, Asst. Attys. Gen., for the State.

ARMSTRONG, J. The plaintiff in error, J. E. Ernst, hereinafter designated defendant, was informed against for the offense of larceny by having, while cashier and managing officer of the Citizens' Bank of Headrick, existing under the laws of this state, illegally and indirectly borrowed money from said bank, was convicted and sentenced to imprisonment in the state penitentiary at Granite, for a period of one year and one month. To reverse the judgment rendered, he prosecutes this appeal.

The information in this case is exceedingly lengthy, and, from the view we entertain of it, we deem it unnecessary to set it out in extenso. The defendant demurred to the information, which the court overruled, and the defendant excepted.

The uncontradicted evidence is that at the time of the alleged offense the defendant was the cashier and managing officer of the Citizens' Bank of Headrick and in entire charge of the loans of said bank, a banking corporation organized under the laws of this state, and that the defendant, acting in conjunction with J. R. Ham, indirectly borrowed money from said state bank; the borrowing and procedure by which said money was borrowed was only directly shown by the evidence of said Ham; that the said loan was made by agreement with the defendant, negotiated in the name of Ham, with the agreement that the sum so borrowed was to be used jointly by Ham and the defendant, the

defendant executing to Ham his note for one-half of the sum so borrowed from said bank. The notes given said bank by Ham for said loan were introduced in evidence, and had noted thereon in the handwriting of the defendant, "Half of joint money used by Ham and Ernst for Altus property, owed to Citizens' Bank," and on a note given by the defendant to Ham there was noted, "Half of \$250 note of J. R. Ham to Citizens' Bank of even date."

There was also introduced in evidence letters in the handwriting of the defendant to said Ham, then in New Mexico, referring to the notes described in the information in this case, and stating in said letters that the defendant and Ham owed the bank considerable interest.

Entries on the books of said bank shown to be in the handwriting of the defendant were also introduced in evidence, showing a record of said notes described in the information in this case executed to said bank by said Ham.

Upon the conclusion of the evidence of the state, the defendant demurred thereto, which the court overruled, and the defendant excepted.

The defendant did not testify in his own behalf or offer any defense whatever to the offense with which he was charged, except evidence as to his previous good character as a man of honesty and integrity, which previous good character was not controverted by the state.

Forty-three errors are assigned by defendant and are argued in defendant's brief in groups. Such numerous errors and elaborate brief of defendant and his grouping of such errors in the argument thereof, together with the fact that the case-made contains the record of two previous mistrials of defendant in this case, presents a record for our consideration out of the ordinary and has not only challenged our strict attention, but has received our most careful consideration.

[1] We are, however, of the opinion that, notwithstanding the numerous errors assigned, only the following cardinal questions are presented by the record in this case which require our review to reach a proper disposition of this appeal: (1) Is the information sufficient in this case to charge the offense of which defendant was convicted? (2) Is the person used by a managing officer of a bank existing under the laws of this state as an intermediary in securing a loan from such bank, under section 270, Revised Laws 1910, an accomplice of the said officer of such bank in such crime? (3) Was the witness Ham an accomplice of the defendant in this case, so that it was necessary to a legal conviction that his evidence be corroborated?

While the information in this case may be said not to be a model of correct drafting,

that it contains repetitions, and in the hands of a skilled draftsman could be improved, we are still of the opinion that it sufficiently charges the offense of which defendant was convicted. It does not charge two different offenses, and it sufficiently informs the defendant of the offense he was called upon to meet, so as to enable him to prepare his defense, and therefore the court did not err in overruling a demurrer thereto.

Every instruction given the jury by the court was excepted to by defendant, and, after a most thorough review of said instructions, we are forced to the conclusion that the law is properly stated by the said instructions, and that said instructions are free from error. The defendant requested several instructions which the court refused to give, and the defendant duly excepted to such refusal. These requested instructions were either covered by the general instructions, or are based upon the proposition that Ham was an accomplice of defendant, and that defendant could not be legally convicted upon his uncorroborated evidence.

This prosecution is for a violation of section 270, Revised Laws 1910, which reads as follows:

"It shall be unlawful for any active managing officer of any bank organized or existing under the laws of this state to borrow, directly or indirectly, money from the bank with which he is connected; and the officer * * * authorizing a loan to any such person, as well as the person receiving the same, shall be deemed guilty of a larceny of the amount borrowed."

Defendant most earnestly insists that Ham was an accomplice of the defendant, and, unless his evidence was corroborated, the jury should have been instructed to, and should have, acquitted the defendant, and with this contention we are not in accord.

The law under which the defendant was convicted applies only to managing officers and those connected with the bank by whom the loan is made or received, and does not apply to an intermediary used in obtaining the loan, who is not in any wise connected with the bank making the loan, and therefore Ham was not an accomplice of the defendant, and it was not required that his evidence be corroborated to sustain the conviction in this case, and the court did not err in refusing to instruct the jury upon the law of accomplices.

[2, 3] The entire evidence in this case is uncontradicted and points unerringly to the guilt of the defendant as charged, and the trial court would have erred had he sustained the demurrer of the defendant to the evidence, or granted defendant's prayer for a directed verdict of acquittal. It is true that the law offers a premium for previous good character in the way of generating a doubt of the guilt of one accused, where without

such previous good character such doubt would not exist, and, where conviction follows, tends to lessen the penalty imposed; but where the guilt of the defendant is clearly shown by undenied facts and no defense, other than technical objections is made by the defendant, as in this case, such previous good character cannot be used as a shield and work out an acquittal of the guilty defendant.

The defendant had a fair and impartial trial, was ably defended in the trial court and represented with great zeal in this court, and the jury doubtless gave him the benefit of previous good character in fixing his punishment at imprisonment for one year and one month.

The motion for a new trial and the motion for arrest of judgment were each without merit and properly overruled.

Finding no prejudicial errors in the record, the judgment of the trial court is affirmed.

DOYLE, P. J., and MATSON, J., concur.

(16 Okl. Cr. 481)

BUNDY v. STATE. (No. A-2832.)

(Criminal Court of Appeals of Oklahoma.
Nov. 1, 1919.)

(Syllabus by the Court.)

1. CRIMINAL LAW §59(2)—WHO ARE "PRINCIPALS."

All persons concerned in the commission of a crime, whether it be a felony or misdemeanor, and whether they directly commit the act constituting the offense, or aid and abet in its commission, though not present, are "principals."

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Principal.]

2. CRIMINAL LAW §372(2), 1137(5)—INTOXICATING LIQUORS §236(11)—EVIDENCE SUFFICIENT FOR CONVICTION OF ILLEGAL SALE.

The record in this case carefully examined, and the evidence found sufficient to sustain the verdict rendered, and that no reversible error was committed in the trial of the case.

(Additional Syllabus by Editorial Staff.)

3. INTOXICATING LIQUORS §215—INFORMATION FOR ILLEGAL SALE.

An information averring every element of the offense of selling intoxicating liquor, and only charging one offense and sufficiently informing defendant of the offense he was called upon to answer, was not demurrable.

Appeal from County Court, Commanche County; R. J. Ray, Judge.

George Bundy was convicted of violating the prohibitory liquor laws, and he appeals. Affirmed.

Johnson & Stevens, of Lawton, for plaintiff in error.

S. P. Freeling, Atty. Gen., and R. McMillan, Asst. Atty. Gen., for the State.

ARMSTRONG, J. The plaintiff in error, George Bundy, hereinafter designated defendant, and one J. H. Lewis, were jointly charged with unlawfully selling intoxicating liquors to Will George on April 3, 1916. Upon his separate trial he was convicted and sentenced to serve a term of 30 days in the county jail and to pay a fine of \$100 and the costs, and to stand committed until the said fine and costs were fully paid. To reverse the judgment rendered, the defendant prosecutes this appeal. J. H. Lewis entered a plea of guilty.

The uncontradicted evidence in the case is: That the defendant was, at the time the offense is alleged to have been committed, and for several years prior thereto, engaged in the cigar and tobacco business in Lawton, Comanche county, Okl., his place of business being known as the "Mogul Cigar Store"; that the said defendant, at the time alleged in the information that said intoxicating liquors were sold, and for several years prior thereto, at various times, employed J. H. Lewis as a clerk in his said business; and that, at the time of the said alleged sale, the said Lewis was so employed, and was seen behind the counter of said cigar store "waiting upon the trade"; that, for six or seven years prior to said alleged sale, the defendant rented from the owner of the building the room in which said business was conducted; that on the 3d day of April, 1916, the said J. H. Lewis, being at the time in charge of said business and behind its counter, sold and delivered to Will George a bottle of whisky, for which the said George paid 75 cents; that the said Lewis got the said whisky which was sold to George from under the showcase in said place of business of the defendant; and that at the time said sale of whisky was made the defendant was not in his place of business.

On the cross-examination of the witness George by the defendant, it was developed that he (George) had at several different times, other than the time charged in the information, purchased whisky in the said business house of the defendant, and thereafter the defendant moved the court to exclude said evidence of said other purchases, which the court refused to do, and the defendant excepted.

[3] As the information avers every element of the offense, and only charges one offense and sufficiently informs the defendant of the offense he was called upon to answer, the court did not err in overruling the demurrer to the information. *Ferguson v. State*, 10 Okl. Cr. 672, 137 Pac. 1195; *Teague v. State*, 13 Okl. Cr. 270, 163 Pac. 954; *Star v. State*, 9 Okl. Cr. 210, 131 Pac. 542.

[2] The defendant earnestly insists that the trial court committed reversible error in not excluding the evidence of other sales of intoxicating liquors in the place of business of the defendant near the time of the sale alleged in the information. It is the opinion of the court that the trial court did not err in refusing to exclude this evidence, for the following reasons: First. Because the evidence was elicited upon cross-examination by counsel for the defendant, and he cannot be heard to complain in this court, even if the admission of said evidence was erroneous, because the error, if any, was invited by him. Second. The evidence was competent in this case for the purpose of showing that part of the business conducted by this defendant, in connection with his alleged cigar store, was the sale of whisky, and it was competent to show that the sale of whisky had been repeatedly made in such place of business near to and preceding the particular sale charged in this case, for the purpose of showing that the defendant had knowledge of such sales, and that the intoxicating liquor was kept intermingled with the other goods in defendant's place of business, thereby tending to establish the conclusion that the particular sale made was a part of the business of the defendant conducted at said place and consummated with his knowledge and consent, and especially is the legality of this evidence impressive when it is remembered that the defendant did not make any real defense, did not testify in the case.

[1] In the instant case, Lewis was the servant of the defendant, and, under the facts disclosed by the evidence, a sale by Lewis in the place of business of the defendant was in contemplation of law a sale by the defendant, and for which he was criminally liable, notwithstanding he was not present when the sale was made.

In *Cook v. State*, 4 Okl. Cr. 519, 111 Pac. 660, it is said:

"It is immaterial as to whether the defendant was present when the beer was sold or not. He owned the premises and controlled the business. The negro was simply his servant, and a sale by the negro was a sale by the defendant, and the defendant is responsible for any violation of the prohibitory liquor law committed by his negro porter."

It is also urged by the defendant that as it was not shown that a conspiracy existed between the defendant and Lewis, and it being shown that the defendant was not in his said place of business when the sale charged in the information was made, the court committed reversible error in refusing to direct a verdict for the defendant. With this contention we cannot agree. It was not necessary to a legal conviction that a conspiracy be shown to exist by and between Lewis and the defendant. The illegal sale by Lewis, in the place of business of the defendant,

while he was employed as clerk of the defendant, and evidence of other sales in defendant's place of business elicited by the defendant on cross-examination of the state's witness, together with the fact that the defendant did not present any real defense to the prosecution against him, did not testify, and did not call his codefendant, who had pleaded guilty, as a witness, was sufficient evidence upon which the jury could rightfully conclude that the sale by Lewis was done with the knowledge of the defendant, and in the line of his duties as a clerk of the defendant, and to warrant the verdict returned in this case, and the court did not err in refusing to instruct the jury to acquit the defendant.

"When there is proof in the record tending to reasonably sustain the allegations in the information, a trial court has no right to advise the jury to return a verdict of not guilty, and especially is this true when there has been no testimony offered on the part of the accused." *State v. Duerksen*, 8 Okl. Cr. 601, 129 Pac. 881, 52 L. R. A. (N. S.) 1013.

The court did not err in overruling the motion for a new trial, and the motion in arrest of judgment.

The judgment of the trial court is sustained.

DOYLE, P. J., and MATSON, J., concur.

(16 Okl. Cr. 478)

GUNTER et al. v. STATE. (No. A-8196.)

(Criminal Court of Appeals of Oklahoma.
Nov. 1, 1919.)

(Syllabus by the Court.)

1. LARCENY §32(6) — ALLEGATION OF OWNERSHIP IN INFORMATION.

Information for petit larceny charging that the defendants stole coal, "the property of the D. Beams Drilling Company," held sufficient allegation of the ownership of such property in such a prosecution under the criminal procedure of this state.

2. CRIMINAL LAW §1159(3) — CONVICTION NOT REVERSED ON CONFLICTING EVIDENCE.

Where there is evidence in the record from which the jury could reasonably infer that the defendants are guilty of the crime charged, the judgment of conviction will not be reversed because the evidence is conflicting.

3. CRIMINAL LAW §1038(1), 1056(1) — NO REVIEW OF INSTRUCTIONS ON FAILURE TO OBJECT OR EXCEPT BELOW.

Where the record shows no objection or exception to the instructions of the trial court, such instructions will not be examined by this court for the purpose of discovering other than fundamental errors.

4. CRIMINAL LAW §822(1) — SUFFICIENCY OF INSTRUCTIONS CONSIDERED TOGETHER.

The instructions must be considered as a whole, and when considered together, if they fairly and correctly state the law applicable to the case, they will be sufficient.

Appeal from County Court, Washita County; Owen F. Renegar, Judge.

Wiley Gunter and Oliver Robinson were jointly tried and convicted of the crime of petit larceny, and each appeals. Affirmed.

Massingale & Duff, of Cordell, for plaintiffs in error.

S. P. Freeling, Atty. Gen., and W. C. Ham, Asst. Atty. Gen., for the State.

PER CURIAM. This is an appeal from the county court of Washita county, wherein the defendants were, upon a joint trial, each convicted of the crime of petit larceny, and each sentenced to serve a term of imprisonment in the county jail of 20 days and to pay a fine of \$50.

[1] It is first contended that the information does not state facts sufficient to constitute a public offense. No demurrer was filed to the information in the lower court on this ground. The first attack made against the information was by way of objection to the introduction of evidence on the ground stated. The particular objection to the information is that it does not sufficiently designate and describe the name of the owner of the property charged to have been stolen. The information alleges that the defendants stole coal, "the property of the D. Beams Drilling Company," without alleging whether said company is a corporation or a partnership, and, if a partnership, the information is alleged to be defective because it fails to give the individual names of the members thereof.

At common law the information would have been insufficient; but the common-law rule does not obtain in this state because of the enactment of section 5743, Revised Laws 1910, which provides:

"When an offense involves the commission of, or an attempt to commit, a private injury, and is described with sufficient certainty in other respects to identify the act, an erroneous allegation as to the person injured, or intended to be injured, is not material."

The following decisions of this and other states support the conclusion that the information sufficiently describes the owner of the property alleged to have been stolen under a statute like the foregoing: *Martin v. Terr.*, 4 Okl. 105, 43 Pac. 1067; *Rau v. State*, 7 Okl. Cr. 349, 123 Pac. 1037; *Andrews v. State*, 100 Ark. 184, 139 S. W. 1134; *Ivy v. State*, 109 Ark. 446, 160 S. W. 208.

[2] It is also contended that the verdict is not sustained by the evidence. There is a

sharp conflict in the evidence, and, had the jury believed the evidence of the defendants and their witnesses, an acquittal should have followed. However, the testimony of the state's witnesses supports the theory that these defendants were together in an automobile about 1 o'clock at night, and drove up to an oil derrick not far from the town of Foss, in said Washita county, where a quantity of coal was kept for use in drilling an oil well. That the defendant Wiley Gunter got out of the car, and that the defendant Oliver Robinson, who was driving the car, waited for him in a public highway while the lights on the car were turned off; that Gunter went onto the premises of the drilling company, and yelled, and, receiving no reply, proceeded to where the coal was stored and picked up a large chunk of coal, weighing about 100 pounds, and was in the act of carrying it to the public highway in the direction of where the automobile was located, when he was discovered by the night watchman, told to halt, and, upon his refusal to do so, was shot. Gunter got up, got into the car and the two drove away. Later in the morning, about 2 o'clock, they were arrested in the town of Foss, where Gunter had gone to have his wound dressed. The defendants admit that they were on the scene, but Gunter claims that he was drunk that night, and that Robinson was driving him around to sober him up, and that he stopped at the oil derrick to get a drink of water. It appears also from the evidence that both defendants had previously worked at the oil derrick and were familiar with the premises.

While the evidence is conflicting, the jury having determined the conflict against the defendants, and there being evidence in the record from which the jury could reasonably infer that the purpose of the defendants' visiting the oil derrick at 1 o'clock in the morning was to steal coal, and that they were caught in the act of stealing coal from such premises, the judgment will not be reversed because of the alleged insufficiency of the evidence.

[3, 4] The following instruction is complained of, for the reason that the term "reasonable doubt" is not used therein:

"You are instructed that before the defendants, or either of them, can be convicted of the crime of theft as charged in the information, it is incumbent upon the state to prove, among other things, that the coal in question was the

property of the D. Beams Drilling Company, and that said coal was taken from the said D. Beams Drilling Company, without its consent and with the purpose on the part of said defendant or defendants to appropriate the same to his or their benefit, and, unless these facts have been proven, it will be your duty to acquit the defendants."

The record does not show that any objection was made or exception taken to the giving of this instruction. In another instruction, the court told the jury that the defendants were presumed to be innocent, and that—

"Such presumption abides with them throughout the trial of the case until the evidence convinces you to the contrary beyond a reasonable doubt, and in this connection you are instructed that the burden of proof is upon the state to prove the guilt of the defendants as charged in the information beyond a reasonable doubt."

Also, in another instruction, the jury was told that—

"You are not at liberty to single out any one instruction or paragraph of the charge, and consider to the exclusion of other instructions or paragraphs; but you shall take each and every instruction or paragraph of the charge and consider them as a whole in making up your verdict."

It has been held by this court:

"Where the record shows no objection or exception to the instructions of the trial court, such instructions will not be examined by this court for the purpose of discovering other than fundamental errors on appeal." *Ford v. State*, 5 Okl. Cr. 241, 114 Pac. 274.

Also:

"The instructions must be considered as a whole, and, when considered together, if they fairly and correctly state the law applicable to the case, they will be sufficient." *Udike v. State*, 9 Okl. Cr. 124, 180 Pac. 1107; *Nutt v. State*, 8 Okl. Cr. 266, 128 Pac. 165; *Inklebarger v. State*, 8 Okl. Cr. 316, 127 Pac. 707.

Finding the grounds urged for reversal of these judgments to be without merit, and such as did not result in a miscarriage of justice or deprive the defendants of a constitutional or statutory right to their prejudice, the judgment as to each defendant is affirmed.

(55 Utah, 220)

BOOTH v. MIDVALE CITY et al.
(No. 2280.)

(Supreme Court of Utah. Oct. 8, 1919.)

1. STATUTES \Leftrightarrow 195—EXPRESS MENTION AND IMPLIED EXCLUSION.

The maxim, "*Espressio unius est exclusio alterius*," is merely a technical rule of construction and cannot be used to thwart or subvert the obvious intention of the Legislature, and is properly applied only when the legislative intent is not plainly expressed.

2. MUNICIPAL CORPORATIONS \Leftrightarrow 288(1)—PAYMENT FOR STREET PAVING.

A municipality under Comp. Laws 1917, § 570x8, has authority to order a street paved under an arrangement that the municipality should bear one-third of the expense, the county the remainder, and to pay its share of the expense out of the two-mill tax, levy of which is authorized by section 671, subd. 3; the provisions in sections 674 and 675 for special assessments for local improvements as streets not being exclusive.¹

Application to Supreme Court by J. Wilmer Booth for a writ of prohibition against Midvale City and another. Writ denied.

J. C. Wood, of Salt Lake City, for plaintiff.

H. A. Smith, of Salt Lake City, for defendants.

THURMAN, J. This is a proceeding for a writ of prohibition restraining and prohibiting Midvale City, a municipal corporation of Salt Lake county, Utah, from entering into a contract with said county for paving a certain street within the limits of said city. It is stipulated by the parties that the facts alleged in the answer of the defendants are true and constitute all the facts pertaining to the matter in controversy. The answer, in substance, alleges that defendant city is a municipal corporation of the third class; that the other defendant, John Aylett, is its duly elected and qualified mayor; that plaintiff is a resident and taxpayer of said city, both as to real and personal property; that Center street is a public thoroughfare running east and west through said city, and from the Oregon Short Line Railroad on the east to Jordan river on the west the street is wholly within said city, and between said points is a distance of 7,920 feet; that defendant, if not restrained, will enter into a contract with said county whereby said city and county will jointly construct a bituminous pavement 18 feet wide along and upon said Center street between said points and throughout the entire distance above named, at a total expense of \$42,554.55; that the city's portion of said amount will be one-

third thereof, of \$14,151.52, which said last-named sum the city intends to pay unless restrained by order of this court; that defendant has not given notice to levy a special tax to raise funds for the payment of said improvement and has taken no steps to that end, but, on the contrary, the defendant, unless restrained, intends to pay its proportion, or one-third of the cost of said improvement, from the general fund of said city; that the city, by its council, has passed a resolution authorizing its mayor to enter into a contract with Salt Lake county whereby the city will agree to pay one-third of the cost of said improvement if the county will pay the remaining two-thirds; that such payment by said city will increase the taxes to be levied against the real and personal property of the plaintiff in the same proportion and in the same manner as it will increase the taxes of other residents of said city and not otherwise; that said Center street is the principal street for traffic and travel through said city, and for more than 30 years last past has been used as a public highway; that it is extensively traveled and forms the chief thoroughfare from Salt Lake City through Midvale City to Bingham Canyon and numerous other towns in said county; that said street at all places within the limits of said city is in bad repair and wholly unfit for traffic or travel, and it is necessary to expend approximately \$4,950 on said street in order to place it in condition for temporary use; that when such money is expended for said purpose such repair will be temporary only, and it will be necessary from year to year to expend large sums in maintaining said street within the said city in such condition that it may be used as a public street; that for many years last past said city has been compelled to expend large sums per annum in sprinkling said street within the limits of said city, and said sums have been and in the future will be necessary for said purpose; that if said street shall be paved in the manner contemplated, sprinkling thereof will not be necessary, the improvement thereof will be permanent, and for a long period of time it will not be necessary to expend money in repairing said street; that it is for the best interest of all the people of said city to permit the defendant city to enter into said contract with Salt Lake county.

The facts further show that the bridge on Center street across the Jordan river is in such condition that it is dangerous and inadequate for traffic and travel to and through said city, and that it is necessary to replace the same by a steel structure; that defendant will be compelled to and will replace the same with a steel structure at a cost amounting approximately to \$10,766.32; that the total cost of paving said Center street and

¹ Pettit v. Duke, 10 Utah, 311, 37 Pac. 663; Board of Education v. Hunter, 48 Utah, 373, 159 Pac. 1021.

replacing said bridge by one made of steel will be approximately \$52,344.12; that said street extends through farming and vacant lands on both sides for practically the entire distance, and it is impracticable to pave the same in whole or in part from funds raised by local assessment upon abutting property; that the expense thereof would be wholly disproportionate to and in excess of any special benefits which said property owners would receive from said improvement; that all the inhabitants of said city will derive substantially the same benefits from the improvement now contemplated in the proposed agreement with said county; that by said proposed agreement with said county the county will pay two-thirds of all the costs of said improvement, including the installation of said steel bridge, and the defendant city will pay the remainder, to wit, the sum of \$17,448.04; that State street from Salt Lake City to the intersection of said Center street is now paved with concrete and bituminous pavement, and Salt Lake county proposes to and will pave the public highway from the Jordan river westerly to the town of Bingham, and, unless defendant is permitted to and does join said county in the paving of said Center street, said street will remain unimproved for an indefinite length of time and will remain in such condition that it will not be suitable or fit for public traffic or travel; that if defendant is permitted to join said county in said improvement the entire distance from Salt Lake City to Bingham Canyon will be placed in good condition for public travel. Such, in substance, are the admitted facts.

At the close of the oral argument the court was convinced, without further investigation, that the writ prayed for should be denied, and so ordered immediately, in order that the defendant might proceed in its contemplated agreement with the county. It only remains to state the contention of the parties and our reasons for the conclusion arrived at.

[1, 2] Plaintiff contends that notwithstanding the provisions of Comp. Laws Utah 1917, § 570x8, which confers upon cities, among other things, the power to pave streets within their limits, and the provisions of section 671, subd. 3, which authorizes cities to levy a tax annually of not to exceed two mills on the dollar to open, improve, and repair streets, still the cities are without power to pay for the pavement of said streets otherwise than by local assessment upon property abutting upon the streets to be improved. In this contention plaintiff relies upon the provisions of said Comp. Laws, §§ 673, 674, and 676, all of which sections relate to special taxes levied upon the property of abutting owners in paving districts laid out with the view to improvements by the method of local assessment. Sections 674 and 675, specially relied on by plaintiff, read as follows:

"674. To defray or cause to be defrayed the cost and expense of such improvements or any of them, the city council shall have power and authority to levy and collect special taxes and assessments upon the blocks, lots, or parts thereof, and pieces of ground adjacent to or abutting upon the street, avenue, alley, or sidewalk thus in whole or in part opened, widened, curbed and guttered, graded, parked, extended, constructed, or otherwise improved or repaired, or which may be especially benefited by any of said improvements; provided, that the above provisions shall not apply to ordinary repairs of streets or alleys, and that one-half of the expense of bringing streets, avenues, alleys or parts thereof to the established grade shall be paid out of the general fund of the city; and such council shall have power to pave, repave, or macadamize any street or alley or part thereof in the city, and for that purpose to create suitable paving districts, which shall be consecutively numbered, such work to be done under contract.

"675. The cost of paving, macadamizing, or repaving of the streets and alleys within any paving district, except the intersection of streets and space opposite alleys within such district, shall be assessed upon the lots and lands abutting upon the streets and alleys in such district, in proportion to the square feet, or feet front, or both, so abutting upon such streets and alleys."

The matter in controversy turns entirely upon the question as to whether the method provided by the sections just quoted for paying the cost of paving streets is exclusive, or whether the city is also clothed with authority to pay for similar improvements from the general fund. If plaintiff's contention is correct, it follows that in no case can the city use the general funds or any part thereof for the pavement of its streets. No matter where the street may be situated, nor how generally it may be used for traffic and travel, if paved at all it must be paved exclusively at the expense of the abutting owners, and if a sufficient number of the abutting owners protest against it as the law provides they may, then the improvement cannot be made at all. The proposition is novel in this jurisdiction. It is contrary to every conception of the law we have hitherto entertained concerning controversies of this kind.

It is conceded by the plaintiff that, were it not for the provisions contained in the sections quoted, the other sections to which we have referred confer ample authority upon the city to pay for the improvement out of the general fund. In other words, it is admitted that section 570x8, supra, which confers power to pave, and section 671, supra, which authorizes the levy of a tax annually to open, improve, and repair, would be sufficient to authorize payment out of the general fund for the improvement in question, were it not for the provisions contained in the sections quoted.

Plaintiff's contention in the concrete is best explained by quoting literally from his able

brief in this case. After quoting the language of section 674, *supra*, he says:

"While the words 'shall have power and authority to levy and collect special taxes and assessments,' as used in the section 674, would seem to be merely the grant of an additional power, yet the subsequent provisions of the statute that special assessment shall not apply to ordinary repairs, or one-half of the expense of bringing streets to grade, indicates that it was the intention of the Legislature to limit the authority of the city councils in the making of local improvements, and paying for the same, doing so by special taxes and assessments upon the property especially benefited thereby. The express mention that special assessments shall not be levied to make ordinary repairs, or for paying one-half of the expense for bringing streets to grade and the provision that ordinary repairs, or one-half of such expense to bring streets to grade, shall be paid out of the general fund, implies that all other improvements of a local nature, especially benefiting certain property, shall be paid for by assessments upon the property especially benefited."

It will be seen from the foregoing excerpt that plaintiff relies upon the maxim, "*Espresso unius est exclusio alterius*." His argument proceeds:

"* * * The express mention that ordinary repairs and one-half the expense of bringing streets to grade, shall be paid out of the general fund, is an exclusion of all other improvements mentioned in that particular section of the statute, and a limitation upon the authority of the city council, where the improvement is a local one, to the defraying of the expense by special taxes or assessments."

The maxim relied on is merely a technical rule of construction. It cannot be used to thwart or subvert the obvious intention of the Legislature. It should only be resorted to when the intention of the Legislature is not otherwise plainly expressed. No reason is stated by plaintiff, nor does any appear to the mind of the court, why all of the provisions of the various sections referred to may not stand and be given full force and effect. Section 570x8, *supra*, confers upon the city the express power to pave. Section 671, *supra*, confers power upon the city to raise a fund annually by general taxation, at least to the extent of two mills on the dollar. No reason is given why this fund may not be applied in paving the streets of the city in the discretion of the city council, except in the opinion of plaintiff to the effect that these provisions of the law should yield to the maxim, "*expressio unius*," etc. which, as before stated, is a mere rule of construction to be resorted to only when the intention is not otherwise clearly expressed. All the reasons which occur to our minds are against plaintiff's contention. Not only is the language of the statute conferring power to make the improvement and the means to do it with by general taxation clear

and unmistakable, but the reasons why cities should have such power are equally clear. It is admitted in the instant case that all of the inhabitants of Midvale City will derive substantially the same benefits from the contemplated improvement. Center street is the principal street of the city. It is used by all of the inhabitants and the public generally. Why should not this general fund which the city is authorized to raise for the very purpose of improving the streets be applied to paving this particular street which is admittedly for the common benefit of all? Why should the city be compelled to resort to proceeding by local assessment upon the property of abutting owners and incur the risk of a successful protest which would defeat the undertaking altogether? It is easy to conceive of an improvement upon a street that ought not to be made against the protest of abutting owners—a street which may be of small consequence to the general public but of infinite importance to those living in the immediate vicinity. In such case, the city in its discretion should, and probably would, resort to the method of local assessment instead of applying the general fund.

Counsel for plaintiff has industriously collated and called to our attention several cases bearing in a greater or less degree upon the matter in controversy. As sustaining his contention, however, they are far from satisfactory. They are nearly all easily distinguished from the case at bar. The distinction will readily appear upon casual examination, and therefore the cases need not be considered in detail. Such as are not distinguishable, we believe, are contrary not only to reason but to the great weight of authority. We cite them, however, for the benefit of those whom it may concern: *Pettit v. Duke*, 10 Utah, 811, at page 317, 37 Pac. 568; *Township of Dubuque v. City of Dubuque*, 7 Iowa, 262; *Bryan v. Sundberg*, 5 Tex. 418; *Scott v. Ford*, 52 Or. 288, 97 Pac. 99; *N. Y. Central R., etc., Co. v. Reusens*, 151 App. Div. 458, 135 N. Y. Supp. 919; *Murtauge v. Patterson*, 45 N. J. Law, 267; *Findlay v. Howe*, 18 Wash. 286, 43 Pac. 28; *Bank of Lansing v. Lansing*, 25 Mich. 207; *Zottman v. San Francisco*, 20 Cal. 97, 81 Am. Dec. 96; *Johnson v. Common Council*, 16 Ind. 227.

The defendant city contends that the power to levy local assessments upon the abutting owners for the improvement of streets is merely an additional power and by no means exclusive; that the city may resort to the local assessment method or improve the streets out of the general fund in its discretion, at least it may apply the general fund to the extent of two mills on the dollar. As already foreshadowed, in our opinion the defendant's contention is correct. In support thereof it calls our attention to the doctrine enunciated by several text-writ-

ers and in numerous apparently well-considered cases. In *McQuillan, Mun. Corp.* vol. 4, § 1863, the author says:

"Usually when a municipal corporation has power to make or provide for the making of improvements it has power to make arrangements to meet the expense thereof. The mode of paying for public improvements is sometimes prescribed by statute or charter, but in the absence of express direction the method to be adopted is within the discretion of the proper authorities. A general power authorizing the paying for public improvements by special assessments is usually construed as *not affecting the power of the municipal corporation to make improvements and pay therefor out of the general revenue.* However, the rule is different under authority to make the improvement only at the expense of the property abutting thereon." (Italics ours.)

In 28 Cyc. at page 969, we find the following:

"A municipality, subject to the ordinary legislative limitations as to expenditures and indebtedness, may improve its streets and pay for the same out of its general funds; and a charter or statutory provision allowing special assessments does not necessarily deprive the city of this power; but in the absence of express direction, it leaves to the discretion of the municipal authorities the choice of modes for defraying the expenses."

Defendant also cites the following cases, many of which are decisive of the question here presented: *Commonwealth v. George*, 148 Pa. 463, 24 Atl. 59, 61; *Garden City v. Trigg*, 57 Kan. 632, 47 Pac. 524; *Atchison v. Leu*, 48 Kan. 138, 29 Pac. 467; *Tappan v. Long Branch, etc.*, 59 N. J. Law, 371, 35 Atl. 1070; *City of Evansville v. Summers*, 108 Ind. 189, 9 N. E. 81, 1080; *Memphis v. Brown*, 20 Wall. 289, 22 L. Ed. 264; *Soule v. City of Seattle*, 6 Wash. 315, 33 Pac. 384, 1080; *Pine Tree Lumber Co. v. City of Fargo*, 112 N. D. 360, 96 N. W. 357; *Clark v. City of Des Moines*, 19 Iowa, 221, 87 Am. Dec. 423; *State ex rel. v. City of Ely*, 129 Minn. 40, 151 N. W. 545, Ann. Cas. 1916B, 189; *Barber Asphalt Pav. Co. v. City of Harrisburg*, 64 Fed. 283, 12 C. C. A. 100; 29 L. R. A. 401; *District of Columbia v. Lyon*, 161 U. S. 200, 16 Sup. Ct. 450, 40 L. Ed. 670; *Portland Lumber Co. v. City of East Portland*, 18 Or. 21, 22 Pac. 543, 6 L. R. A. 290; *United States v. Ft. Scott*, 99 U. S. 152, 52 L. Ed. 348; *Heller v. Garden City*, 58 Kan. 236, 48 Pac. 841; *Board of Education v. Hunter*, 48 Utah, 373, 159 Pac. 1021; *State v. Eldredge*, 27 Utah, 477, 76 Pac. 339.

The cases speak for themselves, and this opinion would not be strengthened by our attempting an elaborate review.

From the showing made by the admitted facts, plaintiff, as a taxpayer of the city, would have little or nothing to gain even if

we were permitted to consider the case from the standpoint of what would be least burdensome to him. It is admitted that, if the agreement with the county is forbidden or restrained and the improvement is not made as contemplated, the city will be compelled, at its own expense, to construct the bridge across the Jordan river at a cost of nearly \$11,000, and make immediate temporary repairs to the street at a cost of nearly \$5,000, besides the annual cost of sprinkling, to the extent of several hundred dollars. These sums the city has the undoubted right to expend, and it is admitted that it will expend them unless the agreement with the county for the permanent improvement is permitted. It is a simple matter of addition to demonstrate that these sums aggregate approximately the same amount as the city will have to pay for the permanent improvement sought by this action to be restrained. These considerations have no logical bearing upon the question presented here, but they at least serve to emphasize the fact that there is no question of hardship to the plaintiff involved.

For the reasons stated, it is ordered that the temporary writ be quashed and a permanent writ denied. Defendant to recover costs.

CORFMAN, C. J., and FRICK, WEBER, and GIDEON, JJ., concur.

(55 Utah, 151)

VALIOTIS v. UTAH-APEX MINING CO.
(No. 3299.)

(Supreme Court of Utah. Oct. 10, 1919.)

1. TRIAL ¶165—TESTIMONY ASSUMED TRUE ON NONSUIT.

Testimony for plaintiff must be assumed to be true on motion for nonsuit.

2. TRIAL ¶140(1)—IMPEACHMENT BY SHOWING CONTRADICTORY STATEMENTS.

A statement signed by a witness and containing statements of fact inconsistent with his testimony is competent only for purpose of impeachment, and therefore raises a question of credibility of the witness for jury and not the court to decide.

3. TRIAL ¶139(1) — NONSUIT IMPROPER IN FACE OF SUSTAINING TESTIMONY.

Court properly overruled motion for nonsuit where plaintiff's evidence tended to prove his cause of action.

4. TRIAL ¶165—PLAINTIFF ENTITLED TO INFERENCES ON MOTION FOR NONSUIT.

On motion for nonsuit, court must give to the plaintiff the benefit of every fair and reasonable inference that might properly be drawn from the evidence by the jury.

5. TRIAL \Leftrightarrow 244(4)—INSTRUCTIONS SINGLING OUT FACTS IMPROPER.

In action for injuries to employé, instruction *held* properly refused, in that by singling out certain facts which the evidence tended to prove it invaded province of jury.

6. MASTER AND SERVANT \Leftrightarrow 291(9) — MISLEADING INSTRUCTION ON RES IPSA LOQUITUR.

In an employé's action for injuries, a requested instruction that no negligence is to be presumed because of the happening of the accident *held* properly refused as misleading, in that jury might have misunderstood the term "accident" to refer to the accident with all attendant circumstances described by the witnesses.

7. TRIAL \Leftrightarrow 255(2)—NECESSITY OF REQUEST FOR INSTRUCTIONS.

If it was the contention of employer, being sued for injuries to employé from broken rung in ladder, that question of whether broken rung rendered ladder unsafe, was for jury, such idea should have been embodied in a proper request.

8. MASTER AND SERVANT \Leftrightarrow 270(12)—ADMISSIBILITY OF EVIDENCE IN ACTION FOR INJURIES.

In action for injuries to an employé from a loose rung in a ladder, evidence of the hoisting of heavy timbers which sometimes swung against ladder and loosened rungs was admissible to show the cause of the defect and necessity of frequent inspection by employer.

9. NEW TRIAL \Leftrightarrow 68 — VERDICT PALPABLY AGAINST WEIGHT OF EVIDENCE.

Trial judge should set aside verdict for insufficiency of evidence whenever in his judgment the verdict is clearly and palpably against the weight of the evidence, but generally ought not, in view of Comp. Laws 1907, § 3478 (Comp. Laws 1917, § 7208), disturb verdict if in his opinion there is substantial evidence to support it, since to so do would be to invade province of jury.¹

10. APPEAL AND ERROR \Leftrightarrow 987(2)—REVIEW OF QUESTIONS OF FACT.

By constitutional provision, appeals do not lie on questions of fact in law cases.²

11. APPEAL AND ERROR \Leftrightarrow 979(1)—REVIEW OF DISCRETION IN RULING ON MOTION FOR NEW TRIAL.

The granting or denial of a motion for new trial founded on the insufficiency of the evidence to justify the verdict, where the evidence is conflicting, rests in the sound legal discretion of the trial judge, and his decision will not

be disturbed on appeal unless there is a clear abuse of discretion.³

12. APPEAL AND ERROR \Leftrightarrow 1005(3)—REVIEW OF RULING ON MOTION FOR NEW TRIAL.

Appellate court will examine evidence to ascertain whether there is a substantial conflict or whether there is substantial evidence to support verdict, and if there is a substantial conflict will hold that lower court did not abuse its discretion in refusing new trial, but if evidence is incredible or inherently improbable or inconsistent with natural laws as to impel conclusion that verdict is result of mistake, prejudice, or passion, court will hold lower court in error notwithstanding some conflict in the evidence.⁴

13. MASTER AND SERVANT \Leftrightarrow 286(25)—NOTICE OF DEFECT IN LADDER AS JURY QUESTION.

In action for injuries to employé from a loose rung in a ladder, where defense was that employé had slipped off a secure rung and that employer had no notice of the defect, *held*, under the evidence, that the case was for the jury.

14. NEW TRIAL \Leftrightarrow 68 — INSUFFICIENCY OF EVIDENCE.

In action for injuries to employé from loose rung in ladder where defense was that employé had slipped off a secure rung and that employer had no notice of defective rung, court did not abuse its discretion in overruling motion for new trial because of insufficiency of evidence, where evidence was conflicting and subject to different inferences and presented a case of the credibility of witnesses.

Appeal from District Court, Salt Lake County; R. B. Porter, Judge.

Action by Dan Vallotis against the Utah-Apex Mining Company. Judgment for plaintiff, and defendant appeals. Affirmed.

King, Straup, Nibley & Leatherwood, of Salt Lake City, for appellant.

Olson & Lewis, of Salt Lake City, for respondent.

PRATT, District Judge. Plaintiff brought this action to recover damages for personal injuries sustained by him on October 10, 1916, while working as a miner for the defendant in its mine at Bingham Canyon, Salt Lake county, Utah.

Among other facts, plaintiff's complaint in substance alleges that on October 10, 1916,

¹ White v. Union Pac. Ry. Co., 8 Utah, 56, 29 Pac. 1030; Nelson v. Rapid Transit Co., 10 Utah, 196, 37 Pac. 268; Anderson v. Railway Co., 35 Utah, 509, 101 Pac. 579; Lancino v. Smith et al., 36 Utah, 462, 106 Pac. 914.

² Railroad Co. v. Board of Education, 33 Utah, 310, 90 Pac. 566, 11 L. R. A. (N. S.) 645; State v. Brown, 36 Utah, 46, 102 Pac. 641, 24 L. R. A. (N. S.) 545; Cobb v. Hartenstein, 47 Utah, 174, 152 Pac. 424; Russell v. Watkins, 49 Utah, 596, 164 Pac. 867; Newton v. Railroad Co., 43 Utah, 229, 134 Pac. 571; Christianson v. Railroad, 35 Utah, 146, 99 Pac. 680, 20 L. R. A. (N. S.) 255, 18 Ann. Cas. 1159; Tremelling v. Southern Pac. Co. (Utah) 170 Pac. 84; Jensen v. Railroad Co., 44 Utah, 100, 138 Pac. 1185.

³ Nelson v. Rapid Transit Co., 10 Utah, 196, 37 Pac. 268; Farr v. Griffith, 9 Utah, 416, 35 Pac. 506.

⁴ Whittaker v. Ferguson, 16 Utah, 240, 51 Pac. 980; Harris v. Laundry Co., 39 Utah, 436, 117 Pac. 700, Ann. Cas. 1913E, 96; Hill v. S. P. Co., 23 Utah, 94, 63 Pac. 814; Hoggan v. Cahoon, 31 Utah, 172, 87 Pac. 164; Nelson v. S. P. Co., 15 Utah, 325, 49 Pac. 644; Anderson v. Mining Co., 15 Utah, 22, 49 Pac. 126; Connor v. Raddon, 16 Utah, 418, 52 Pac. 764.

the defendant had provided as a means of ingress and egress to and from the working place of the plaintiff in said mine a certain manway consisting of wooden ladders extending vertically between two levels in said mine (the 1,300 and 1,200 foot levels) of a height of about 100 feet; that prior to and at the time of the injury to plaintiff the defendant negligently and carelessly caused and permitted one of the steps or rungs on said ladderway to be broken or loosened so as to afford no support for plaintiff's feet at that point; and that by reason of the said carelessness and negligence of the defendant the plaintiff, while descending said ladderway, on or about the 10th day of October, 1916, fell down the shaft or manway in which the ladderway was constructed a distance of about 85 feet, and was thereby greatly and permanently injured, etc. Defendant's answer denies these allegations of the complaint, and alleges contributory negligence and assumption of risk on the part of the plaintiff.

The case was tried to a jury and resulted in a verdict and judgment for the plaintiff upon conflicting evidence. At the close of plaintiff's case, defendant moved for a nonsuit, which motion was overruled by the court. After verdict and judgment for the plaintiff, defendant moved for a new trial, which motion was also overruled by the court, and thereafter in due time defendant appealed.

The record discloses the following facts: Three shifts were employed in defendant's mine, each consisting of drillmen, timbermen, and muckers, and each shift being in charge of a shift boss. The first shift went to work at 8 o'clock in the morning, was relieved at 4 o'clock in the afternoon by the second shift, and the second shift was relieved by the third at midnight, which last shift worked until 8 o'clock in the morning. The change of shifts was effected in about one-half hour, so that the second shift, on which plaintiff worked at the time of his injury, went to work at about 4 o'clock in the afternoon and quit work at 11:45 at night, and the third shift began work about 12:15 a. m. On October 10, 1916, and for several months prior thereto, the three shifts, in turns, had been working in the mine on the 1,200-foot level, which level was reached from the next lower level, known as the 1,300-foot level, by means of the ladder in question. This ladder consisted of two by four inch uprights, on which were nailed two by four crosspieces, or rungs, a foot apart, the extremities of which rested in grooves in the upright sides and face of the ladder cut to a depth of $1\frac{1}{2}$ inches and of sufficient width to receive the rungs. There was some conflict in the evidence as to the size of the nails used to fasten the ends of the rungs into the grooves. The ladder was

erected in sections, end to end, and stood vertically between the two levels to a height of about 100 feet, in a shaft 4 feet eight inches square. In going to and returning from their place to work on the 1,200-foot level, the men were required to climb up and down this ladder, each carrying a light. Heavy timbers and drills were hoisted up through the same shaft, and it was shown that the timbers sometimes swung against the ladder and loosened the rungs, necessitating repairs. Timbers had been so hoisted some time during the afternoon of October 10th while plaintiff's shift was working on the 1,200-foot level. It was shown that the shift boss ordinarily followed his men in ascending the ladder when they went to work and preceded them in descending it when they quit their work, and that at lunch time it was his custom to descend the ladder to the 1,300-foot level and, after lunch, return to the place where his men were working. It was the shift boss' duty, and his practice, to order a timberman to make immediate repairs if he found anything wrong with the ladder. It was shown that the shift boss of the shift to which plaintiff belonged descended the ladder a few minutes before the accident. There was a conflict of evidence as to the condition of the ladder and, if defective, as alleged in the complaint, as to how long such defect had existed, as bearing upon the question of whether or not the defendant had constructive notice of it.

Plaintiff testified that as he climbed the ladder on the afternoon of the accident he did not notice any loose rungs, but that on leaving his work that night and climbing down the ladder he stepped on a loose rung about 13 feet from the top, felt it give way, and he fell to the bottom, receiving certain injuries which he described.

The plaintiff having introduced his evidence tending to prove his cause of action as alleged (unless it was not shown that defendant had notice, either actual or constructive, of the defective condition of the ladder which caused plaintiff to fall), the defendant moved for nonsuit and contended in the lower court, and contends here, that it was not shown that defendant had notice, actual or constructive, of the defective condition of the ladder. The court overruled the motion, and this ruling of the court is assigned as error by the appellant.

[1-4] Counsel for appellant contend that the only evidence having any tendency to prove either actual or constructive knowledge on the part of the defendant of any defect in the ladder was given by Nick Katrinas, a fellow workman of the plaintiff, who testified that he (Katrinas) had observed loose rungs in the ladder for three or four days prior to the accident and also on the day of the accident. But, say counsel, this witness was self-impeached by the typewritten state-

ment which he admitted having signed and which he made to the defendant company in March, 1917, concerning the accident, in which the witness said that the ladder was "in good condition and no rungs were broken." This statement was introduced as Exhibit 1 on cross-examination of the witness. He testified that he did not know at the time of signing it that it contained such a statement of fact; that that part of the exhibit wherein it is stated that the ladder was "in good condition and no rungs were broken" had not been read to him; and that he could not read. "It was untrue," said the witness. This testimony on motion for nonsuit must be assumed to be true. Exhibit 1 was not competent proof of the facts stated in it and was not and could not be used as such. It was competent and material for the purpose of impeachment only. It raised, therefore, merely a question of the credibility of the witness, a question for the jury to decide and not for the court. As the evidence on behalf of the plaintiff tended to prove the cause of action alleged by him, and on motion for nonsuit the trial court must give to the plaintiff the benefit of every fair and reasonable inference that might properly be drawn from the evidence by the jury, the court did not err in overruling the motion for nonsuit.

Appellant complains of certain parts of the court's charge to the jury, to none of which did appellant reserve an exception except to paragraph 7 of the charge, which reads as follows:

"If you find by a preponderance of the evidence that the defendant neglected to exercise reasonable care and diligence to maintain said ladder way described in plaintiff's complaint, in a reasonably safe condition, and that, by reason of said negligence on the part of the defendant, one of the rungs of said ladder, at or about a point 13 feet from the top thereof, became so loose and insecure that it gave way under the weight of the plaintiff, as he stepped on it, while proceeding to descend the ladder, on or about October 10, 1916, thereby causing the plaintiff to fall down the manway, and sustain injuries as alleged in the complaint, your verdict should be for the plaintiff, unless you find, by a preponderance of the evidence, that the plaintiff was himself guilty of negligence which proximately contributed to the injury, or unless you find that the plaintiff assumed the risk arising from such negligence of the defendant, as in these instructions explained."

Read and considered in connection with the entire charge, we fail to find prejudicial error in this instruction. But it is contended by counsel that this instruction and others given were contrary to defendant's requests Nos. 2 and 6, which the court refused to give. Those requests, refusal to give which is assigned as error, read as follows:

No. 2. "You are instructed that the plaintiff has not made out a case by merely showing that the step or round of the ladder was loose or broken. He is required to further show by a greater weight of the evidence that the defendant or its agents and officers whose duty it was to examine and repair the ladder, knew, or in the exercise of ordinary care could have known [of such condition], for a sufficient length of time prior to the accident, to have repaired the defect and have avoided the injury."

No. 6. "You are further instructed that no negligence is to be presumed or inferred against the defendant because of the happening of the accident, nor because the plaintiff fell from the ladder, nor are you to presume or infer any negligence on the part of the defendant merely because a round was loose or broken, or because it gave way as the plaintiff stepped upon it, if you should believe that there was any round loose or broken, or that it gave way."

Request No. 2 is, however, in substance contained in the court's instruction No. 18, whereby the court charged the jury as follows:

"If you find from the evidence that the defendant knew, or by the exercise of reasonable care ought to have known, that the rung of the ladder in question was loose and insecure, if you believe that it was loose and insecure, and if sufficient time had elapsed after such knowledge, or after defendant, by the exercise of reasonable care, ought to have had such knowledge, in which to make necessary repairs, and if then the defendant did not repair the ladder and make it secure, and the plaintiff was injured by reason of such failure, then the defendant was guilty of negligence."

[5, 6] Request No. 6 was properly refused by the court. It is open to the objection that it singles out of a mass of facts and circumstances, which the evidence tended to prove and which the jury had a right to consider, certain facts, minimizes their force and effect, and invades the province of the jury as to the inferences to be drawn therefrom in connection with all of the facts and circumstances as shown by the evidence. The request as framed was likely to mislead the jury, as the term "the accident" appearing in the request might have been understood by the jury to mean the accident with all the circumstances attending it, as described by witnesses, for the term "accident" is commonly used in that sense.

[7] But it is urged by counsel that "it was not for the court but for the jury to say whether a loose or broken rung in the ladder rendered it unsafe or dangerous." If such was counsel's contention and the purpose of request No. 6, that idea should have been embodied in a proper request. No such request is contained in the record. It is quite evident from the record, particularly from defendant's requests, that the part of request No. 6 reading as follows: "Nor are you to

presume or infer any negligence on the part of the defendant merely because a round was loose or broken"—was submitted on the theory of counsel that there could be no recovery by the plaintiff for an injury caused thereby unless defendant had knowledge of the defect or with ordinary care and diligence could have known of it in time to repair the ladder and prevent the injury.

However that may be, reasonable minds could not well differ as to the conclusion that the loose and insecure rung in the ladder, if proven, rendered it unsafe and dangerous, in view of the undisputed evidence as to the use to which the ladder was put, the number of employes using it, its vertical length of 100 feet in a dark shaft, the necessity of carrying a light while ascending or descending the ladder, the serious injury, perhaps death, that might result from a fall from it, and the fact, which the jury must have found, that while the plaintiff was descending the ladder he stepped upon a loose and insecure rung, which gave way, and caused him to fall to the bottom of the shaft, without fault on his part. The entire absence of a rung, since the rungs were only a foot apart, would have been less of a menace, snare, or delusion, as a workman would not be likely to intrust his weight to space while descending the ladder.

Appellant complains of the refusal of the trial court to give defendant's request No. 11, which reads as follows:

"You are instructed that the defendant, as the employer of the plaintiff, was not required to furnish him an absolutely safe place to work, nor was the defendant an insurer of the plaintiff against accident and injury. The defendant can only be chargeable with negligence, and can be held liable only in the event that you find that the defendant was guilty of negligence in the particulars alleged in the complaint."

Having charged the jury as the court did respecting the relative duties of the master and the servant, the risks assumed by the latter, and under what circumstances, and what circumstances only, the plaintiff could recover, it was not prejudicial error for the court to refuse to give this request. In our opinion the issues of fact and the respective theories of counsel for the parties were fully and fairly covered by the court's charge in its entirety, and the trial court did not err in the particulars assigned by appellant.

The next assignment of error upon which appellant relies relates to the admission of certain testimony. During the progress of the trial the plaintiff was permitted to show that it was the daily practice of the defendant company to hoist heavy timbers up the manway in question, and that sometimes said timbers swung against the rungs of the ladder and loosened them. Defendant objected to this testimony on the ground that it was

immaterial and not within the issues, which objection was overruled and an exception taken. Later, on direct examination, the same witness testified, without objection, that during the shift on which plaintiff was working on the day of his injury timbers were hoisted in the manway. There was other testimony tending to show the same facts.

[8] In our opinion the testimony to which objection was made, especially in view of the fact that it was shown that timbers were hoisted in the manway during the shift on which plaintiff had been working when he was injured, was admissible as tending to show the cause of the loose rung and also the necessity of frequent inspection of the ladder by the defendant. The jury was instructed by the court that plaintiff's recovery, if any, must be based upon the negligence charged in plaintiff's complaint and no other; so that in effect this testimony was properly limited to the purposes for which it could be considered.

Lastly, counsel for appellant contend that the lower court erred in overruling defendant's motion for new trial. In the language of counsel, it is affirmed that the trial court "ought to have granted a new trial because the verdict was manifestly against the clear weight of the evidence, and that this is so palpable as to indicate that the jury either misconceived or mistook the charge or the evidence, or abused their trust, and that the learned court below for this reason abused its discretion in not setting aside the verdict and in not granting a new trial."

It will be perceived that counsel for appellant do not contend that there was no evidence to support the verdict, but that the verdict is so palpably against the clear weight of the evidence as to indicate that the trial court abused its discretion in refusing to grant a new trial. In other words, we are asked to review the weight of the evidence.

[9] It is undoubtedly true, as counsel for appellant contend, that the trial judge may and should set aside a verdict for insufficiency of the evidence and grant a new trial, whenever in his judgment the verdict is clearly and palpably against the weight of the evidence. Not to do so would be an abuse of his discretion. *Ann. Cas. 1912D, 1226, note; Gate City Nat. Bank v. Boyer, 161 Mo. App. 143, 142 S. W. 487; Nelson v. Rapid Transit Co., 10 Utah, 196, 37 Pac. 268; Farr v. Griffith, 9 Utah, 416, 35 Pac. 506.*

But the trial judge ought not as a general rule to disturb the verdict if in his opinion there is substantial evidence to support it. To set aside the verdict in such case would be to invade the province of the jury, in whom is vested the power to decide all questions of fact and to whom all evidence thereon is to be addressed. *Comp. Laws Utah,*

1907, § 3478; Comp. Laws Utah, 1917, § 7208. See 20 R. C. L. 277, where the rule is stated as follows:

"As the jury is the exclusive judge of the evidence, it must in reason be the exclusive judge of what constitutes the preponderance of the evidence, and, when that judgment is reached upon evidence sufficient to support a verdict, it should not be disturbed by the court."

Mr. Justice Brewer, in *Railway Co. v. Kunkel*, 17 Kan. 145, said:

"We do not mean that he [the trial judge] is to substitute his own judgment in all cases for the judgment of the jury, for it is their province to settle questions of fact; and when the evidence is nearly balanced, or is such that different minds would naturally and fairly come to different conclusions thereon, he has no right to disturb the findings of the jury, although his own judgment might incline him the other way. In other words, the finding of the jury is to be upheld by him as against any mere doubts of its correctness. But when his judgment tells him that it is wrong, that whether from mistake or prejudice, or other cause, the jury have erred, and found against the fair preponderance of the evidence, then no duty is more imperative than that of setting aside the verdict, and remanding the question to another jury."

See, also, 20 R. C. L. 274, notes 9, 10, and 11.

The proper exercise of the trial court's power to set aside a verdict and grant a new trial has never been regarded as an invasion of the jury's function to decide the facts. If a new trial be granted, the trial court does not thereby decide a question of fact except only as it may be incidentally involved in its ruling as a matter of law that there is a legal insufficiency of the evidence to justify the verdict rendered. In such case the questions of fact are submitted to another jury for decision under proper instructions as to the law of the case.

While the trial court may, as we have seen, review the evidence, consider its weight and the credibility of witnesses, and grant a new trial, if satisfied that there is a marked and clear preponderance of the evidence against the verdict, it is quite generally held that an appellate court has no such discretion.

[10] One of the obvious reasons therefor is that the appellate court, limited to the examination of the record merely, has not the advantage that the trial judge has to judge such matters, having, as he does, the witnesses before him and being given the opportunity to see the witnesses, hear their testimony, and observe their demeanor while testifying. This is applicable alike to equity cases as well as law cases. *Wilcox v. Rhode Island Co.*, 29 R. I. 292, 70 Atl. 913; *Nelson v. Rapid Transit Co.*, 10 Utah, 193, 37 Pac. 268; *McCornick v. Mangum et al.*, 20 Utah, 17, 57 Pac. 428; *Endress v. Shove*, 110 Wis.

141, 85 N. W. 651. To which we may add that, by constitutional provision of this state, appeals do not lie on questions of fact in law cases. *Whittaker v. Ferguson*, 16 Utah, 240, 51 Pac. 980; *Harris v. Laundry Co.*, 39 Utah, 430, 117 Pac. 700, Ann. Cas. 1913E, 96; *Hill v. S. P. Co.*, 23 Utah, 94, 63 Pac. 814; *Hoggan v. Cahoon*, 31 Utah, 172, 87 Pac. 164; *Nelson v. S. P. Co.*, 15 Utah, 325, 49 Pac. 644; *Anderson v. Mining Co.*, 15 Utah, 22, 49 Pac. 126; *Connor v. Raddon*, 16 Utah, 418, 52 Pac. 764.

But as the right or power to review and decide controverted questions of fact on appeal in law cases did not exist prior to statehood and did exist, as now by constitutional provision, in equity cases, the constitutional restriction of appeals in law cases to the review of questions of law alone was probably intended to preserve this distinction without material change.

[11] The granting or denial of a motion for new trial founded on the insufficiency of the evidence to justify the verdict, where the evidence is conflicting, rests in the sound legal discretion of the trial judge, and the question directly involved on appeal is whether or not that discretion has been improperly exercised or abused. As said in the case of *Harrison v. Sutter St. R. Co.*, 116 Cal. 161, 47 Pac. 1020:

"That the granting of a new trial is a thing resting so largely in the discretion of the trial court that its action in that regard will not be disturbed except upon the disclosure of a manifest and unmistakable abuse has become axiomatic and requires no citation of authority in its support."

And in *White v. Union Pacific Railway Co.*, 8 Utah, 56, 29 Pac. 1030:

"The rule is, when a motion is made for a new trial because of the insufficiency of the evidence and the testimony is conflicting, the granting or refusing a new trial is largely in the discretion of the trial court, and its act will not be overruled unless there is a clear abuse of discretion."

See, also, *Nelson v. Rapid Transit Co.*, supra; *Anderson v. Railway Co.*, 35 Utah, 509, 101 Pac. 579; *Lancino v. Smith et al.*, 36 Utah, 462, 105 Pac. 914.

[12] This court has repeatedly held that the discretion of the trial court, exercised in granting or refusing to grant a motion for new trial, based on the insufficiency of the evidence to justify the verdict, cannot be interfered with when, upon examination of the evidence as disclosed by the record, it is apparent that there is a substantial conflict of evidence as to material issues of fact in the case relative to which the insufficiency is alleged. In such a case this court must hold as a matter of law that no abuse of discretion is shown. (Cases supra.) We must of necessity, however, in every such case examine the record of the evidence for

the purpose of determining whether or not there is a substantial conflict or whether or not, as in the instant case, there is substantial evidence to support the verdict.

As said in *Railroad Co. v. Board of Education*, 32 Utah, at page 310, 90 Pac. at page 566, 11 L. R. A. (N. S.) 645:

"If there is no substantial evidence in support of any one or more of the material elements upon which the verdict and judgment rests, then it becomes merely a question of law for this court to determine, and we cannot shirk the responsibility of looking into the evidence to ascertain whether there is any substantial evidence in support of all the essential facts necessary to support the judgment by simply assuming that all questions of fact are for the jury and the trial court to pass upon."

See, also, *State v. Brown*, 36 Utah, 46, 102 Pac. 641, 24 L. R. A. (N. S.) 545; *Cobb v. Hartenstein*, 47 Utah, 174, 193, 152 Pac. 424; *Russell v. Watkins*, 49 Utah, 598, 164 Pac. 867.

If it should appear that the evidence on which the verdict is based is so incredible or inherently improbable or so inconsistent with or contrary to natural laws or physical facts, as to impel but the one conclusion that the verdict is the result of mistake, prejudice, or passion, we might then very properly say that the verdict is not supported by substantial evidence, or that there is not a substantial conflict of evidence, and therefore the lower court abused its discretion or erred in refusing to grant the new trial. In such a case we look into the evidence, examine its legal effect, and opposing logical tendencies, if any, not for the purpose of deciding the facts, as we may do in equity cases, but to determine whether or not the trial court erred in its application of fixed legal principles. Our power or authority to do so must, of course, be exercised cautiously; but the fact that an incautious exercise of such power may transcend our constitutional authority in cases at law to hear and determine questions of law only is not inconsistent with its existence. A question of law is never an abstract question. It arises only with respect to ascertained facts or their logical and legal tendencies as matter of proof. The inquiry then is: What are the facts? And, secondly, what is the legal principle applicable thereto? If the evidence, taken as a whole, be reasonably susceptible of opposite conclusions as to the existence or nonexistence of an ultimate fact, depending upon inferences to be drawn therefrom, or the weight to be given to the testimony of this or that witness, or set of witnesses, we must conclusively presume the fact to be such as will support the ruling which we are called upon to review; but if, after giving due consideration to the fact that the trial judge is better able to weigh conflicting evidence, the evidence be such nevertheless as to impel

but one reasonable conclusion, and that as to a fact adverse to the ruling, it would be our duty as an appellate court to so declare, notwithstanding there might be some conflict in the evidence.

In *Stafford v. Adams*, 118 Mo. App. 717, 88 S. W. 1130, the court said:

"It is the duty of courts to determine what constitutes substantial evidence, and the business of the triors of fact to settle conflicts therein."

And the same court, in *Brockman Commission Co. v. Aaron*, 145 Mo. App. 307, 130 S. W. 116, said:

"While appellate courts uniformly adhere to the rule that the credibility of witnesses and the weight to be given their testimony are issues of fact and not of law, the rule has never been carried to the length of requiring courts to accord probative value to testimony that is so palpably false or absurd that no reasonable mind would give it any credence. It is within the province of the court to ascertain whether or not testimony has any evidentiary strength, and, if it is found to be impotent, to cast it aside as tho it had not been given."

In the case of *Toledo, St. L. & W. R. Co. v. Howe*, 191 Fed. 776, at page 782, 112 C. C. A. 262, at page 268, "substantial evidence" is defined with reference to the facts of that case as follows:

"It must be, as said Judge Severens, 'something of substance and relevant consequence, and not vague, uncertain, or irrelevant matter not carrying the quality of "proof" or having fitness to induce conviction.'"

And again, at page 785, of 191 Fed., at page 271 of 112 C. C. A.:

"If the circumstances are such that it can be said fair-minded men might not agree as to the conclusions to be drawn, the case must be submitted to the jury."

In *Newton v. Railroad Co.*, 43 Utah, at page 229, 134 Pac. at page 571, this court said:

"If it is clear that the injured person failed to exercise ordinary care, the question is one of law; but, if the circumstances are such as to leave that question shrouded in doubt to the extent that different minds may fairly and honestly arrive at different conclusions, then it is a question of act."

As applied to particular circumstances of the case, the following statement, bearing upon the substantial evidence rule, is approved by this court in the case of *Christensen v. Railroad*, 35 Utah at page 146, 99 Pac. at page 680, 20 L. R. A. (N. S.) 255, 18 Ann. Cas. 1159:

"Where the evidence of negligence is entirely inferential and the testimony for the defendant is clear and undisputed to the effect that there was no negligence, the plaintiff's case is over-

come as a matter of law, and it becomes the duty of the judge to take the case from the jury."

The same doctrine was considered in the case of *Tremelling v. So. Pac. Co.* (Utah) 170 Pac. at page 84, in the following language:

"It must not be assumed, however, that the rule thus stated can be given general application. Indeed, the rule can rarely be applied, since the evidence generally is such that it is the exclusive province of the jury to draw the inferences therefrom."

The following cases illustrate the principle that the appellate court will disregard evidence which is contrary to natural laws, physical facts, or scientific principles: *Note to Fleming v. Northern Tissue Paper Co.* (Wis.) 15 L. R. A. (N. S.) 701; *McCarthy v. Bangor & Aroostook Co.*, 112 Me. 1, 90 Atl. 490, L. R. A. 1915B, 140, and note; *Russell v. Watkins supra*.

In *Jensen v. Railroad Co.*, 44 Utah, 100, 138 Pac. 1185, in which case it was urged that the trial court had erred in refusing to grant a new trial on the alleged ground that the verdict was excessive and was rendered under the influence of passion and prejudice, it was said:

"Whether a new trial should or should not be granted on this ground, of necessity, must largely rest within the sound discretion of the trial court. Still that court, in such particular, is not supreme or beyond reach. Its action may nevertheless be inquired into and reviewed on an alleged abuse of discretion, or a capricious or arbitrary exercise of power in such respect. Such a review is not a review of a question of fact, but of law. * * * Our power to correct a plain abuse of discretion or undo a mere capricious or arbitrary exercise of power cannot be doubted."

What are the facts which appellant contends clearly demonstrate that the lower court abused its discretion in denying the motion for a new trial? Are they of such a nature that we may say as a matter of law that the verdict is not supported by substantial evidence?

While the evidence on the part of the defendant, consisting of the testimony of seven witnesses, tended strongly to prove that the ladder in question was in sound condition at the time of the accident, which occurred about 11:45 at night, when the workmen of the second shift were leaving their work and the third shift was preparing to come on, and that the plaintiff's foot probably slipped off a secure rung as he was descending the ladder, it was not conclusive. Not only the testimony of the plaintiff, but the testimony of three other witnesses produced in his behalf, equally positive and more direct, tended to prove that plaintiff's fall and consequent injury was caused by a loose rung which gave way as plaintiff stepped upon it. Reasonably certain it is that if the rung gave way as plaintiff stepped upon it, and caused him to fall, as he testified, the rung was loose and insecure at that time.

The testimony on the part of the defendant concerning the soundness of the ladder related to a time before and after the accident, but in a degree of remoteness therefrom that it did not preclude the possibility that the defect actually existed at the time of the accident, but had been immediately thereafter repaired by somebody, except only the testimony given by the shift boss, who descended the ladder about five minutes before the accident, and who testified that then "the ladder was all right, there was nothing wrong with it." But it is quite apparent even from the record of his testimony that he was conscious that he had made this statement of fact rather more strongly than he was justified in doing, because he added, "everything was—I could not find anything loose on it, that is, I didn't notice anything the matter with the ladder at all," clearly indicating the probability or possibility that a rung may have been loose which he failed to observe.

On the other hand, besides the testimony of the plaintiff as to the condition of the ladder and his consequent injury, one of his witnesses, who, it was shown, descended the ladder immediately before plaintiff descended it, testified in substance that when he reached the rung in question he felt that it was loose and avoided it by stepping over it to the next rung below. This witness was knocked from the ladder by the falling body of the plaintiff and was injured at the same time. Two other witnesses for the plaintiff, who descended the ladder a few minutes after the accident and were the last to leave the 1,200-foot level, each testified that when he descended the ladder he observed that the rung in question was missing, and one of them testified to the finding of a similar rung at the bottom of the shaft, near the ladder, which he picked up but left in the place where he had found it. This testimony was also corroborated by the other witness. Moreover, the conflict in the evidence as to the condition of the ladder at the time of the accident would have been largely explained if, as a matter of fact, somebody had replaced the rung of the ladder during the interim of about 30 minutes between the changing of shifts, which would be a very natural thing to do, and which any one of the timbermen might have done to prevent injury to the workmen of the on-coming shift.

[13] Therefore, so far as the soundness of the ladder, or the looseness of the rung, and the resulting injury to plaintiff, is concerned, there was a substantial conflict of evidence which required the jury to weigh the conflicting evidence and the credibility of the witnesses who testified thereto and determine the question of fact thus presented. In view of the verdict of the jury and the trial court's

ruling on motion for new trial, that question of fact must be resolved against the appellant and in favor of the trial court's ruling.

The only question about which there can be any serious or reasonable controversy is as to when the rung became loose and whether the defendant had timely notice thereof, actual or constructive. It appeared without contradiction that the shift boss of the shift to which plaintiff belonged descended the ladder about five minutes before the accident occurred, when the workmen on his shift had finished their labor and were about to descend the ladder to the 1,300-foot level. If, therefore, there was any evidence tending to show that the rung was loose at that time, the jury would have been justified in finding that the shift boss either observed it or, in the exercise of ordinary care, should have discovered it and caused immediate repair of the ladder to be made. If the jury believed the testimony of the witness Katrinas, who appellant contends was impeached, to the effect that he had noticed loose rungs in the ladder for three or four days before the accident and had also observed a loose rung at or about 4 o'clock in the afternoon of the day of the accident, when he, the plaintiff, and others, including the shift boss, ascended the ladder to their work, then the question of facts as to whether the defendant had notice, actual or constructive, of such condition of the ladder, must also be resolved against the appellant, for it cannot in such a case be successfully contended that the defendant did not have at least ample time and opportunity to discover and repair the defect, especially in view of the fact that the shift boss followed the men up the ladder that afternoon and was the first man to descend the ladder when the men quit their work that night. But if the jury did not believe this testimony given by the witness Katrinas—and it must be conceded that there is grave doubt as to its truth, as neither the plaintiff nor two of plaintiff's witnesses observed any such defects at that time, according to their testimony—there was nevertheless other evidence from which the jury could have found that the looseness of the rung had been caused some time between 4 o'clock that afternoon and the cessation of their work that night, and during the progress of said work, and therefore the defendant, through its shift boss, had timely notice thereof.

It was shown that the defendant was accustomed to use the manway in which the ladder was constructed for the purpose of hoisting heavy timbers from the 1,300-foot level to the 1,200-foot level, and that such practice sometimes caused those timbers to swing against the ladder and loosen its rungs, necessitating repairs, and that, while plaintiff and the workmen of the second shift were working on the 1,200-foot level on the day of the accident, such timbers were hoisted in

the manway. Since there was no evidence of any other cause, it was for the jury to say whether or not the loose rung was caused by the hoisting of such timbers during that time. We cannot say that they were not justified in so affirmatively finding, and, if such was the fact, the shift boss, who preceded the men in descending the ladder about five minutes before the accident, had opportunity to discover it and cause it to be repaired, or at least the jury had the right to so find. Since the shift boss was charged with the duty of making necessary inspections and causing necessary repairs to be made, the knowledge that he might thus have acquired would be imputed to the defendant, his principal.

[14] While, as it appears, the defendant had the preponderance in number of witnesses, it does not necessarily follow that the preponderance of the weight of the evidence was on the side of defendant or that the preponderance of the weight of the evidence was not in favor of the plaintiff. It was a case of the credibility of witnesses, substantially conflicting evidence and inferences to be drawn therefrom, concerning which fair-minded men might reasonably entertain different conclusions. Therefore, as the existence of the defective rung and defendant's knowledge thereof and sufficient opportunity to remedy it are the only findings of the jury which appellant contends are not justified by the evidence, and the record discloses no substantial error, it must be held as a matter of law that the trial court did not abuse its discretion in denying appellant's motion for new trial. The judgment of the trial court is therefore affirmed, with costs to the respondent.

CORFMAN, C. J., and FRICK, GIDEON, and THURMAN, JJ., concur.

(40 Nev. 55)

ASPINWALL v. ASPINWALL. (No. 2235.)

(Supreme Court of Nevada. Oct. 9, 1916.
Rehearing Denied.)

1. DIVORCE §91 — COMPLAINT INSUFFICIENT TO SHOW JURISDICTION.

Under St. 1915, c. 28, § 1, providing that divorce may be obtained by complaint to the court of the county in which the cause therefor accrued, or in which defendant shall reside or be found, or in which plaintiff resides, if the parties last cohabited there, or in which plaintiff shall have resided for six months, the complaint of a husband, not alleging his residence in the county, but merely that he is now therein, does not bring his status within the jurisdiction of the court, the matrimonial domicile of the parties being in another state, and the marital offenses complained of being such as might have been determined by the courts of the matrimonial domicile, though the complaint alleges that defendant can be found in and is a resident of the

county; the right of the wife to acquire another domicile separate from him, where their unity is dissolved, not availing him.

2. DIVORCE §62(1, 5)—MARITAL STATUS FOLLOWS DOMICILE OF PARTIES.

As respects jurisdiction in divorce suits, the marital status follows the marital domicile, and is independent of the corporeal presence of either or both of the parties.

3. DIVORCE §62(5)—COURT WITHOUT JURISDICTION WHERE DOMICILE OF PARTIES IS IN ANOTHER STATE.

The courts of a state are without jurisdiction of the subject-matter of an action for divorce, where neither party has a domicile within such state.

4. DIVORCE §91—JURISDICTION OF ACTION BY NONRESIDENT NOT BASED ON RESIDENCE OF WIFE IN STATE.

Although St. 1915, c. 28, empowers the courts to grant a divorce where either plaintiff or defendant has a domicile within the state, yet in husband's suit for divorce, where he does not allege his own domicile in the state, his allegation of wife's residence within the state is insufficient, in the absence of facts entitling her to a separate domicile; her domicile being presumed the same as that of her husband.

Appeal from District Court, Washoe County; Thomas F. Moran, Judge.

Action by Lloyd Aspinwall against Elizabeth Roosa Aspinwall. From an order dismissing the action, plaintiff appeals. Affirmed.

George Springmeyer, of Reno, for appellant.

Hoyt, Gibbons & French, of Reno, for respondent.

Brown & Belford, of Reno, *amicus curiae*

MCCARRAN, J. This was an action in divorce. The complaint in the action set forth:

"That the defendant, Elizabeth Roosa Aspinwall, is now living in and can be found in and is a bona fide resident of Washoe county, state of Nevada, and that plaintiff is now in said county; that substantial parts of this cause of action accrued in said Washoe county, state of Nevada."

Two causes of action are set up in the complaint in furtherance of plaintiff's prayer for a decree of divorce. The first cause of action is that of extreme cruelty resulting in mental anguish to the plaintiff, etc. The second cause of action is that of adultery, and the complaint in that respect alleges, on information and belief, acts of adultery committed by defendant in the town of Chatham, Morris county, state of New Jersey, and in the city of New York, state of New York, and at 700 Wheeler avenue, in the city of Reno, state of Nevada, and elsewhere in the county of Washoe, state of Nevada.

A demurrer to the complaint was interposed by defendant, respondent herein, in which, among other things, the demurrant asserted the want of jurisdiction of the district court.

The matter being submitted on demurrer, the same was sustained by the court for want of jurisdiction. The plaintiff, appellant herein, declining to amend his complaint, an order was entered dismissing the action. From this order appeal is prosecuted to this court.

[1] It will be observed that the complaint in this action makes no pretense at asserting either that the residence of the plaintiff was within this state, or that he was domiciled within the jurisdiction of the court. The plaintiff in the court below, appellant herein, sought to assert the jurisdictional prerequisite by alleging that the defendant, Elizabeth Roosa Aspinwall, "is now living in and can be found in and is a bona fide resident of Washoe county, state of Nevada."

Our statute applicable to the subject reads as follows:

"Divorce from the bonds of matrimony may be obtained, by complaint under oath, to the district court of the county in which the cause therefor shall have accrued, or in which the defendant shall reside or be found, or in which the plaintiff shall reside, if the latter be either the county in which the parties last cohabited, or in which the plaintiff shall have resided six months before suit be brought, for the following causes. * * * Stat. 1915, p. 26.

The appellant in this case relies upon the decision of this court in the case of Tiedemann v. Tiedemann, 36 Nev. 494, 137 Pac. 824. In that case the wife, Gertrude Eleanor Tiedemann, alleged in her complaint:

"(1) That plaintiff is a resident of Carson city, Ormsby county, state of Nevada.

"(2) That plaintiff is informed and believes, and upon such information and belief alleges the fact to be, that said defendant is now within, and can be found in said county of Ormsby, and within the jurisdiction of this court."

The distinction between the allegations of residence contained in the complaint in the Tiedemann Case and those found in the complaint in the case at bar must not be lost sight of in arriving at a correct application of the law of the case. In the matter at bar the husband, Lloyd Aspinwall, files his complaint, making no allegation or even attempted allegation of residence within this state or within the jurisdiction of the district court. In this respect the only averment in the complaint is "that plaintiff is now in said county." In the Tiedemann Case the wife, as plaintiff, asserted her residence within the jurisdiction of the district court, and alleged grounds which would warrant the assumption of separate domicile.

We approach the consideration of the matters presented in this record in the light of

legal doctrines quite well established. At common law it was a well-founded rule that a woman on her marriage loses her own domicile and acquires that of her husband. *Barber v. Barber*, 21 How. 582, 16 L. Ed. 226; *Harrison v. Harrison*, 20 Ala. 629, 56 Am. Dec. 227; *Jenness v. Jenness*, 24 Ind. 355, 87 Am. Dec. 335; *Hairston v. Hairston*, 27 Miss. 704, 61 Am. Dec. 530, Ann. Cas. 1912D, 400, note.

While this general rule established at common law may prevail to-day, modern law and modern decisions have established at least one well-founded and well-sustained exception.

The Supreme Court of the United States, in the case of *Cheever v. Wilson*, 9 Wall. 108, 19 L. Ed. 604, in answer to the proposition that the domicile of the husband is the wife's, and that she cannot have a different one from his, said:

"The converse of the latter proposition is so well settled that it would be idle to discuss it. The rule is that she may acquire a separate domicile whenever it is necessary or proper that she should do so. The right springs from the necessity for its exercise, and endures as long as the necessity continues. 2 Bishop on Marriage and Divorce, 475. The proceeding for a divorce may be instituted where the wife has her domicile. The place of the marriage, of the offense, and the domicile of the husband are of no consequence. *Ditson v. Ditson*, 4 R. I. 87."

Eminent authority supports the proposition that under modern law the wife may acquire a domicile separate and distinct from that of her husband where the unity of the husband and wife is breached, as, for instance, where the husband has given cause for divorce (*Atherton v. Atherton*, 155 N. Y. 129, 49 N. E. 933, 40 L. R. A. 291, 63 Am. St. Rep. 650; *Frary v. Frary*, 10 N. H. 61, 32 Am. Dec. 395; *Buchholz v. Buchholz*, 63 Wash. 213, 115 Pac. 88, Ann. Cas. 1912D, 395, note; *Duxstad v. Duxstad*, 17 Wyo. 411, 100 Pac. 112, 129 Am. St. Rep. 1138; 9 R. C. L. 545), or where by mutual agreement there is a separation (9 R. C. L. 545), or where by the institution of divorce proceedings the dissolution of the unity is made manifest (*Jenness v. Jenness*, supra; *McGrew v. Mutual Life Insurance Co.*, 132 Cal. 85, 64 Pac. 103, 84 Am. St. Rep. 20).

It may, we think, be safely asserted as an established proposition of law that, if the plaintiff is a bona fide resident of the state of the forum, the courts of that state may acquire jurisdiction to decree a divorce in his or her favor irrespective of the domicile or residence of the defendant. 9 R. C. L. 400.

In the case of *Tiedemann v. Tiedemann*, supra, this court held that an action for divorce may be instituted by a resident of the state in a court of the county, regardless of the residence of the defendant, if it is alleged that the defendant can be found within the

county where the suit is instituted and is actually served with process therein.

The residence of the wife, the defendant in the case at bar, even though the same might be within this state and within the alleged county, would, as we view it, avail nothing in the way of conferring jurisdiction where the plaintiff, the husband, was a resident of and domiciled in another state, and made no pretense of asserting residence within this jurisdiction. The fixed domicile of the parties was the domicile of the husband, the plaintiff in this action. True, the wife might, under conditions heretofore referred to, establish a separate domicile, and, when the same was established under the laws of the state, she might sue for divorce, and thereby confer jurisdiction upon the courts of the state in which her new domicile was fixed; but such is not the case presented in the record before us. The matrimonial domicile of the parties in the case at bar was in another jurisdiction, and, in so far as the plaintiff in this action was concerned, he, claiming no residence or domicile within this state, could not, as we view it, bring his status within the jurisdiction of our district court. Domicile in legal contemplation depends, not alone upon residence, but upon all the circumstances surrounding the act of residence. 9 R. C. L. 540.

The establishment of residence, like that of domicile, must depend largely upon the intention of the party, and no intention can be even assumed where in a matter of this kind the party seeking to confer jurisdiction on the courts for the purpose of having the latter determine his marital status declines to even assert his residence.

The rule recognizing the right of the wife to acquire another and separate domicile from her husband where their unity is dissolved will not avail in behalf of the husband to the extent that he may go into a jurisdiction foreign to the matrimonial domicile, and, without asserting his residence or domicile therein, invest the courts with jurisdiction to determine his marriage status. *Haddock v. Haddock*, 201 U. S. 562, 26 Sup. Ct. 525, 50 L. Ed. 867, 5 Ann. Cas. 1.

The right of the wife to establish a separate residence and domicile from that of the husband arises out of the necessity of the case, and, as we view the law, her right to assert a separate residence grows out of the grounds or causes by reason of which the matrimonial unity no longer exists in fact. It is the averment of a residence separate and apart from that of the husband, together with the causes for such separate residence, that gives the wife the right to sue for divorce in the courts of a jurisdiction other than that of the matrimonial domicile.

This case is to be distinguished from the case of *Tiedemann v. Tiedemann*, supra, inasmuch as in that case the wife asserted in her verified complaint grounds which, if proven,

were sufficient to establish a cause for her maintenance of a separate residence and domicile, and coupled with these averments was the allegation of her residence within this jurisdiction; while in this case no averment of residence on the part of the husband, the plaintiff, appears, and the marital offenses of which he complains were such as might properly have been determined by the courts of the matrimonial domicile.

We are cited to many authorities, some of which bear directly and others indirectly upon the question at bar. But in reviewing these authorities we must not lose sight of the fact that we are dealing with a matter of public concern, one in which the basic or underlying thing applicable to the conference of jurisdiction is that of the status of the parties to a marriage contract; and, while there is a lack of uniformity in the decisions, there is nevertheless a strong tendency appearing in those decisions which we deem best considered to hold that the question of domicile is vital in determining jurisdiction. In the case of *Loker v. Gerald*, 157 Mass. 42, 31 N. E. 709, 16 L. R. A. 497, 34 Am. St. Rep. 252, the very question which we deem the turning point in the matter at bar was touched upon. In that case the parties were married in Massachusetts and lived together until the wife deserted the husband, who afterwards moved to Colorado, and there prosecuted a divorce against the wife on grounds of desertion and adultery. There the court said:

"It is sufficient for the present case to say, that by our decisions, it not appearing that the wife separated from her husband for justifiable cause, her domicile followed his, and that therefore, for the purpose of divorce, the court in Colorado had jurisdiction of both the parties within the meaning of the statute."

In the case of *Keil v. Keil*, 80 Neb. 498, 114 N. W. 570, the Supreme Court of Nebraska had under consideration a question quite similar to that at bar, in which Keil, a minister, having received a call from a church in Iowa, moved with his wife and family to the latter state. After living in Iowa for some months, the wife with her children returned to the state of Nebraska, their former residence, and within three days after arriving in the latter state she brought her action for divorce, alleging that the defendant was a nonresident. It was held that, the plaintiff and defendant having established a home in Iowa with intention to make it their future residence, the plaintiff, the wife, could not regain her residence in Nebraska to entitle her to maintain an action for divorce until she had been there for a period of six months.

Many authorities may be found where, following the rule laid down by this court in the case of *Tiedemann v. Tiedemann*, supra, the wife, declaring her residence to be in a jurisdiction foreign to that of her husband,

has successfully maintained an action for divorce even through constructive service. Indeed, many other cases have been cited to us where the husband, moving to another jurisdiction than that of the matrimonial domicile, has taken up his residence in the foreign domicile, and there successfully prosecuted his suit for dissolution of the marital relations. But the case at bar falls within a different class from either of these, inasmuch as the husband, the plaintiff here, fails to assert domicile or residence within this state, and the status of the parties is not by any allegation declared to be within the jurisdiction of our district court.

As we have already stated, the question of residence is one that may depend upon both the acts and the intention of the party seeking to establish the same. It is a question which involves both the law and the facts, and may be determined by the acts and conduct of the party and by other matters susceptible of proof. *Hulett v. Hulett*, 37 Vt. 586; *Reeder v. Holcomb*, 105 Mass. 94; *Gambrell v. Schooley*, 95 Md. 260, 52 Atl. 500, 63 L. R. A. 427; *Kennedy v. Ryall*, 67 N. Y. 379; *Hope v. Flentge*, 140 Mo. 390, 41 S. W. 1002, 47 L. R. A. 806; 9 R. C. L. 556.

[2-4] In applying the statute of this state relative to jurisdiction in divorce proceedings, as in applying the statutes of any state, the matrimonial domicile of one or the other of the parties to the action, it must be borne in mind, is essential to confer jurisdiction over the status of the marital relation. The complaint must allege that one or the other of the parties has a domicile within the jurisdiction of the court in addition to alleging any other facts necessary to comply with statutory requirements such as residence or presence within the county where the suit is instituted. Statutes regulating divorce are presumed to be enacted with reference to the general law relative to the marriage relation, and are to be construed with reference to that law. Marital status follows marital domicile, and is independent of the corporeal presence of either or both of the parties. It is for this reason that the courts of one state are without power to annul a marital status which exists in another state. Where neither party to the suit has a domicile within the state where the action is instituted, the courts of that state are without jurisdiction of the subject-matter of the action. A state may empower its courts to dissolve the marital relation where only one of the parties has a domicile within the state, and its statutes may make it immaterial whether it be the domicile of the plaintiff or the defendant. Such, we think, is the law of Nevada.

The difficulty with the complaint in the case at bar lies in the fact that the plaintiff does not allege residence, and hence no domicile in this state in himself. The allegation of residence in the defendant wife, without

the allegation of facts from which it would follow that her domicile is separate from that of her husband, is insufficient. From the allegations of the complaint, the matrimonial domicile of the defendant wife must be assumed to be the same as that of the husband plaintiff, and that is not alleged to be within the jurisdiction of the court.

The intention of the party may be established by proof as any other element going to the merits of the action, and as any other fact in the case may be determined by the trial court.

The order of the trial court is affirmed.
It is so ordered.

NORCROSS, C. J., and COLEMAN, J., concur.

(43 Nev. 266)

ADAMS et al. v. WAGONER et al.
(No. 2389.)

(Supreme Court of Nevada. Oct. 30, 1919.)

1. DEEDS \S 211(1)—EVIDENCE SHOWING INCAPACITY OF GRANTOR.

In action to cancel mother's deed to daughter, executed by mother while in her last illness and a few hours before her death, evidence *held* to show that mother, at time of execution of deed, was not possessed of sufficient intelligence to understand fully the nature and effect of the transaction.

2. TRUSTS \S 43(3)—EVIDENCE OF CONSULTATION BETWEEN CHILDREN INSUFFICIENT TO ESTABLISH TRUST.

Evidence of consultation between children, without the knowledge or consent of the mother, whereby children agreed that mother, who was lying on deathbed, should convey property to one of the children, who agreed with the other children to pay the debts of the estate and distribute the residue by proper conveyance equally between other heirs, was not admissible as proof that child to whom property was so conveyed held land in trust for the other children.

3. DEEDS \S 211(4) — SUFFICIENCY OF EVIDENCE TO SHOW UNDUE INFLUENCE.

Evidence *held* to show that mother's deed to daughter, with whom mother was living at time of her death, executed while mother was in her last illness and a few hours before her death, was procured by undue influence of daughter.

4. APPEAL AND ERROR \S 1058(2)—REJECTION OF TESTIMONY HARMLESS ERROR.

In suit to cancel mother's deed to daughter, refusal to permit another daughter, who had been joined with grantee daughter as defendant, to testify to transaction between her and mother with respect to mother's disposition of her property, if error, was harmless, where court permitted her statement that deed had been prepared in accordance with mother's directions to stand, and where it was such fact

that was sought to be elicited by the rejected testimony.

5. DEEDS \S 68(3) — DEED OF INCOMPETENT GRANTOR HELD VOID.

Mother's deed to daughter, executed while mother was in her last illness, and at a time when she was not capable of comprehending fully and fairly the nature and effect of the transaction, *held* void.

Appeal from District Court, Lyon County; T. C. Hart, Judge.

Suit by May A. Adams and others against Ella E. Wagoner and others. From a judgment for plaintiffs and from an order denying a motion for new trial, defendants appeal. Affirmed.

Le Roy F. Pike and Walter M. Kennedy, both of Reno, for appellants.

J. E. Campbell, of Reno, for respondents.

SANDERS, J. This suit was brought by certain heirs of Annie Hofheins, late of Yerington, Nev., against other heirs of said Annie Hofheins (all being her children), to cancel a conveyance of lands and personal property alleged to have been obtained from her a few hours before her death by the defendant children, when, from her condition, she was incapacitated of understanding the nature and effect of the transaction, or, in case such should not be found to be the fact, that the grantee in said conveyance, Ella E. Wagoner, be declared to hold all of the property described in said conveyance in trust for all of the children of Annie Hofheins; that she be required to account, and that she be enjoined from disposing of any of the property specified in the alleged conveyance.

With the exception of certain admissions, all the allegations of the complaint were denied by the answer, and for an affirmative defense the defendants allege: For many years prior to the death of Annie Hofheins, the defendant Ella E. Wagoner lived with her mother at her home in Yerington, Nev., nursed and cared for her mother, and in consideration of the services rendered and to be rendered by said Ella E. Wagoner, and the agreement on the part of her, the said Ella E. Wagoner, to pay the debts of the said Annie Hofheins, the latter sold and delivered to Ella E. Wagoner all of the property described in the deed exhibited with the complaint and sought by the plaintiffs' action to be canceled and annulled; that Annie Hofheins, at the time of the execution and delivery of said deed was of clear and sound mind; that she freely and voluntarily acknowledged the conveyance to be her act and deed; that no trust was created or intended by her to be created by said instrument. The plaintiffs replied, and for reply denied the new matter contained in the answer.

The action being purely equitable in its

nature, the issues were tried by the court without a jury. The court found, in part, as follows:

"That at the time Annie Hofheins' name was signed to said purported deed she was in her last illness, from which her death was then imminently impending, and from which she died on the day following the signing of said purported deed; that owing to said illness her mind was weakened and was lacking in understanding; that she was not at the time of signing said deed, nor thereafter, and for several hours prior thereto had not been, in mental condition competent to transact business, or to discuss understandingly any business transaction whatever; that because of her said illness and her consequent mental condition, as aforesaid, and her impending death from said illness, when her name was signed to said purported deed, she was not in mental condition to know or understand its contents, and did not then and there, nor thereafter, know or understand its contents nor apparent legal effect; that the said conveyance was not signed by any person for her, acting under her conscious direction and authority, while she, the said Annie Hofheins, understood the meaning of said purported deed, or comprehended the amount or nature of the property mentioned therein."

As a conclusion of law the court found that said purported deed should be by judgment and decree canceled and declared to be wholly null and void and of no legal force nor effect whatever. Upon this finding and conclusion the court rendered and caused to be entered its judgment. From the judgment and order denying their motion for a new trial the defendants have appealed.

[1] The principle upon which courts of equity act in cases such as that disclosed by the court's finding is clearly stated in the early case of *Harding v. Wheaton*, 2 Mason, 378, Fed. Cas. No. 6051, affirmed by the Supreme Court, in *Harding v. Handy*, 11 Wheat. 125, 6 L. Ed. 429, and followed in *Allore v. Jewell*, 94 U. S. 511, 24 L. Ed. 260; *Turner v. Insurance Co.*, 10 Utah, 74, 37 Pac. 94, and adjudicated cases without number. From a careful analysis of the conflicting testimony, the undisputed facts, and the attending circumstances surrounding the execution of the conveyance, we are irresistibly led by their combined effect to the conclusion that the deceased, if not disqualified, was, at the time of the conveyance, unfit to attend to business of such importance as the disposition of her entire property, and was not possessed of sufficient intelligence to understand fully the nature and effect of the transaction.

Counsel for appellants insist that, conceding the physical and mental weakness of the grantor, still the formal execution, acknowledgment, and delivery of the instrument is convincing proof that the grantor at the time acted upon her own independent, deliberate judgment, with full knowledge of the legal ef-

fect of the instrument, and insist that the case falls within that long line of authorities holding that it did not appear that the grantor was incapable of exercising a discriminating judgment. We are impressed that the conclusion of counsel is refuted by the undisputed testimony of the parties in interest present, aside from the independent evidence clearly tending to support the court's finding in this particular. It is obvious from the record that those who assumed to act for the grantor and to prepare a deed for her to execute were impressed at the time with the consciousness of the grantor's extreme weakness. The grantor was sick, dying, at the point of death, and within a few hours after the formal execution of the deed she lapsed into a state of coma, until overcome by death on the following day. The grantor took no part in the formation of the deed. No one counseled with or advised her of the purport of the deed, its contents, or its legal effect. She was not advised of her rights, and no one offered to her an explanation of its contents. It sufficiently appears from the evidence that May Adams, Ella E. Wagoner, and H. Belle Wagoner, children of the deceased present and parties to this suit, together with their attorney, held a consultation shortly before the execution of the deed, and without the presence and hearing of the deceased, concerning the disposition of the deceased's property, having in mind that the deceased, some time prior to the execution of the deed and before her condition had become serious, had expressed a desire that her interest in a certain tract of land be mortgaged to a sister of the deceased for the purpose of obtaining sufficient funds to defray the expenses of her illness. As a result of the consultation between the children present and said attorney, it was agreed and understood between them that to save costs of administration, in the event of the death of their mother, a bargain and sale deed should be prepared for her to execute, conveying to Ella E. Wagoner, one of her children (appellant), all of her estate, with the understanding between themselves that the grantee would, upon the death of the grantor, pay the debts of the estate and distribute the residue by proper conveyance equally between all of the heirs of the deceased. This is the deed in question. It appears that H. Belle Wagoner was delegated to present the deed thus prepared to the grantor for her to execute, and it was understood that, in the event the grantor should raise any objection as to its contents, H. Belle Wagoner would explain to her the purport of the deed. No objection was made by the deceased, and it appears that because of her weakness her signature thereto was effected by H. Belle Wagoner guiding the hand of the deceased, and the deceased acknowledged the deed then and there before a notary.

[2, 3] While the evidence of the consultation between the children named and their attorney respecting the propriety of disposing of the property of the deceased without her knowledge or consent was not admissible as proof of a trust, as is urged by counsel for appellants in opposition to its admission as evidence for any purpose, it is strong evidence of a conviction that the grantor was at the time unfit to manage or incapable of making disposition of her property, or that she did not possess sufficient intelligence to understand fully the nature and effect of the transaction. *Harding v. Wheaton*, supra. We use the fact of the arrangement between the children present for the purpose of corroborating the observations already made as to the capacity of Annie Hofheins; for, if such an arrangement was made, it demonstrates in the most forcible manner the opinion of the family as to her incapacity, at least in a judicious manner, to dispose of her property. Assuming she might have been capable in law of executing a deed, it is impossible for us to ignore the fact that she was at the mercy of those immediately about her. We do not impute to any of the children present meditated fraud, or that one was any more responsible than the other for obtaining the deed under such circumstances; but we are constrained to hold that the deed was obtained by undue influence, exerted over weakness, upon one whose mind had ceased to be the safe guide of her actions. It is therefore against conscience for Ella E. Wagoner to derive any advantage from the deceased's act.

The whole difficulty in this case arises from the conduct of Ella E. Wagoner after the procurement of the deed. Since the death of the grantor she represents the transaction as being an absolute sale to her of all the property of the deceased. To prove this important averment alleged in her answer to the complaint, Ella E. Wagoner undertook to prove by H. Belle Wagoner, her codefendant, that Annie Hofheins had stated to her that she intended all her property to go to Ella E. Wagoner and to make her the object of her bounty. The court sustained the objections interposed to all questions designed to elicit from the witness the details of any transaction between the deceased and the

witness with respect to the disposition of her property. We are impressed that this course of examination was an attempt to prove a consideration for the conveyance different from that stated in the answer, as well as that expressed in the deed itself.

[4] But, passing this, counsel for the respondents insist that the witness, being a codefendant and a party in interest, and the other party to the transaction being dead, should not be permitted to testify. On the other hand, counsel for appellants insist that since the witness was made a party to the action against her will, and that she, in her testimony, had disclaimed any interest whatsoever in the result of the litigation, the testimony was competent. Not deciding that the position of either counsel is correct, the evidence of this witness shows (in giving her version of the arrangement between the parties as to the preparation of the deed) that she told the attorney who prepared the instrument to make the conveyance to Ella E. Wagoner, and in response to the question, "Why did you tell Mr. Pilkington to make that deed to Ella Wagoner to all of that property?" she replied, "My mother told me to." For all intents and purposes this was the evidence sought to be elicited. It was known to the court that Ella E. Wagoner had for many years lived with the deceased, shared with her the responsibilities and conduct of her home, and that she cared for and nursed the deceased in her illness. Since the court allowed the statement that the deed was prepared in accordance with the deceased's direction to stand, the court must have given the statement and the existing relations between the grantor and the grantee whatever weight they deserved, and the appellants were not prejudiced.

[5] We conclude to affirm the judgment and order, upon the ground that at the time of the execution of the conveyance Annie Hofheins was not capable of comprehending fully and fairly the nature and effect of the transaction, its extent, or its importance, and that her mind had ceased to be a safe guide for her actions.

Let the judgment and order be affirmed.

COLEMAN, C. J., and DUCKER, J., concur.

(35 N. M. 508)

MIERA et al. v. AKERS et al.
(Nos. 2220, 2229, 2230.)(Supreme Court of New Mexico. Oct. 16,
1918.)*(Syllabus by the Court.)***1. WILLS §357—REVIEW BY DISTRICT COURT OF DECLARATION OF INVALIDITY IN PROBATE COURT.**

When an instrument purporting to be a will has been declared invalid by the probate court, the district court has jurisdiction to hear and determine its validity after the record of the probate court has been regularly transmitted to it.

2. WILLS §356—REVIEW OF ADMISSION TO PROBATE IN PROBATE COURT.

The action of the probate court in probating a will may be reviewed under sections 1439 and 5881, Code 1915, either by contest in the probate court or by appeal to the district court.

3. WILLS §370—SUFFICIENCY OF RECORD ON APPEAL FROM PROBATE TO DISTRICT COURT.

Section 1438, Code 1915, construed, and held that the record on appeal from the probate to district court is sufficient if properly certified, and the record of the proceedings at the trial in the probate court need not be made a part of the record by bill of exceptions.

4. APPEAL AND ERROR §151(2)—WIDOW AS AGGRIEVED "PARTY" IN PROBATE PROCEEDINGS.

Section 1439, Code 1915, construed, and held that there are no formal parties to a cause in the probate court wherein a will is offered for probate, and that the word "party" in the statute means "person" aggrieved. Held, further, that the widow of the deceased is an aggrieved party within the meaning of the statute.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Party.]

5. WILLS §374—TRIAL DE NOVO ON APPEAL FROM ORDER OF PROBATE COURT ON APPLICATION FOR PROBATE.

Upon appeal from the probate court to the district court from an order or judgment admitting or denying the probate of a will, the cause is tried "de novo."

6. EXECUTORS AND ADMINISTRATORS §35(19)—WHERE WILL FOUND FABRICATED REMOVAL OF EXECUTORS BY PROBATE COURT IMMATERIAL.

The action of the trial court in ordering the removal of appellants as executors held immaterial under the circumstances.

7. EXECUTORS AND ADMINISTRATORS §21(1)—VALIDITY OF APPOINTMENT OF ADMINISTRATOR WITH WILL ANNEXED.

The appointment of an administrator with the will annexed is void, when the persons named in the will, competent to act, are appointed and accept the trust.

Appeal from District Court, Sandoval County; Raynolds, Judge.

A purported will of Epimenio A. Miera, deceased, dated August 19, 1916, was filed for probate, and another purported will, dated July 16, 1916, was filed for probate by Venceslao Miera, and after hearing the probate court admitted the will of July 16, 1916, to probate, and decreed that the will of August 19, 1916, was invalid, and issued letters to John W. Akers and Venceslao S. Miera as executors and ordered that the will, the opinion of the court, and the record in the August, 1916, will case, be transmitted to district court, and the widow, Merejilda de Miera, appealed from the order and from an order appointing Ross Merritt as third executor or as administrator of the estate, and Elisea Montoya appealed from the order admitting the July, 1916, will to probate, and the widow began an action in the district court to have the three executors of the estate removed, and this case and the three appeal cases were consolidated for trial in the district court, and heard with the cause certified by the probate court, and judgments were rendered that the July, 1916, will was invalid, that the August, 1916, will was valid, and that the executors were guilty of neglect of duty, and from such judgments John W. Akers, Venceslao S. Miera and others perfected appeals. Judgments affirmed.

A. B. Renehan and Carl H. Gilbert, both of Santa Fé, for appellants.

Barth & Mabry, of Albuquerque, Marcos C. de Baca, of Bernalillo, and Felix Baca, of Albuquerque (A. A. Sedillo, of Albuquerque, of counsel), for appellees.

PARKER, C. J. Epimenio A. Miera died in Sandoval county on October 9, 1916, possessed of certain real and personal property. Ten days after his death an instrument purporting to be his last will and testament, dated August 19, 1916, was filed for probate in the office of the clerk of the probate court. On November 25, 1916, another instrument, purporting to be his last will and testament, dated July 6, 1916, was filed for probate by Venceslao Miera in said court.

Hearings were had in the probate court with respect to both of said instruments, and on January 6, 1917, the probate court admitted the July, 1916, will to probate; decreed that the August, 1916, will was invalid; issued letters to John W. Akers and Venceslao S. Miera, as executors of said estate, and ordered that the will, the opinion of the court, and the record in the August, 1916, will case be transmitted to the district court in conformity to the statute in such cases made and provided.

Merejilda G. de Miera, the widow of the deceased, appealed from the order admitting to probate the July, 1916, will, as well as from another order made by said court appointing one Ross Merritt as a third executor or as an administrator of said estate. Elisea

Montoya, named as a legatee and devisee in the August, 1916, will, also appealed from the order probating the July, 1916, will. The widow, on August 23, 1917, instituted an action in the district court for Sandoval county, by which she sought to have the three executors of the estate removed from office on the ground of neglect of duty by them. This cause was docketed in the district court as No. 481. The three appeal cases and cause numbered 481 were consolidated for trial in the district court, and heard with the cause certified to the district court by the probate court and involving the order of the last-named court holding invalid the will dated August 19, 1916. Judgments were rendered by the district court holding, in substance and effect, that the will of July 6, 1916, was fabricated by Venceslao S. Miera after the death of Epimenio A. Miera; that the July will was invalid; that the August will was in all respects valid; and that the executors had been guilty of neglect of duty. From such judgments John W. Akers, Venceslao S. Miera, Onofre Akers, and Estefana Wagner have perfected appeals to this court.

[1] 1. The appellants' counsel challenge the right of the district court to make any order or enter any judgment with respect to the August will on the ground that no appeal was taken by the widow or Elisea Montoya from the action of the probate court in denying the probate of that will. In this jurisdiction the Legislature has wisely seen fit to cause to be reviewed by district courts any order or judgment of a probate court declaring invalid the last will and testament of any person, and this is true whether the decision of the court be made in a contest before it or in an original proceeding before it to probate a will. Sections 5879 and 5883, Code 1915. In the cases at bar, the record discloses that the probate court ordered the record in the August will case to be transmitted to the district court, and that the record was transmitted to and received by that court. Eliminating the proposition as to the sufficiency of the record, there can be no doubt but that the district court was authorized to hear and determine the proposition as to the validity of the August will. It obtained this right of jurisdiction and review, not by virtue of an appeal by any aggrieved party, but by operation of the law.

[2] 2. Appellants contend that the court was without jurisdiction in the matter of the July will. The argument first made is that to acquire jurisdiction the statute must be strictly followed, and that an order admitting to probate a certain will is not a final judgment from which an appeal was allowable at the time the proceedings in this case were had.

Where an order has been made probating a will the action of the probate court in the premises, under our statutes, may be reviewed by two distinct and separate methods, viz. by way of contest in the court in which

the will was admitted to probate (section 5881, Code 1915), providing the contest be initiated within one year after such probate, and by an appeal to the district court. Section 1439, Code 1915, as construed in *Teopfer v. Kaeufer*, 12 N. M. 372, 379, 78 Pac. 53, 67 L. R. A. 315. The fact that no contest was initiated in the probate court with respect to the July will is immaterial, for the widow and any other interested party was free to pursue the remedy by appeal without initiating any contest before the probate court.

[3] 3. The appeal, however, is attacked upon the ground that the record of the proceedings of the trial in the probate court was not settled and signed and made a part of the record on appeal to the district court by way of bill of exceptions. The argument is based upon that part of section 1438, Code 1915, providing that appeals to the district court from the probate court must be had "subject to the same restrictions as in case of appeals from the district to the Supreme Court." Counsel assumes that consequently the record of proceedings can come before the district court only when the same are settled and signed as a bill of exceptions, although the proceeding in the probate court constituted a nonjury case and the statute (section 4493, Code 1915, the section in force at the time the appeal was taken and perfected) authorizes the testimony and all motions, orders, or decisions made or entered in the progress of the trial to become a part of the record by certificate rather than by way of bill of exception. The record of the probate court was certified by its clerk to the clerk of the district court, upon order of the probate court, and that is sufficient under the statute; the transcript of testimony having been verified by certificate of the official stenographer.

[4] 4. Counsel for appellant also assert that the statute only permits "parties" to the cause to appeal, and argues that neither the widow of the deceased, or Elisea Montoya, were "parties" to the cause in the probate court. The statute does use the word "party," but it does not mean a formal party, because there are no formal parties to such a cause in the probate court. We hold that any aggrieved person may appeal to the district court under section 1439, Code 1915, and that both the widow and Elisea Montoya, under the circumstances, were aggrieved parties.

[5] 5. In *Teopfer v. Kaeufer*, 12 N. M. 372, 379, 78 Pac. 53, 54 (67 L. R. A. 315), cited supra, it was said that after the record is sent up "the whole matter was before the district court for a trial de novo" which answers appellants' contention that the court should not have tried the case de novo.

[6] 6. There is substantial evidence to support the finding of the court that the July will was fabricated after the death of Epimenio A. Miera, as well as to support the finding that the August will was valid in all re-

spects. That being so, it follows that John W. Akers, Venceslao S. Miera, and Ross Merritt are without right to administer the said estate. Upon that premise the action of the court in removing them as executors is rendered immaterial. The right of Akers and V. S. Miera to administer the estate depended upon the validity of the July will under which they claimed the right, and in which they were nominated as executors; and, that will having been declared spurious, their rights in that respect end.

[7] 7. The persons named as executors in the July will were competent to act as such, and the appointment by the probate court of Ross Merritt as a third executor or as an administrator with the will annexed was without the sanction of the law. Consequently he also is without right to urge the proposition here that the court was without right to remove him. It might also be stated that he does not appear in the record as an appellant before this court, and that he is not urging the proposition, but that the appellants of record are attempting to do it for him.

In conclusion, we might add that it is not entirely clear as to when a judgment of removal of an executor or administrator of an estate rendered under the provisions of section 2241, Code 1915, should be sustained. The section authorizes an action in the district court for the purpose of having an executor or administrator removed who, among other things, has been "unfaithful to or neglected his trust, to the probable loss of the applicant." The executors in the case at bar executed their bond in a sum which we assume was sufficient to make good to the widow any loss she may have sustained by the unfaithfulness and neglect of duty of the executors. Under such circumstances, the question recurs as to whether the widow could be said to have been subjected to "probable loss." We have found no legal definition of those words. We shall not discuss the subject further, however, because a decision of the proposition is unnecessary to the disposition of this case. For the reasons mentioned, the judgments of the trial court will be affirmed; and it is so ordered.

ROBERTS, J., and HOLLOMAN, District Judge, concur.

(55 Utah, 292)

NEW YORK PLATE GLASS INS. CO. v. MARTINES. (No. 8359.)

(Supreme Court of Utah. Nov. 26, 1919.)

1. MASTER AND SERVANT §330(3)—EVIDENCE SHOWING INJURY TO THIRD PERSON BY SERVANT'S NEGLIGENCE IN HIS EMPLOYMENT.

In an action by a plate glass insurer to recover from a garage keeper damages to the front of a hotel caused by backing an auto bus from the garage into it, evidence held to sustain

finding that defendant, "by his servants and employes acting within the scope of employment, committed the injuries complained of.

2. MASTER AND SERVANT §301(1)—OWNERSHIP OF AUTOMOBILE DOES NOT ESTABLISH LIABILITY.

The mere fact of ownership of an automobile will not establish liability of the owner for injuries resulting from negligent operation by one to whom the owner has lent the car, something more than ownership being required to establish agency or the relation of master and servant between the owner and a borrower or negligent operator.¹

3. APPEAL AND ERROR §1058(1)—HARMLESS ERROR IN EXCLUSION OF DOCUMENTARY EVIDENCE OTHERWISE DEVELOPED.

In a plate glass insurer's action against a garage keeper for damages through the negligence of the keeper's employe in backing an auto bus into a hotel front, exclusion from evidence of a book of accounts between defendant garage keeper and a third person, who drove the bus on a percentage basis, held harmless to defendant, who testified at great length and without contradiction as to his business and settlements with the bus operator.

Appeal from District Court, Sevier County; H. N. Hayes, Judge.

Action by the New York Plate Glass Insurance Company, a corporation, against F. G. Martines. Judgment for plaintiff, and defendant appeals. Affirmed.

Bean & Hunt, of Richfield, for appellant.

E. E. Hoffman and J. H. Erickson, both of Richfield, for respondent.

CORFMAN, C. J. This was an action brought by plaintiff to recover damages by reason of the negligent operation of an automobile.

It is in substance alleged in the complaint that, at the time of the negligence complained of, defendant was engaged in the business of buying and selling, repairing and storing, operating and hiring out, automobiles, and running a garage and automobile livery at Richfield, Utah; that while engaged in the business aforesaid defendant's agents and employes negligently and carelessly backed an auto bus from defendant's garage, across a street, and against a hotel building owned by one Mrs. Diana C. Johnston and insured by the plaintiff, thereby breaking the plate glass front and damaging the said building to the amount sued for in the action. It is further alleged that the plaintiff's claim for damages against the defendant was paid by it, as insurer, to the said Diana C. Johnston, and her right of action against the defendant is duly assigned to the plaintiff.

The answer admits that during the times stated in the complaint defendant was engaged in maintaining a garage at Richfield, Utah, and engaged in buying, selling, storing,

§ For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

¹ McFarlane v. Winters, 47 Utah, 533, 155 Pac. 457, L. R. A. 1916D, 612.

and repairing automobiles, and denies generally the other allegations of the complaint.

The trial was to the court without a jury. Judgment was rendered in plaintiff's favor as prayed for in its complaint. Motion for a new trial was made and denied. Defendant appeals.

The errors complained of on appeal go to the admission of certain testimony over defendant's objection, denial of motion for a nonsuit, the insufficiency of the testimony to support the trial court's findings, and the denial of defendant's motion for a new trial.

The facts disclosed by the testimony show that the defendant was, on the date of the accident, May 3, 1917, the owner of an auto bus and hack. There is testimony tending to show that the bus was being operated under a verbal lease from the defendant by one Joseph Ireland, who collected the fares from the traveling public and paid to the defendant 15 per centum of the net proceeds thus realized in the operation of the bus, under the name of Richfield Auto Service. When not in use upon the roads, the bus was kept without charge at the garage of the defendant. On the evening of the day in question, the garage was left in the sole charge of one Kenneth Hood, an employé of the defendant. Ireland had been engaged to take a party from the Johnston Hotel, just across the street from the garage, to Monroe Hot Springs, and had arranged with Hood to drive the bus over to the hotel while he (Ireland) was preparing for the intended trip. Hood negligently backed the bus from the defendant's garage across the street, over the curbing and into the hotel, thereby causing the damages complained of to the hotel building. The hotel building was at the time insured against accident by the plaintiff, and, under the terms of the policy and an assignment made, the plaintiff was subrogated to the rights of the owner of the hotel in the action brought for damages against the defendant.

The defendant testified that the duties of his employé, Hood, were those of a night watchman, to let cars in the garage for storage, direct their storage, move cars when necessary to do so, collect storage fees, and that he had the general care and management of the garage business from 7 o'clock in the evening until 8 o'clock in the morning. The testimony of the defendant further tends to show that Hood was inexperienced in the operation of motor cars on their own power, and that the defendant had instructed Hood that his duties were to be confined to doing the work within the garage and that he should not attempt to move the cars left there or about the building except by hand.

William Johnston, a witness for the plaintiff, testified that he was at the time of the accident the proprietor of the hotel, and

that he and his wife, the owner, were at the time engaged in running it; that both before and after the accident the defendant had, in conversations with him, admitted that Hood and Ireland were in his employ, and that he had seen them both working in and about the defendant's garage; that after the accident the defendant had acknowledged to the witness that they were working for him and that he would hold out their wages to pay to the hotel the damages occasioned by the accident; that subsequently the defendant advised him that Hood and Ireland had quit working for him and that he was in nowise responsible for the damages. The defendant denied that Ireland was in his employ at the time of the accident, or that he had admitted to the witness Johnston that Ireland was working for him at the time. He further testified that Ireland was operating the bus under lease as before stated.

The trial court found:

"That on or about May 3, 1917, the defendant, while engaged in the business of running the said garage, * * * and by his agents, employés, and servants, to wit, one Kenneth Hood, did carelessly, negligently, and wrongfully back the said auto bus into and upon the front of the said building," etc.

[1] The defendant contends that under the testimony Hood was not acting within the scope of his employment with the defendant, but solely as the agent and servant of Ireland, and that as a matter of law he should not be held to answer for the damages sued for by plaintiff. In support of this contention, counsel have cited us to *Sherwood v. Warner*, 27 App. D. C. 64, 4 L. R. A. (N. S.) 651, 7 Ann. Cas. 98. In that case the plaintiff was a mechanic in the employ of an elevator and machine company that had sent plaintiff with certain helpers to repair a damaged elevator (not in use) for the defendant. While working upon the elevator, the plaintiff's arm became caught between a wheel and the elevator ropes. The plaintiff, through his helpers, called the defendant's house janitor—who was not employed to repair, nor assisting in the repairing, nor engaged in operating, the elevator—to aid in extracting the plaintiff. The janitor responded to the request made by the plaintiff and lowered the elevator instead of raising it, thereby severely injuring the plaintiff, by reason of which he sought to recover damages against the defendant. It was held as matter of law that under the circumstances the janitor acted as the agent of the plaintiff, and not in the general course of his employment as the defendant's servant. The court, in passing upon the question there involved, enunciated the well-recognized doctrine that—

"To make a master liable for an injury caused by his servant's negligence, the servan

must have done the act causing the injury in the service of the master, and in doing an act which the master is bound to perform or which is done by his direction."

While the doctrine as applied to the facts in that case is based, as we believe, on sound legal principles, and supports the contention and theory of the defendant here, it must be kept in mind that there is testimony in the record before us tending to show that the defendant admitted after the accident, as well as before, that both Hood and Ireland were working for him at the time of the accident. These admissions on the part of the defendant, as testified to by the witness Johnston, when taken in connection with the further facts, admittedly true, that when the accident occurred Hood was in the general employ of the defendant, having sole charge of defendant's garage where auto cars were being constantly stored and handled, that Ireland who was driving the auto bus in question kept and cared for it, when not running, at defendant's garage and made his headquarters there, affords some substantial testimony, at least, on which to base the finding of the trial court that "the defendant by his servants and employees" committed the injuries to property, as complained of by plaintiff.

[2] While it is true, as was held by this court in *McFarlane v. Winters*, 47 Utah, 598, 155 Pac. 437, L. R. A. 1916D, 618, the mere fact of ownership of an automobile will not establish a liability of the owner for injuries resultant from the misuse or negligent operation by one to whom the owner has loaned it, and something more than ownership is required to establish agency or the relation of master and servant between the owner and the borrower, or the negligent operator, yet, in view of the testimony here as to the admissions of the defendant, and the facts and circumstances disclosed by the record, we are not prepared to say that the trial court's finding as to defendant's liability was not a proper one.

[3] In support of defendant's theory that the auto bus in question, while owned by the defendant, was being operated under a lease from the defendant to Ireland at the time of the accident and that the defendant had no control over it, defendant offered to introduce in evidence, over the objection of the plaintiff, a book purporting to be the accounts kept by Ireland while he was driving the auto bus, and to further show that settlements were made between Ireland and the defendant for the use of the bus upon a percentage basis, and also to show that Ireland was not in defendant's employ at the time of the accident. The trial court's refusal to admit the book is assigned as error.

The authenticity of the book was not attempted to be shown, except the defendant

testified that he was acquainted with, and that the entries were in, the handwriting of the garage bookkeeper. Moreover, the defendant was permitted to testify at great length, and without contradiction, as to how he had transacted business and made his settlements with Ireland. The record stands uncontradicted that Ireland was operating the bus on a percentage basis and that settlements were made in accordance with the book kept by the garage bookkeeper. From any viewpoint we cannot perceive how the exclusion of the exhibit offered was prejudicial to the defendant.

As we view the record, the findings of the trial court, as pointed out, are sustained by the evidence, and we find no prejudicial error assigned that would warrant us in reversing the judgment. It is therefore ordered that the judgment of the district court be affirmed. Costs to the respondent.

FRICK, WEBER, GIDEON, and THURMAN, JJ., concur.

(55 Utah, 284)

CLARK et al. v. LUND. (No. 8376.)

(Supreme Court of Utah. Nov. 25, 1919.)

1. LIMITATION OF ACTIONS \S 14—CONTRACTS TO SHORTEN PERIOD VALID.

Parties to a contract may stipulate for a period of limitations shorter than that fixed by the statute of limitations.

2. SALES \S 431—RELEASE FROM FURTHER LIABILITY NOT COVENANT TO REFRAIN FROM SUIT.

A clause in a "guaranty contract," in which a seller represented and warranted a stallion, "this contract expires, and the seller is hereby released from any further obligations to the purchaser after April 1, 1915," was not a covenant or agreement not to sue on the contract after April 1, 1915.

3. SALES \S 431—RELEASE CONSTRUED.

A clause in a "guaranty contract," in which a seller warranted a stallion to be serviceably sound, "this contract expires, and the seller is hereby released from any further obligations to the purchasers after April 1, 1915," had the effect of releasing the seller from any duties or defaults occurring after April 1, 1915, but did not prevent the purchasers from suing for defaults occurring prior to such date.

4. LIMITATION OF ACTIONS \S 24(4) — SIX-YEAR STATUTE APPLICABLE TO BREACH OF WARRANTIES IN SALE.

An action held based on an alleged breach of contract of warranty and governed by the six-year statute of limitations, and not Comp. Laws 1917, \S 6468, prescribing three years as the period for the commencement of action for relief on the ground of fraud; although it was

alleged in the complaint that representations and warranties in the agreement were false and untrue.

Appeal from District Court, Utah County;
A. B. Morgan, Judge.

Action by E. W. Clark and others against
L. W. Lund. From judgment of dismissal,
plaintiffs appeal. Reversed.

Parker & Robinson, of Provo, for appellants.

Edward McGurkin and W. E. Rydallch,
both of Salt Lake City, for respondent.

WEBER, J. The amended complaint filed by plaintiffs is, in substance, that on December 17, 1913, plaintiffs purchased a stallion from defendant for the sum of \$2,600, and that the parties at that time entered into a contract denominated a "guaranty contract," in which the defendant represented and warranted the stallion to be serviceably sound. The contract, which is set out in the complaint, contains, among others, this provision:

"This contract expires, and the seller is hereby released from any further obligations to the purchasers after April 1, 1915."

It is further alleged that the representations and warranties in the agreement were false and untrue, and that said stallion, at the time of sale was afflicted with chronic inflammation of the liver, and that because of such disease he died on or about May 13, 1914. Plaintiffs further allege that they duly performed all conditions precedent on their part to be performed under the terms of the agreement, and that the said stallion, if as represented and warranted by the defendant, would be of the value of \$2,600, but, if not as represented and warranted, would be of no value whatever.

To the amended complaint defendant demurred on these grounds:

"(1) That said amended complaint does not state facts sufficient to constitute a cause of action.

"(2) That said alleged cause of action set forth in said amended complaint is barred by the provisions of subdivision 4 of section 2877 of the Compiled Laws of Utah of 1907, and also is barred by the provisions of subdivision 4 of section 6468 of the Compiled Laws of the State of Utah of 1917.

"(3) That on its face said amended complaint shows that the alleged cause of action set forth therein is barred by the provisions of subdivision 4 of section 2877 of the Compiled Laws of the State of Utah of 1907, and also is barred by the provisions of subdivision 4 of section 6468 of the Compiled Laws of the State of Utah of 1917.

"(4) That upon its face said amended complaint shows that the alleged cause of action therein set forth is null, void, expired and fully released, and of no further effect or binding

after the 1st day of April, 1915, and that it is also barred by the provisions of subdivision 4 of section 2877 of the Compiled Laws of the State of Utah of 1907, and is also barred by the provisions of subdivision 4 of section 6468 of the Compiled Laws of the State of Utah of 1917."

The demurrer was sustained by the court. Plaintiffs electing to stand on the complaint, the cause of action was dismissed. From the judgment of dismissal plaintiffs appeal.

The respondent contends here, as he did in the trial court, that the sentence, "This contract expires, and the seller is hereby released from further obligations to the purchasers after April 1, 1915," is, first, a covenant, not to sue, and, second, a complete release and extinguishment of the contract.

[1, 2] In support of the first contention, it is argued that parties to a contract may stipulate for a period of limitations shorter than that fixed by the statute of limitations, and authorities are cited supporting that well-established proposition. It is further said by respondent's counsel that courts sometimes construe a release as a contract not to sue. We also agree with the latter assertion. From these premises counsel draw the conclusion that the sentence above quoted from the contract is a covenant not to sue—that plaintiffs covenanted and agreed not to bring any suit on the contract after April 1, 1915. Such a conclusion does not, and cannot, follow in this case, unless the plain language and meaning of the contract be distorted out of all semblance of reason. If the seller is liable for any breaches of the warranties contained in the contract occurring before April 1, 1915, the purchasers may bring suit at any time within the statute of limitations, but they cannot recover on breach of warranty occurring after April 1, 1915, is clearly the meaning of the paragraph in question.

[3] The other proposition advanced by defendant is also without merit. "This contract expires, and the seller is hereby released from any further obligations to the purchasers after April 1, 1915," means what it says; and that is, that the defendant is released and discharged from all obligations, duties, and defaults occurring after April 1, 1915, and it is logically and necessarily implied that he is liable for breaches of contract before the date named and that he is released from none of those. The words "after April 1, 1915," limit the obligations to that date, and nothing that may happen after or beyond the date specified shall create any obligation or liability on the part of the seller.

A similar provision of a contract was construed in *Board of Education v. Wright-Osborne Co. et al.*, 49 Utah, 468, 164 Pac. 1038. Referring to a provision in a contract that a bond should "expire two years from the date of contract," it is said by Mr. Justice Frick:

"The meaning as well as the apparent intention of the provision clearly is that the obligation in the bond shall not cover any defaults of the contractor under his contract which occur after the expiration of two years."

In that case, as in this, suit was brought on the bond after its termination and based on defaults occurring before its expiration. If we entertained any doubt as to the meaning and effect of the contract set out in plaintiffs' complaint, we would still be inclined to hold the case above referred to as applicable to and decisive of the propositions presented in respondent's brief.

[4] This suit being based on an alleged breach of contract occurring in 1914, and having been commenced within six years after the alleged cause of action accrued, the statute of limitations (Comp. Laws Utah 1917, § 6468) prescribing three years as the period for the commencement of action for relief on the ground of fraud cannot be successfully invoked by defendant.

We are of the opinion that the court erred in sustaining the demurrer interposed by defendant to the amended complaint.

The judgment dismissing the action is therefore reversed, with costs to appellant.

CORFMAN, C. J., and FRIOK, GIDEON, and THURMAN, JJ., concur.

(55 Utah, 237)

BUSH v. BUSH et ux. (No. 3357.)

(Supreme Court of Utah. Nov. 12, 1919.)

1. REPLEVIN §1—ELEMENTS OF ACTION IN CLAIM AND DELIVERY.

The essential elements of an action in claim and delivery are the same as in the common-law action of replevin.

2. REPLEVIN §58—PLEADING OF RIGHT OF POSSESSION.

Complaint in action in claim and delivery should state facts from which it may be inferred with reasonable certainty that plaintiff is entitled to possession of property at time of commencement of action; an allegation of ownership being insufficient, inasmuch as owner may not be entitled to possession.¹

3. REPLEVIN §8(4)—RIGHT OF OWNER TO BRING ACTION.

Owner has no right to bring action in claim and delivery, unless he is entitled to immediate possession of the property.

4. PLEADING §48—ALLEGATIONS OF COMPLAINT.

Complaint, in order to state cause of action, must state facts which, if true, will entitle plaintiff to legal or equitable relief.

¹ Chambers v. Emery, 34 Utah, 380, 108 Pac. 1081, Ann. Cas. 1912A, 332, and note.

5. REPLEVIN §58—SUFFICIENCY OF ALLEGATIONS AS TO POSSESSION.

Complaint, in action in claim and delivery, held defective in failing to allege plaintiff's right to possession of the property at the time of bringing the action.

6. PLEADING §11—COMPLAINT MUST ALLEGE ULTIMATE FACT.

In pleading a cause of action, ultimate fact must be stated.

7. PLEADING §408—WAIVER OF DEFECT.

In action in claim and delivery where complaint was defective in failing to plead plaintiff's right to possession, defendant by tendering requested instructions relating to the right of possession, and by permitting court without objection or exception to give other instructions relating to possession, waived such defect.²

8. PLEADING §408—ANSWER SUFFICIENT TO RAISE ISSUE OF POSSESSION.

In action in claim and delivery where complaint was defective in failing to plead plaintiff's right of possession, answer held not to waive defect.

9. APPEAL AND ERROR §834(1)—PRESUMPTION AS TO JUDGMENT.

Every reasonable intendment must be indulged in favor of the judgment.

Appeal from District Court, Salt Lake County; J. Louis Brown, Judge.

Action by Clara Bush, administratrix, etc., against Amos Bush and wife. Judgment for plaintiff, and defendants appeal. Affirmed.

Hancock & Barnes, of Salt Lake City, for appellants.

Robt. L. Judd, of Salt Lake City, for respondent.

THURMAN, J. [1] This is an action in claim and delivery. The essential elements are the same as in the common-law action of replevin. A verdict was rendered in favor of plaintiff, and judgment entered thereon. After judgment the defendants moved the court to dismiss the complaint and vacate the judgment on the ground that the "complaint does not state facts sufficient to constitute a cause of action." The motion was overruled, and the order overruling it is assigned as error, and relied on by appellants for a reversal of the judgment.

The complaint, after alleging the death of plaintiff's intestate, the plaintiff's appointment as administratrix, and a description of the property proceeds as follows:

"That on the 13th day of October, 1918, and for some time prior thereto Hubert Bush, deceased, was the owner and in possession of said property, and that ever since said date his said

² Harkness v. McClain, 8 Utah, 53, 29 Pac. 964; Voorhees v. Manti City, 13 Utah, 435, 45 Pac. 564; Mangum v. Bullion, Beck & Champion Min. Co., 15 Utah, 534, 50 Pac. 334.

estate has been and now is the owner of said property, which is of the reasonable value of \$775.

"That on or about the 4th day of November, 1918, the defendants did wrongfully and willfully and without the consent of the plaintiff keep the said goods in their possession, and refuse to deliver them to the said plaintiff herein.

"That on or about the 4th day of November, 1918, and before the commencement of this action, the plaintiff duly demanded the said goods from the said defendants, but that the said defendants wrongfully and willfully refused to deliver to the plaintiff the said goods in question."

(Prayer for judgment.)

The specific objection made to the complaint by appellants is that it fails to allege that plaintiff was entitled to possession of the property when the action was commenced. It is contended by appellants that in an action of this kind a complaint which fails to allege that plaintiff is entitled to the immediate possession of the property in controversy is fatally defective. On the other hand, respondent contends that an allegation of ownership in the plaintiff carries with it a presumption of right to possession, and therefore a specific allegation of right to possession is not essential. Each of the parties present for our consideration numerous authorities in support of their respective contentions, from which it appears there is more or less conflict, and in some respects no little confusion.

The authorities cited and relied on by appellant are as follows: *Chambers v. Emery*, 36 Utah, 380, 103 Pac. 1081, Ann. Cas. 1912A, 332, and note; 23 R. C. L. 925; *Fredericks v. Tracy*, 98 Cal. 658, 33 Pac. 750; *Simonds v. Wrightman*, 36 Or. 120, 58 Pac. 1100; *Casto v. Murray*, 47 Or. 57, 81 Pac. 388, 883; *Masterston v. Clark*, 41 Pac. 796;³ *Bane v. Peerman*, 125 Cal. 220, 57 Pac. 885; *Vanalstine v. Whelan*, 135 Cal. 232, 67 Pac. 125; *Chan v. Slater*, 33 Mont. 155, 82 Pac. 657; *Ellers v. Pick*, 58 Or. 54, 113 Pac. 54; *Kimball v. Redfield*, 33 Or. 292, 54 Pac. 216; *Kierbow v. Young*, 20 S. D. 414, 107 N. W. 371, 8 L. R. A. (N. S.) 216, 11 Ann. Cas. 1148; *Vitagraph v. Swaab*, 248 Pa. 478, 94 Atl. 126, Ann. Cas. 1916C, 311; *Cobbey, Replevin*, §§ 526-529.

Respondent, in reply, calls our attention to the following: *Pierce v. Langdon*, 3 Idaho (Hasb.) 141, 28 Pac. 401; *Bates v. Capital State Bank*, 18 Idaho, 429, 110 Pac. 277; *Ill. Sewing Mach. Co. v. Harrison*, 43 Colo. 362, 96 Pac. 177, and cases cited; *McAfee v. Montgomery*, 21 Ind. App. 196, 51 N. E. 957; *Nielsen v. Hyland*, 170 Pac. 778.

[2-4] From an examination of the authorities cited it will appear that the contentions of both parties find considerable support. There is a looseness of expression in many

of the cases, in one respect, which has led to some of the confusion above referred to. For example, many of the cases express the view that it is necessary to allege either that the plaintiff is the owner of the property, or that he is entitled to its possession at the time the action is commenced. One or more of the decisions of this court above cited, in the matter referred to, are subject to the same criticism. In every instance, however, where such looseness of expression occurs the specific question here presented was not involved. Such expressions as those referred to, if not carefully read and considered in connection with the facts of the particular case, are well calculated to mislead the reader and induce him to believe that either an allegation of ownership or right to possession at the time the action is commenced is sufficient; that it is not necessary to allege both. We are of the opinion that such is not a correct view of the law, and, save in exceptional cases, it is contrary to the great weight of authority as laid down both by text-writers and in the adjudicated cases. The exceptional cases are where the statement of facts shows that plaintiff is entitled to the immediate possession of the property when the action is commenced, notwithstanding he may not be the owner of the property. The right of immediate possession is an essential element of the action whether the plaintiff is the owner of the property or not. But the converse of the proposition is not maintainable; an allegation of ownership merely is not sufficient, for the reason that, while one party may be the owner of the property, another may be entitled to the present possession. Any number of illustrations will occur to the mind of the reader without making specific reference. This being the case, it is fallacious to assert that an allegation of ownership alone is sufficient. Any complaint, in order to state a cause of action, must state facts which, if true, will entitle plaintiff to legal or equitable relief. This is the crucial test. How, then, can it be contended that where a complaint alleges ownership only it states a cause of action when, even admitting that fact to be true, the plaintiff may, nevertheless, not be entitled to relief as against one having the right of possession when the action is commenced?

In some of the cases cited, especially those from the state of Colorado, it appears a different doctrine is enunciated. The cases so decided proceed upon the theory that an allegation of ownership in the plaintiff carries with it the presumption that plaintiff is entitled to possession. This would be true if the presumption was absolutely conclusive; but, inasmuch as at most it is only a rebuttable presumption, we feel justified in holding that the doctrine is fallacious, and is founded upon an erroneous conception of the legitimate functions of pleading in a court of justice.

³ Reported in full in the Pacific Reporter; reported as a memorandum decision without opinion in 100 Cal. xv.

Much as we appreciate the high standing of the Supreme Court of our sister state, we cannot subscribe to the doctrine announced in the cases referred to.

In Wells on Replevin (2d Ed.) § 94, it is said:

"One of the cardinal rules of this action is, that the plaintiff must in all cases have a general or special property in the goods which he seeks to recover, with the right to their immediate and exclusive possession at the time of the commencement of his suit. This has been the rule from the earliest times, and is sustained by an unbroken current of authorities to the present day. It is also an established rule that the plaintiff, having such property and right of possession, may sustain the action without other title, even against the general owner."

Again, the same author, in section 670, in stating the essential elements of a complaint, says:

"The declaration should be drawn to meet the proof which will be produced at the hearing. The gist of the action is the wrongful detention. The plaintiff must allege the right or title in himself as it exists, the right to immediate possession, and the detention by the defendant."

Shinn on Replevin, § 423, states the rule more elaborately and perhaps more succinctly:

"The declaration, complaint, or petition (as the first pleading on the part of the plaintiff may be called) must in general contain an averment of the three fundamental facts which together make up a cause of action in replevin. That is to say, the plaintiff must, in ordinary cases in the pleading by which he states to the court his cause of action, state the following facts: (1) The ownership of the plaintiff; (2) the right of the possession of the plaintiff to the property at the time the action is brought; and (3) the present wrongful detention of the defendant."

Cobbey on Replevin, § 27, cited by appellant, says:

"Replevin is strictly a possessory action, 'such wherein the right of possession only, and not of property, is contested.' Its primary object is to enable the plaintiff to obtain the actual possession of personal property wrongfully detained from him by the defendant at the time the action is brought. Generally speaking, in an action of replevin the right to the possession of the property at the time the suit is brought is the only matter in controversy, and the only question that can be tried and determined therein."

The same author, in section 591, in naming the essentials of a good complaint, states the rule with less perspicuity as follows:

"A complaint which alleges (1) wrongful taking, (2) wrongful possession, (3) unlawful conversion, is a good complaint in replevin. The complaint must show a right of property and of possession in the plaintiff."

In 23 R. C. L. p. 925, under the head of Pleading, it is said:

"It may be stated as a well-settled general rule that it is necessary to allege both the ownership, either general or special, and the right to immediate possession in a complaint for replevin."

Further on in the same section the author says:

"Where the complaint merely alleges ownership in the plaintiff without averring a right to possession, no cause of action is stated. It is necessary to allege that the plaintiff is the owner and entitled to possession of the property at the date of the commencement of the suit."

In 34 Cyc. at page 1464, we find the following:

"In an action of replevin, as in other civil actions, the complaint must allege facts sufficient to constitute a cause of action, and to show that it exists in favor of plaintiff, and against defendant. Whether the action is at common law or under the statutes, the complaint must state in clear and concise language the facts upon which plaintiff bases his right and which entitle him to recover, and it must allege facts, and not matters of evidence, or legal conclusions. The material facts to be alleged are plaintiff's ownership, either general or special, of the property, describing it, his right to its immediate possession, and the wrongful taking or detention thereof by defendant."

The foregoing excerpts state the law as maintained by all the text-writers we have examined upon the question involved, and we have no reason to believe there is any substantial dissent from the doctrine thus announced. Hence we are driven to the conclusion that an allegation of ownership alone is not sufficient; that there must be a statement of facts from which it may be inferred with reasonable certainty that plaintiff is entitled to the possession of the property when he commences his action, and, as stated by Cyc., supra, it must be a statement of facts, and not mere legal conclusions. See, also, Chambers v. Emery, 36 Utah, 380, 103 Pac. 1081, Ann. Cas. 1912A, 332.

With this statement of the law as we find it, we come now to an analysis of the complaint in the instant case. If there are sufficient facts stated from which it may be inferred with reasonable certainty that plaintiff at the time the action was commenced was entitled to the immediate possession of the property, then the complaint states a cause of action, and the contention of appellant is without merit.

[5] The complaint in effect alleges that plaintiff's intestate was the owner of the property at the time of his death, and that plaintiff thereafter, as administratrix, became the owner and continued to be so until the action was commenced; that on the 4th day of November thereafter the defendant wrongfully, willfully, and without consent of plaintiff

kept possession of the property, and on said date wrongfully and willfully refused to deliver it to plaintiff, although she made demand therefor. This is all that is alleged concerning ownership and right of possession. It will be observed the complaint nowhere alleges that plaintiff was entitled to the possession of the property, either at the time of commencing the action or at the time the complaint was verified, which was on the 13th day of November, 1918. From November 4th until November 13th there is a complete hiatus in the pleading concerning the possession or right of possession, unless we indulge in the presumption that right of possession follows from the fact of ownership, as held by the Colorado court.

[6] We have already observed that that is a deduction that should not be made in pleading. It may be proper as a matter of evidence in the trial of a cause, but, in pleading, ultimate facts must be stated. *Fredericks v. Tracy*, 98 Cal. 660, 33 Pac. 750.

Respondent seems to rely with considerable assurance on the case of *Nielsen v. Hyland*, a Utah case, 170 Pac. 778. In that case the complaint alleged the ownership and value of the property, the wrongful possession by defendants, the demand of plaintiff, and that defendants still continued to wrongfully detain the property, thus bringing the wrong complained of down to the very commencement of the action. Such a state of facts, in our opinion, justifies the conclusion that the plaintiff was entitled to the possession of the property when he commenced his action. We held the complaint was sufficient; we are still of the same opinion, but, without stating the difference in detail, it is sufficient to say no such case is presented here.

[7] In view of what has been said it follows that in our opinion the complaint in this case is fatally defective; and, unless the appellants, by their course of conduct, waived the defect, the judgment of the trial court should be reversed.

[8] The defendants answered the complaint, but it cannot be contended that the answer waived the defect by tendering the issue omitted in the complaint. The answer, in brief, merely denies the allegations of the complaint relating to ownership by plaintiff and wrongful detention by defendants, and affirmatively alleges ownership in defendants.

During the course of the trial defendants tendered certain requests to instruct the jury relating to the right of possession. These were refused by the court, but the circumstance tends to show that right of possession was accepted as an issue at the trial, and evidence admitted thereon. Furthermore, the court was permitted, without objection or exception, to instruct the jury as follows:

"You are instructed that if you find by a preponderance of the evidence that the plain-

tiff in this case, at the time the suit was commenced, was lawfully entitled to the immediate possession of the property in the complaint described, and that the defendants, or either of them, had the same in their possession, you will find for the plaintiff."

[9] While, as heretofore shown, the right of possession at the commencement of the action was not put in issue by the pleadings, yet it must have been made an issue at the trial, and evidence admitted thereon, or the above instruction would not have been given. Every reasonable intendment must be indulged in favor of the judgment. In 14 Standard Ency. of Procedure, at p. 524, it is said:

"The issues of a case are defined by, and confined to, the pleadings. Ordinarily matters not put in issue by the pleadings cannot be litigated. In determining the issues made in the case, the pleadings, and not the evidence, must be looked to. But the parties by their conduct on the trial may include a disputed fact within the issues of the case, although such fact does not appear at issue in the pleadings."

See, also, note to the above citation.

In vol. 21 of the authority last cited, at pages 411 and 412, the text reads:

"The admission of evidence under a defective allegation, without objection, will generally operate as a waiver of the defects; and the same rule has been applied where the complaint omits some fact essential to a cause of action, but which might be supplied by amendment, although there is authority to the contrary."

The cases cited in this excerpt, in note 25, fully support the text. The first case cited, *Slaughter v. Goldberg, Bowen & Co.*, 26 Cal. App. 318, 147 Pac. 90, a California case, requires something more than a passing notice, because it gives full effect to the provisions of section 475 of the California Code of Civil Procedure, which is substantially the same as our Comp. Laws 1917, § 6622, requiring errors to be disregarded which do not affect the substantial rights of the parties.

The action in the case referred to was for damages resulting from the death of plaintiff's intestate alleged to have been caused by negligence. The complaint failed to show the existence of any heirs, which was conceded to be an essential element in stating a cause of action. The defendants filed a general demurrer, and urged in support of it the omission above referred to. The demurrer was overruled, defendants answered and went to trial. Evidence was admitted without objection. On appeal the order of the court overruling the demurrer was relied on for reversal of the judgment. Respondent resisted appellant's contention, and insisted that the admission of evidence without objection cured the omission of the allegation. This point was sustained by the appellate court, which, in the course of its opinion, at

page 93 of 147 Pac., at page 325 of 26 Cal. App., used the following language:

"We do not feel disposed to examine the numerous cases cited by the parties. It seems to us that the reformed procedure would receive a decided shock if a defendant should be permitted to stand by and without objection allow an issue to be tried as though properly presented by the pleadings, and on appeal escape the consequences by claiming that the complaint failed to present such issue. If there ever was a case where section 475 of the Code of Civil Procedure was intended to apply, this, it seems to us, is one."

Then, after referring to and quoting from *Texas & Pac. Ry. v. Lacey*, 185 Fed. 226, 107 C. C. A. 331, which seems to be in point, the California court proceeds:

"In the case here the trial proceeded in all respects as though the pleadings sufficiently presented the issue as to there being heirs, and precisely as it would had the complaint contained the allegation which it is insisted it should have contained. Why, then, should the case go back to have the complaint amended, as it is manifest that the proofs would be the same? How can it be said that defendant has sustained 'substantial injury, and that a different result would have been probable if such error * * * or defect had not occurred'?"—citing the section above referred to.

The case at bar is substantially similar in every respect to the case from which the above excerpts are quoted, except that in the instant case no demurrer was filed and no objections whatever made until after verdict and judgment had been entered thereon. In that respect this is a stronger case for the application of the rule that harmless errors must be disregarded. The following cases also seem to be in point in a greater or less degree: *Noakes v. City of Los Angeles*, 175 Pac. 409; *Boyle v. Imp. Co.*, 27 Cal. App. 714, 151 Pac. 25; *L. & N. Ry. v. Taylor*, 92 Ky. 55, 17 S. W. 198; *Lounsbury v. Purdy*, 18 N. Y. 515; *Wright v. Deering*, 2 Misc. Rep. 296, 21 N. Y. Supp. 929; *Hogg v. Pinckney*, 16 S. C. 387; *Sherwood v. City of Sioux Falls*, 10 S. D. 405, 73 N. W. 913; *Martin v. Graff*, 10 S. D. 592, 74 N. W. 1040; *Stenson v. Elfmann*, 26 S. D. 134, 128 N. W. 588; *Rea v. Ealick*, 87 Wash. 125, 151 Pac. 256.

Many of the cases last cited, like the California case, go to the extent of holding that the defect is waived by introducing evidence, even where the objection was made by demurrer in the court below. We need not go to that extent in the present case, and expressly reserve that question until it becomes necessary to determine it.

Respondent calls our attention to three Utah cases involving the question of defects cured by verdict. *Harkness v. McClain*, 8 Utah, 52, 29 Pac. 964; *Voorhees v. Mantl City*, 13 Utah, 435, 45 Pac. 564; *Mangum v. Bullion*,

Beck & Champion Min. Co., 15 Utah, 534, 50 Pac. 834.

The case of *Harkness v. McClain*, in our opinion, is the only one of the three cases last cited which bears any similarity in principle to the case at bar; and, even in that case, which was an action upon a promissory note in which there was no allegation of notice to the indorser, it seems an answer was filed which raised the issue of notice. In every other respect the cases are similar. As we read the cases heretofore referred to we see no difference between raising the issue by answer where it was not presented by the complaint and raising it by the tacit consent of the parties during the course of the trial. Viewed in that light, the case of *Harkness v. McClain*, supra, is an authority in point.

We find no prejudicial error in the matter complained of. The judgment of the trial court is affirmed at cost of appellants.

CORFMAN, C. J., and FRICK, WEBER, and GIDEON, JJ., concur.

(55 Utah, 272)

ERNST v. ALLEN et al.

ALLEN et al. v. LANGFORD.

(No. 3380.)

(Supreme Court of Utah. Nov. 21, 1919.)

1. EASEMENTS §3(1)—"EASEMENT APPURTENANT."

An "easement appurtenant" or easement proper is a privilege which the owner of one tenement has the right to enjoy in respect to that tenement, in or over the tenement of another person, involving the idea of two distinct tenements, a dominant estate, to which the right is accessorial, and a servient estate, on which it is a burden or charge (citing Words and Phrases, Easement).

2. EASEMENTS §3(1)—"EASEMENT IN GROSS."

An "easement in gross" is a mere personal interest in the real estate of another, not assignable or inheritable, and being so exclusively personal that the owner cannot take another person in company with him (citing Words and Phrases, Easement in Gross).

3. EVIDENCE §448—CONSTRUCTION OF AMBIGUOUS INSTRUMENT IN VIEW OF CIRCUMSTANCES AND SITUATION.

An instrument attempting to create an easement should be read in the light of surrounding circumstances, the situation of the parties, and property involved, where the language used is ambiguous and apparently contradictory.

4. EASEMENTS §3(1)—USE OF WORDS OF INHERITANCE IN CREATING EASEMENT APPURTENANT.

If the words "heirs and assigns" are used in making a reservation of easement where the grantor in fact retains no land that can be benefited by the easement, the use of the words

does not create an easement appurtenant, the element of a dominant state being lacking, and it is only an easement in gross; but if the deed reserving easement refers to no land of the grantor to which the easement can be appurtenant, but such land exists or existed, the fact of its existence may be established to give effect to the words used.

5. EASEMENTS §3(2)—RESERVATION OF EASEMENT APPURTENANT WITHOUT DESCRIPTION OF RETAINED LAND.

Where the owner of a tract of land conveyed part of it, reserving to herself, her heirs and assigns, an equal right with the grantee, his heirs and assigns, to a right of way for vehicles, foot passengers, animals, etc., over a strip of land between that conveyed and that retained, the easement thus created was appurtenant to the retained land, though such retained land was not described by the conveyance.

Appeal from District Court, Salt Lake County; P. C. Evans, Judge.

Consolidated actions by Helen D. Ernst against William Allen and others, and by William Allen and others against Mrs. Helen Langford. From decree for plaintiffs and defendants Allen and others, Ernst and Langford appeal. Case remanded, with directions to modify decree in accordance with decree, and judgment as modified affirmed.

Young & Moyle, of Salt Lake City, for appellants.

Soren X. Christensen and Thomas Ramage, both of Salt Lake City, for respondents.

THURMAN, J. This is a controversy concerning an alleged right of way, hereinafter referred to as an "alley," 10 feet wide and 10 rods long, lying between and adjacent to other lands owned respectively by the parties litigant.

Each of the parties plaintiff and defendant commenced an action against the other to quiet title to the strip of land in question and for injunctive relief. At the trial, the actions were consolidated and tried together. The trial court found the issues in favor of respondents Allen et al., and a decree was entered in accordance with the findings. This appeal is taken to reverse the judgment. Numerous errors are assigned. The material facts, however, are not in dispute, and, in our opinion, the whole controversy is determinable as a question of law dependent upon the construction of one or two deeds of conveyance made and executed by the common ancestor of the parties to this action.

The common ancestor Jane Elizabeth James, formerly owned the entire property now owned by appellant and respondents, including the alley in dispute. The land so owned by Mrs. James is situated on lot 5, block 36, plat A, Salt Lake City survey, fronting west on the east side of Second East street between Fifth and Sixth South.

In April, 1888, Mrs. James, by warranty deed, conveyed to one Eliza Shafer, predecessor in interest of appellant, a portion of said land described as follows:

"Beginning 50 feet north of the S. W. corner lot 5, block 36, plat A, Salt Lake City survey, thence north 38 feet, thence east 10 rods, thence south 38 feet, thence west 10 rods to the beginning, reserving to the said party of the first part, heirs and assigns, an equal right with the said party of the second part, heirs and assigns, to a right of way for all manner and kind of vehicles, foot passengers, animals, loaded or not, over the following described land, to wit: Beginning 78 feet north of the S. W. corner of lot 5, north 10 feet, east 10 rods, south 10 feet, west 10 rods to beginning."

The strip of ground last described as a right of way is the ground in controversy. Eliza Shafer subsequently conveyed the same property, including the alley, to one Isaac Brockbank. Mrs. James joined in this conveyance, still reserving a right of way to herself, her heirs and assigns.

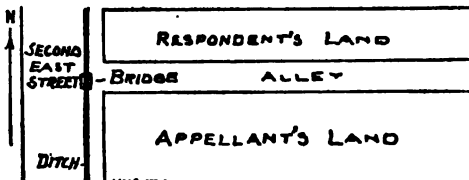
At the time of the execution of these conveyances, Mrs. James was the owner of, and retained ownership of, a small parcel of the land lying north of the alley and abutting thereon, described as follows:

"Commencing at a point 88 feet north from the S. W. corner of lot 5, block 36, plat A, Salt Lake City survey, north 15 feet 1½ inches; east 10 rods; south 15 feet 1½ inches; west 10 rods to beginning."

This is the land now owned by respondents. The entire width of this parcel, fronting on Second East street, is, and ever since before Mrs. James made the conveyance referred to has been, occupied by a building used for residence or business purposes. It extended back 50 or 75 feet. Back of this were sheds where the owner or occupants of the building kept their wood for fuel. On the land now owned by appellant on the south side of the alley, there were, during all the times mentioned, two or more buildings used for residential purposes. The first building fronted west on Second East street and was flush with the south boundary line of the alley. The other building was in the rear. The space between the front buildings on each side of the alley was only 10 feet wide, the designated width of the alley. A ditch extended north and south on the outer edge of the sidewalk in front of the buildings, and during all the times mentioned this ditch was crossed by a bridge leading into the alley. At all times covered by the evidence in the case the alley was used as a right of way in common by the parties litigant and their predecessors in interest. As to whether or not the right of respondents and their predecessors in interest was disputed or acquiesced in by the owners and occupants on the south side of the alley, the evidence is conflicting.

and we deem it unnecessary to attempt a determination of that question. The evidence, however, does satisfactorily establish the fact that the alley was used by Mrs. James in her lifetime and by her successors afterwards, for the purpose of carrying or conveying to the rear of her building coal, wood, groceries, and other articles; and the alley was not only convenient and beneficial for such purposes, but was absolutely essential whenever it became necessary to use vehicles to convey the articles mentioned. The evidence is conclusive that the alley was the only means of ingress and egress to and from the back portion of the premises without going through the building.

The following sketch, made without reference to exact scale, illustrates, approximately, the various parcels of land referred to, the street, ditch, and bridge, and is self-explanatory:



The evidence tends to show that the use made of the alley by respondents and their tenants since they moved there in 1914 has been much more extensive than that made by former occupants, and that no doubt intensified the trouble which finally resulted in the present litigation.

Appellant presents for our consideration a question which, as far as the writer is informed, has never before been determined by this court. The question is not only new in that sense, but, as we view the case, its proper determination is decisive of the main issue presented for our consideration. The question, in the last analysis, is: Can the owner in fee of a parcel of land convey a part thereof and reserve from the part conveyed a right of way for herself, heirs and assigns, over a strip contiguous to that retained by herself, unless the conveyance describes the land so retained by the grantor? Appellant contends with great earnestness and more than ordinary ability that such a reservation only reserves to the grantor a mere personal right which is neither inheritable nor assignable, notwithstanding words of inheritance and assignability are used, and notwithstanding the further fact that the grantor may have retained the ownership of contiguous lands which might be benefited by the right of way. In short, appellant contends that by the terms of the conveyance in this case, including the reservation, the common ancestor, Jane Elizabeth James, did not reserve an easement appurtenant to other lands owned by her which

might be inherited or assigned, but only reserved a way in gross, which upon her death would become extinguished. This position of appellant gives no effect whatever to the words "heirs and assigns" occurring in the reservation in both conveyances, but construes the instruments as if these words had been omitted altogether. Many of the cases hereinafter cited support the contention of appellant that words of assignability or inheritance do not of themselves make the easement assignable or inheritable if in fact it is only an easement in gross.

Whether or not an easement in gross might be made assignable or inheritable merely by the use of words suggestive of these qualities need not be determined by us in the instant case. It is sufficient for our present purpose to determine whether the right of way in question here is an easement appurtenant or an easement in gross under the facts disclosed by the record and the law applicable thereto.

[1] An "easement appurtenant," sometimes called an easement proper, has been defined as follows:

"An 'easement proper' is a privilege which the owner of one tenement has the right to enjoy, in respect to that tenement, in or over the tenement of another person." 3 Words and Phrases, p. 2306.

Again, the same authority, at page 2307, in speaking of the essential elements of an easement appurtenant, says:

"The existence of an easement involves the idea of two distinct tenements: a dominant estate, to which the right is accessorial; and a servient estate, upon which it is a burden or charge."

[2] An "easement in gross" is defined by the same authority, at page 2311, as follows:

"An easement in gross is a mere personal interest in the real estate of another, and is not assignable or inheritable. It dies with the person, and it is so exclusively personal that the owner by right cannot take another person in company with him."

The principal distinction between the two classes of easements seems to be that in the easement appurtenant there must be a dominant tenement, while no such element exists in an easement in gross.

These definitions have been selected, from a large number examined, because of their brevity and perspicuity. Applying them to the facts in the case at bar, we have no difficulty whatever in determining to which class the easement in question belongs. Here we have the right of way reserved by the common ancestor out of the lands conveyed to Eliza Shafer, appellant's predecessor in interest. At the time the common ancestor made this conveyance and reservation, she had and retained ownership of other lands abutting on the right of way which would be permanently

benefited thereby. Indeed, the purpose of the reservation is so manifest, when we consider the surroundings, as to be self-evident and apparently incontrovertible. If the land conveyed by Jane Elizabeth James had been all the land she had and she had reserved therefrom a right of way, it might well be conceded the right would have been merely an easement in gross; there would have been no dominant tenement to which the right of way could have been appurtenant. But such we have seen was not the case. At the very time she made the conveyance and reserved the right of way, she owned other lands upon which she was residing—land contiguous to the right of way and dependent upon it as a means of ingress and egress to and from the back portion of her premises.

It seems to us that this matter is too plain for controversy. The right of way in question, viewed in the light of the surrounding circumstances, has all the earmarks of an easement appurtenant, and unless, as contended, by appellant, it was necessary in the deed to describe the dominant tenement or land to which the right of way was appurtenant, the judgment should be affirmed as far as the right of way is concerned.

In support of her contention that the right of way in question is a mere easement in gross and not an easement appurtenant, and that a deed creating an easement appurtenant should describe the dominant estate, appellant calls our attention to the case of *Cadwalader v. Bailey*, a Rhode Island case, found in 17 R. I. 495, 23 Atl. 20, 14 L. R. A. at page 300. Appellant also cites and relies on all the cases referred to in the opinion of the court, to which we direct the attention of the reader. Appellant appears to rely with great assurance upon the doctrine enunciated in that case and the cases cited, for only one or two other cases are referred to in her brief. We cannot afford to review the case at length, but the controlling facts are that certain grantors owned the land conveyed and also other land known as "Bailey's Beach." The grantors conveyed the first-mentioned land to Cadwalader, with certain bathing rights on the beach, and also stipulated in the deed for themselves, their heirs, administrators, and assigns, that no building except bathing cars should ever be constructed on Bailey's Beach, etc. Cadwalader thereafter sold all of the land so conveyed to him, but undertook in the conveyance to reserve to himself, his heirs and assigns, the right pertaining to the building restriction to which reference has been made. A descendant and residuary legatee of Cadwalader brought the action to enforce the restriction. The court, in concluding the opinion, says:

"It follows, then, that the complainant, never having owned the dominant estate described in the bill, has no standing in a court of equity to enforce rights which were appurtenant thereto."

Thus, we see, the first Cadwalader, having sold the dominant estate, could not retain the naked right to enforce the building restriction. At most, it was only an easement in gross which at his death became extinguished. This is an authority directly in point on the proposition heretofore suggested that if Jane Elizabeth James, the common ancestor, when she made the conveyance referred to, had conveyed away all her land, the reservation of a right of way would have been merely an easement in gross. So far from this case being an authority for appellant in her present contention, it seems to us it tends to support the position of respondent. The clear inference is that, if the first Cadwalader had not disposed of the land intended to be benefited by the restriction, the court would have sustained the action brought by his devisee.

However, while that particular case, for the reasons stated, seems to be against appellant's contention, it must be conceded that one of the cases cited in the opinion is exactly in point to the proposition that, unless the dominant estate is described in a deed of conveyance, any easement attempted to be created is only an easement in gross. *Wagner v. Hanna*, 38 Cal. 111, 99 Am. Dec. 354, is the only case called to our attention, and the only one we have been able to find, that holds to that effect. The first four paragraphs of the syllabi reflect the opinion of the court:

"When the owner of a tract of land sells one-half of it, reserving a right of way across it, and in the same deed grants to the vendee a right of way across the unsold half, these rights are not annexed to, or appurtenant to, the respective tracts, and do not pass with the title. Whether the grant of a right of way be in gross, or appurtenant to some other estate, must be determined from the grant itself, and not by matters aliunde.

"The principal distinction between an easement and a right of way in gross is that in the first there is, and in the second there is not, a dominant tenement.

"The grant of an easement is always made for the benefit of other premises, which are described in the grant.

"A right of way is an interest in lands, to be conveyed only by an instrument in writing, which must describe the interest conveyed. If it is appurtenant to another tract, it must be so described, together with the tract of land to which it is appurtenant."

The opinion is by a divided court, and is otherwise inherently weak and unsatisfactory.

[3] The overwhelming weight of judicial opinion, as we read the cases, is to the effect that an instrument attempting to create an easement should be read in the light of surrounding circumstances and the situation of the parties and property involved, especially where the language used is ambiguous and apparently contradictory.

In *Peck v. Conway*, 119 Mass. 546, in which the deed created an easement, it does not ap-

pear that the dominant estate was described in the deed. The doctrine of the opinion is clearly reflected in the syllabi, the first paragraph of which is as follows:

"A reservation in a deed of land, that no building is to be erected by the grantee, his heirs or assigns, upon the land conveyed, creates an easement, or a servitude in the nature of an easement, upon the land; and the situation of the land relatively to other land of the grantor may be considered in determining whether such easement or servitude is a personal right of the grantor or is appurtenant to his other land."

In *Dennis v. Wilson*, 107 Mass. 591, the same condition exists. It is not apparent that the deed described the dominant estate. Notwithstanding this, an easement appurtenant was sustained. The following paragraph from the court's opinion, on page 592 of 107 Mass. is in point:

"In this case, Jenkins conveyed to Rice part of his entire tract of land. The right of way, excepted and reserved, extended from the highway in front, along the line of division, for a specified distance, less than the whole depth of the lots. As the grantor could have no occasion, apparently, to use such a way for any other purpose than for access to and egress from his remaining land, the inference would seem to be inevitable that it was for that use that both parties must have understood and intended the way to be held."

See, also, *Badger v. Boardman*, 16 Gray (Mass.) 560, in which the court held that no easement was created. We cite the case, however, to the point that, in attempting to determine the meaning of an instrument purporting to reserve an easement, the circumstances surrounding the parties, their situation when the deed is made, and the situation of the property with reference to other lands of the grantor, may be considered.

In *Winston v. Johnson*, 42 Minn. 398, 45 N. W. 958, a right of way was involved. We quote the fourth paragraph of the syllabi, which, so far as the point in review is concerned, states the essence of the opinion:

"When there is in the deed no declaration of the intention of the parties in regard to the nature of the way, it will be determined by its relation to other estates of the grantor, or its want of such relation. Resort may also be had in such a case to other circumstances surrounding the transaction, for the purpose of ascertaining the intent and the effect to be given the instrument."

In *French v. Williams*, 82 Va. 462, 4 S. E. 591, we have a case from which we feel impelled to quote at considerable length. Before doing so, however, we refer for a brief moment to the deed of Jane Elizabeth James, under which both the parties to this controversy claim, and the language therein "her heirs and assigns." Appellant contends that these words are meaningless and without effect. On the other hand, it must be admitted

that the words, both in their technical and ordinary meaning, imply something more than a mere easement in gross as heretofore defined. If, then, because of some technical rule of law, as contended by appellant, these words have lost both their technical and ordinary meaning, it is our duty, if possible, to find for what purpose the words were used. If the purpose does not fully appear in the instrument itself, then there arises an ambiguity which may be explained by the surrounding circumstances, the situation of the parties, and the property involved. The case last referred to is also concerning a right of way. The following excerpt from the opinion, on pages 468 and 469 of 82 Va., on page 594 of 4 S. E., is self-explanatory:

"Nor is it specifically stated in the deed that F. T. Moreland owned the entire tract, or that he retained the part not sold to French. In fact, the failure of the deed to specify that Moreland owned or retained any land to which the 'way' reserved could be appurtenant is strongly urged to uphold the contention that the way reserved was of a right in gross and not of a right appurtenant.

"Hence, the absolute necessity, if the substance, and not the shadowy form, of the contract is to be looked to, of resorting to extrinsic evidence to ascertain the true intent and meaning of the parties, by having recourse to the circumstances which surrounded them at the time, and in the light of which they executed the contract. This is all the more important in view of the rule that a way is never presumed to be in gross when it can fairly be construed to be appurtenant to land. Wash. E. and S. 232. And in view of the further rule 'that parties are presumed to contract in reference to the condition of the property at the time of the sale.' Wash. E. and S. 79. And these principles are all the more applicable inasmuch as the way here is reserved to 'Moreland, his heirs and assigns,' language which strongly tends to preclude the idea of a reservation in gross. Moreover, the way reserved is 'as now and heretofore used,' but the deed, whilst it further designates it as 'from the east back street of said town, leading by the old stone house, to the back mill road,' yet fails to describe the character of way referred to, or whether it was entirely or only in part, over the land conveyed to French.

"It is essential to understand all these things in order to uphold and enforce the contract according to its true meaning; and to understand them resort must be had to the real state of facts and circumstances surrounding the parties when they entered into the contract. It is clear, therefore, that parol evidence is admissible to explain the surroundings, and to enable the court to place itself in the same situation occupied by the parties who made the contract, and thus, in view of all the attendant circumstances, to judge of the meaning of the words used, and of the proper application of the language to the way which, to say the least is, in some measure, ambiguously described." (Italics ours.)

[4] One further suggestion to make our meaning clear in respect to the use of the

words "heirs and assigns" or similar words, and the effect that should be given to them in instruments of this kind: If such words are used in making a reservation in cases where the grantor in fact retains no land that can be benefited by the easement, then the use of such words cannot have the effect of creating an easement appurtenant, for the element of a dominant estate is lacking. In such case it is only an easement in gross. If, on the other hand, the words "heirs and assigns," or similar words, are used in a deed reserving an easement, and the deed refers to no land of the grantor to which said easement can be appurtenant, but such land in fact exists, or existed when the reservation was made, the fact of the existence of such land may be established in order to give effect to the words used in making the reservation.

We also call attention to the following cases, more or less to the same effect as those already considered: *Clark v. Martin*, 49 Pa. at page 297; *McMahon v. Williams*, 79 Ala. at page 288.

[5] It would serve no useful purpose to multiply cases in support of the doctrine enunciated in the opinions above referred to. We have examined and carefully read many times the number of cases above cited, and are satisfied that the selections made reflect the great weight of judicial opinion. It would be a harsh rule indeed that would deprive respondents in this case of an appurtenance almost indispensable to a comfortable enjoyment of their property—an appurtenance enjoyed by them and their predecessors in interest, under a substantial claim of right, for more than a quarter of a century. We refer specifically to the right of ingress and egress to and from their property for the benefit of which the easement was created. Respondents, however, can claim no greater right than that reserved in the deed of their ancestor, Jane Elizabeth James. The right to fry fat or to permit their horses to stand in the alley except while loading and unloading vehicles, or to make any kind of filth therein, is not permissible under the terms of the reservation creating the right of way; and even for the purpose of loading and unloading vehicles only such length of time should be permitted as is reasonably necessary for the purpose. The decree should be modified in these respects. The conclusion reached is decisive of all the questions involved.

The case is therefore remanded to the trial court, with directions to modify the decree in accordance with the views herein expressed, and the judgment so modified may be, and is hereby, affirmed. The parties to pay their own costs on appeal.

CORFMAN, C. J., and FRICK, WEBER, and GIDEON, JJ., concur.

(97 Colo. 20)

FIELDS, State Engineer, et al. v. KINCAID et al. (No. 9055.)

(Supreme Court of Colorado. April 7, 1919.
On Petition for Rehearing, Oct. 6, 1919.)

1. VENUE ⇐13—WHERE WATER RIGHTS ARE "SITUATED" AS AFFECTING VENUE.

Under Code, § 25, requiring action to be tried in county in which subject-matter is "situated," a water right can be held to be situated only at the point of diversion or at the place of use.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Situate.]

2. VENUE ⇐13—REFUSAL OF CHANGE IN ACTION INVOLVING WATER RIGHTS PROPER.

Where action involving water rights was brought in county in which plaintiff's rights were situated, court properly refused, under Code, § 25, to change place of trial to county in which defendant's rights were situated; the subject of the action not being wholly in latter county.

3. VENUE ⇐45—LACK OF JURISDICTION NOT GROUND FOR CHANGE.

Lack of jurisdiction is a ground for dismissal; not for change of venue.

4. COURTS ⇐481—VENUE NOT CHANGED IN WATER RIGHT CASE TO COURT RENDERING FORMER DECREE.

In action to settle water rights of the parties under several decrees, court properly refused to change place of trial to another county, though prayer asked to have decree of court of such county declared null and void, since court could have determined the relative rights of the parties without passing upon validity of such decree.

5. COURTS ⇐481 — MAY ANNUL DECREE OF ANOTHER COURT FOR WANT OF JURISDICTION.

Any court has a right to declare the decree of any other court null and void for want of jurisdiction and to proceed as if there were no such decree, if it is void on its face.

6. COURTS ⇐37(3) — AFTER DECREE PARTIES ESTOPPED TO QUESTION JURISDICTION.

Where parties to water adjudication proceeding submitted to the adjudication without questioning the jurisdiction, and received benefits of decree by using water distributed under it for many years, they cannot claim that the court had no jurisdiction.

7. WATERS AND WATER COURSES ⇐152(11)—ADJUDICATION OF WATER RIGHTS CONFIRMATION OF FORMER DECREE.

A water adjudication decree is a continuation and confirmation of a prior decree in same court adjudicating water rights in same district.

8. PLEADING ⇐9—PURPOSE OF FACTS ALLEGED IN ANSWER NEED NOT BE STATED.

In pleading under the Code the facts constituting a defense are sufficient without stating their purpose, though such method is not to be recommended.

On Petition for Rehearing.

9. APPEAL AND ERROR ⇨854(2)—CORRECT JUDGMENT AFFIRMED THOUGH REASON INSUFFICIENT.

Supreme Court will affirm judgment if for some reason appearing in the record it is shown to be right, no matter how unfounded or insufficient may have been the reasons on which the lower court proceeded.

10. PLEADING ⇨406(7)—OBJECTIONS TO COMPLAINT WAIVED BY ANSWER.

Objection that complaint was ambiguous, unintelligible, and uncertain was waived by answer.

11. WATERS AND WATER COURSES ⇨152(5)—PLEADING PRESENTING ISSUE OF ACCEPTANCE OF FORMER DECREE.

In action involving water rights, pleadings held to present issue of whether defendants had accepted benefits of and used waters in accordance with former adjudication decree.

12. WATERS AND WATER COURSES ⇨152(7)—EVIDENCE OF ACCEPTANCE OF FORMER ADJUDICATION.

In action involving water rights, defendants could show that they had taken water under a former decree upon issue of whether they had accepted benefits of another former decree.

13. APPEAL AND ERROR ⇨917(1)—PRESUMPTIONS ON REVIEW OF JUDGMENT SUSTAINING DEMURRER TO PLEA.

Supreme Court, in passing on court's action in sustaining demurrer to plea, will assume the truth of every fact stated in that plea, except such as were elsewhere in issue and determined against defendants.

14. PLEADING ⇨204(7)—DEMURRER TO PART OF ANSWER STATING SEPARATE DEFENSE PROPER.

It is proper to demur to part of an answer stating and purporting to state a separate defense.

15. PLEADING ⇨368—SEPARATE DEFENSES SHOULD BE SEPARATED.

Where defenses are commingled and do not purport to be separate, the better practice is to require them to be separated to prevent confusion.

En Banc.

Error to District Court, Huerfano County; Granby Hillyer, Judge.

Action by J. K. Kincaid and others against John E. Fields, State Engineer, and others. Decree for plaintiffs, and defendants bring error. Affirmed.

On petition for rehearing. Rehearing denied.

M. C. Saunders, of Pueblo, McCreery & McCreery, of Greeley, and Hartman & Ballreich, of Pueblo, for plaintiffs in error.

Charles Hayden, of Walsenberg, and J. G. Schweigert and Jesse G. Northcutt, both of Denver, for defendants in error.

DENISON, J. The complaint in this suit was filed in the district court of Huerfano county May 20, 1913. It alleges that the plaintiffs and others similarly situated were the owners of water rights in water district No. 16, consisting of the Huerfano river and its tributaries, including Pueblo and Huerfano counties; that the defendants Fields, state engineer, Chew, division engineer, Brown, water commissioner, were shutting down plaintiffs' headgates for the benefit of the other defendants, who owned rights further down the stream which they claimed were superior. The prayer was for injunction, that a decree mentioned hereinafter as the Pueblo decree be held void, and for general relief. There was a demurrer to the complaint, various motions to strike, the case was finally tried, and plaintiffs had judgment. The defendants, having leave to stand on their demurrer and objections to the evidence, introduced no evidence. The court entered a decree enjoining defendants from interfering with the flow of waters of the Huerfano and Cucharas rivers into the ditches of the plaintiffs and others mentioned in the decree. The defendants bring the case here on error.

In order to understand the full situation it is necessary to review the legislation and decrees affecting water district 16.

February 19, 1879 (Laws 1879, p. 94), the well-known act for the adjudication of water rights in Colorado was passed. This act created certain water districts and gave the Governor power to create more. None of the districts created by the act, however, included any stream now in question. February 23, 1881 (Laws 1881, p. 142), another statute modifying and extending the act of 1879 was enacted. February 13, 1885 (Laws 1885, p. 181), an act was passed fixing terms of court in Huerfano county on the first Monday in June and in Pueblo county on the fourth Monday in April. April 1, 1885 (Laws 1885, p. 257), the statute creating water district 16 was enacted. March 24, 1887, Pueblo county and Huerfano county, theretofore in the same judicial district, were placed in separate districts, and by the same act Huerfano county had a term of court beginning on the second Tuesday of December. May 20, 1887, at the term of the Pueblo district court beginning on the fourth Monday of April, suit was begun under the statute for the adjudication of water rights in district 16. On the 24th of January, 1888, at the December term of the Huerfano district court, suit was begun to adjudicate the water rights in district 16. June 12, 1889, a decree was entered in the Huerfano county suit, which for convenience is known as the Read decree. September 1, 1891, a decree called the Pueblo decree was entered in said suit in Pueblo coun-

ty. None of the parties owning the ditches to which water is adjudged by the Read decree seem to have appeared in the Pueblo suit; neither did any of those obtaining judgment in the Pueblo case appear in the Read case.

September 25, 1895, another suit was begun in Huerfano county, which ended February 23, 1898, in a decree adjudging certain water rights to various parties, and in this case the parties defendant in the present case, or their grantors, appeared and obtained adjudications of their rights different from those granted them by the Pueblo decree. This is called the Killian decree.

The defendants moved for a change of place of trial on several grounds, which when analyzed amount to two:

(1) That the action affected real estate situated wholly in Pueblo county.

(2) That the action was to enjoin or affect in some way a decree for irrigation rights rendered by the district court of Pueblo county.

[1] 1. Upon the first ground: A water right can be said to be "situated" (Code, § 25) only at the point of diversion or at the place of use; we do not decide which. The rights of the plaintiffs are all diverted and used, and therefore "situated," in Huerfano county, and those of the defendants in Pueblo county.

[2] Defendants claim that the "subject of the action" (Code, § 25) is their rights, situated in Pueblo county, while plaintiffs claim that it is their rights, situated in Huerfano county. It would appear to be as much one as the other that will be adversely or beneficially affected by the decision. If, therefore, the subject of the action is to be regarded as that property which is affected by the decision, the motion, so far as this ground is concerned, was rightly denied, because the subject of the action is in both counties. Code, § 25. We do not see how the subject of the action in any view of the case can be said to be wholly in Pueblo county, and so must say that the first ground of the motion was not good.

[3-5] The second ground of the motion was that the Pueblo decree was sought to be set aside or varied or modified by the present suit, and that the only court that could do that was the Pueblo court, and that therefore the Huerfano court was without jurisdiction. If the Huerfano court was without jurisdiction, it was ground for dismissal, not for change of venue. However, even though it is true that the prayer of the bill in the present case asked that the Pueblo decree be held null and void, and the decree in the present case declares it to be null and void (see paragraph 11 of the decree), it does not follow that the Huerfano court had no jurisdiction, because the suit was to settle the relative rights of the parties under the sev-

eral decrees, and might be (indeed later in this opinion is) decided on another point than the invalidity of the Pueblo decree. Moreover, any court has a right to declare the decree of any other court null and void for want of jurisdiction, or rather has a right to proceed as if there were no such decree, if it is void on its face. It was within the power, therefore, of the Huerfano court to determine whether the Pueblo decree was void on its face or not, but, since that question was one of the questions involved in the main suit, it was not proper, or at least the court was not bound, to decide it on motion.

If it could be said that in order to decide for plaintiffs the Huerfano court must hold the Pueblo decree to be void, it might with equal truth be said if there should be a transfer of the case to Pueblo, that in order to decide for defendants the Pueblo court must hold the Read decree to be void. *Summit County v. Lake County*, 179 Pac. 875, not yet officially reported.

There was no error in the denial of the motion.

The principal ground upon which defendants rely for reversal is that the Huerfano court had no jurisdiction of the Read case or the Killian case, and hard questions are raised based on Sess. Laws 1879, p. 99, §§ 19 and 29, Sess. Laws 1881, p. 144, § 8, and the acts creating water district 16 and changing the terms of court in Huerfano county, but we do not find it necessary to determine them.

The court found, and the finding was justified by the evidence, that all the defendants or their grantors were parties to the Killian decree and took advantage of it, and that water had been distributed to them for many years under it.

[6] It was Pueblo county claimants who initiated the Killian case, apparently on the theory that the Read decree was valid and superior to that of Pueblo; but, whatever the theory may have been, having submitted to the adjudication without questioning the jurisdiction, and having received the benefits of the decree, they cannot now claim that the Huerfano district court had no jurisdiction. *Handy Ditch Co. v. So. Side Ditch Co.*, 26 Colo. 333, 58 Pac. 30; *Consol., etc., Ditch Co. v. New Loveland, etc., Co.*, 27 Colo. 521, 522, 62 Pac. 364.

[7] Under the practice in this state the Killian decree was in substance but a continuation of the Read decree, and consequently a confirmation of it. The Read and Killian decrees, therefore, as against these defendants, must stand.

[8] It is urged by the defendants that advantage cannot be taken of the fact that they procured adjudication under the Killian decree because it amounts to estoppel and estoppel has not been pleaded. It is true that no special plea of estoppel as such has been

set up by the plaintiffs, but the facts of the Killian decree and the distribution under it have been pleaded and proved, and it is they that constitute the estoppel. In pleading under the Code the facts constituting a defense are sufficient without stating their purpose, though we do not recommend that method. And this is true whether they are alleged by one party or the other. 18 Cyc. 809-811. See, also, *Gillette v. Young*, 45 Colo. 562, 566, 101 Pac. 766.

We think what has been said requires the conclusion that the present judgment is right and should be affirmed. We are not to be understood as holding that the Pueblo decree was with or without jurisdiction.

Judgment affirmed.

SCOTT, J., not participating.

On Petition for Rehearing.

DENISON, J. Upon petition for rehearing plaintiffs in error say that the principal point which they urge is not that the Huerfano district court had no jurisdiction to render the Read and Killian decrees, but that it had no jurisdiction over this case, because this is a suit to set aside the Pueblo decree rendered by the Pueblo district court.

On this point we now restate what we said in our former opinion, that the court below had jurisdiction of the present case, notwithstanding the Pueblo decree is therein sought to be set aside, and although the finding is that the same is void, because the real purpose of this case is to determine the relative rights of the parties, and that can be done without determining the validity of the Pueblo decree; also because any court has power to disregard any decree of any other court which on its face is void for want of jurisdiction, and such power involves the power to determine whether it is thus void. The ultimate power to determine whether such decree is thus void is, of course, in the court of last resort.

In the present case, if the determination of such question were necessary to the determination of the case, we should determine it.

We adhere to the conclusion expressed in our original opinion, that the question of the validity of the Pueblo decree is not necessary to the question of the affirmance or reversal of this case. The parties now before us were all in the Killian case and are bound by the Killian decree, which is shown by the complaint and the evidence to be later than that of Pueblo. The decision in this present case was that the water be distributed according to the Killian and Read decrees, which were practically one, and this decision was right whether the Pueblo court originally had jurisdiction or not.

Counsel are in error in supposing we hold the Pueblo decree void. We hold that the

defendants were bound by the Killian decree whether the Pueblo decree was void or valid, and that therefore the decree in the present case was right.

[8] Counsel are again in error in supposing that in affirming the judgment we necessarily adopt the finding of the court below that the Pueblo decree was void. We affirm a judgment if, for some sound reason appearing in the record, it is shown to be right, no matter how unfounded or insufficient may have been the reasons upon which the lower court proceeded.

[10] The objection, that the complaint is ambiguous, unintelligible, and uncertain was waived by answer.

[11] It is earnestly urged that the Pueblo decree and the continued taking of water thereunder by the defendants stand admitted in the pleadings; that, since a demurrer to the defense alleging the Pueblo decree and continued distribution thereunder was sustained, that decree and the distribution and continued taking of water thereunder stand admitted. But the plaintiffs in their replication set up the Killian decree and alleged that the defendants appeared, obtained adjudication in that case, and have ever since accepted its benefits and used water in accordance with it. This, under the Code, was taken as denied. There was, then, an issue on that point, which was found for the plaintiffs.

[12] The defendants were not, then, as they seem to claim, prevented from proving distribution under the Pueblo decree. Upon the issue whether they had accepted benefits under the Killian decree, they might show, if they were able to do so, that they had always taken under the Pueblo decree, as evidence tending to show they had not taken under the other; and as to their being parties to the Killian case and making proof and obtaining adjudication therein there is no dispute.

[13] The error, then, if it was an error, in sustaining the demurrer to the plea of the Pueblo decree, cannot avail plaintiffs in error, because, for the purpose of this decision, we assume the truth of every fact stated in that plea except such as were elsewhere in issue and determined against the plaintiffs in error.

It is urged that the water officials could not be estopped. If so, it does not follow that the users of water cannot, and, if they can, then the officials can be enjoined from delivering water to them.

It is claimed that the answer of the water officials, not having been denied, stands admitted and controls the case. We can find nothing in this answer as shown in abstract or record that militates against our conclusions.

It follows from what has been said that the demurrer to the complaint was properly overruled.

[14, 15] It is proper to demur to part of an answer stating and (as in this case) purporting to state a separate defense. The objection, therefore, to plaintiff's demurrers on the ground that they were to separate parts of the answer is not well taken. Where defenses are commingled and do not purport to be separate, the better practice is to require them to be separated, to prevent confusion.

We were wrong in our former opinion where we said that the Killian decree and acceptance of its benefits had not been pleaded as an estoppel. They are expressly so pleaded in the replication.

SCOTT, J., not participating.

(56 Mont. 284)

DANIELS v. GRANITE BI-METALLIC CONSOLIDATED MINING CO.
(No. 4024.)

(Supreme Court of Montana. Oct. 17, 1919.)

1. APPEAL AND ERROR ¶853—INSTRUCTION UNOBTAINED TO BECOMES LAW OF CASE.

An instruction given without objection from either party became the law of the case on the subject.

2. MINES AND MINERALS ¶118—RULES OF MINING INSPECTOR BINDING ON COMPANY AND ENGINEER.

Under Rev. Code, § 1724, the rules and regulations of the mining inspector as to signals for the starting of mine hoists or cages were binding on a mining company and its engineer, and for damages proximately caused by the unauthorized act of the engineer in substituting a signal code of his own the mining company is liable; violation of the code constituting negligence.

3. MINES AND MINERALS ¶118—CONTRIBUTORY NEGLIGENCE IN SIGNALING ENGINEER TO HOIST CAGE.

To determine whether plaintiff, injured in defendant company's mine by the sudden hoisting of a cage on an incomplete signal, was negligent, plaintiff's conduct must be measured by that of the average man under similar circumstances, and in giving signals to the engineer on the surface to raise the cage he should have been governed by the customs and usages of reasonably prudent, experienced miners.

4. MINES AND MINERALS ¶118—LEGAL NEGLIGENCE IN TAKING POSITION TO SIGNAL FOR HOIST.

If undisputed evidence shows that the position assumed by plaintiff to give signals to defendant mining company's engineer on the surface to hoist a cage was more dangerous than another position he might have taken, and that with full knowledge of the facts and probable consequences he voluntarily assumed the more dangerous position, he was negligent as a matter of law.

5. NEGLIGENCE ¶71—CONDUCT OF REASONABLY PRUDENT MAN IN CHOICE OF WAYS.

In balancing ways to make a choice between them, one is not required to choose unerringly in the light of after events, but only to make such a choice as under all obvious circumstances a reasonably prudent man might have made.

6. MINES AND MINERALS ¶125—CONTRIBUTORY NEGLIGENCE A JURY QUESTION.

In an action against a mining company for injuries to plaintiff when the surface engineer suddenly hoisted a cage on incomplete signal from plaintiff, whether under all the circumstances plaintiff was negligent in taking the more dangerous of two possible positions to make the signal held a question for the jury.

7. TRIAL ¶260(1)—REPETITION OF INSTRUCTIONS.

Offered instructions whose subject-matter was fully covered by other instructions given were properly refused.

8. MINES AND MINERALS ¶125—BURDEN TO PROVE CONTRIBUTORY NEGLIGENCE ON DEFENDANT.

Plaintiff, suing defendant mining company for injuries when its engineer hoisted a cage suddenly on an incomplete signal from plaintiff, did not have the burden to prove the company's negligence and his own freedom from contributing fault; the defense of contributory negligence being special, to be pleaded and proved by defendant.

9. NEGLIGENCE ¶82—ONLY CONTRIBUTORY NEGLIGENCE BARS RECOVERY.

Only such negligence on plaintiff's part as constituted a proximate or contributing cause of his injury bars his recovery.

Appeal from Third District Court, Granite County; Geo. B. Winston, Judge.

Action by William Daniels against the Granite Bi-Metallic Consolidated Mining Company. From judgment for plaintiff, and from an order denying its motion for new trial, defendant appeals. Judgment and order affirmed.

W. E. Moore, of Phillipsburg, and Walker & Walker, of Butte, for appellant.

J. J. McDonald, of Phillipsburg, S. P. Wilson, of Deer Lodge, and J. J. McCaffery, of Butte, for respondent.

HOLLOWAY, J. The defendant, Granite Bi-Metallic Consolidated Mining Company, owned and operated the Granite mine, near Phillipsburg, Mont., and also leased certain ore bodies in the mine to other persons to work on a royalty basis. The facilities of the mine were at the service of the lessees as well as the employees. To govern the use of the cage, certain signals prescribed by the state mine inspector were in use. The signals to lower and hoist were given by means of a gong in the engine house, on the surface. To the striker of the gong was attached a small wire cable which extended down the

shaft and at each level was fastened to a lever. By pulling down upon the lever, the gong was sounded. On the day of the accident plaintiff and his partner, McDonald, were on the 700 level to procure samples with a view to securing a lease of ore bodies at that level. Having secured the samples, they returned to the shaft, gave the required signal, and the cage was lowered. McDonald, with the samples, stepped upon the cage, and plaintiff undertook to give to the engineer the signal (three bells) to hoist men to the surface. When one bell had been given, the cage was suddenly hoisted, with the result that plaintiff was thrown violently to the floor of the station, receiving the injuries of which he complains.

It is charged in the complaint that the defendant, by its engineer, was guilty of negligence in moving the cage before the signal was completed, and that this negligence proximately caused the injury. By its answer defendant denied any negligence on the part of the engineer, and alleged that plaintiff was guilty of contributory negligence in that he stood with one foot on the cage and the other on the floor of the station while giving the signal to hoist. In his reply plaintiff admitted that he stood with one foot on the cage and the other on the floor of the station, but denied that he was guilty of negligence in so doing.

The trial resulted in a verdict for plaintiff, and from the judgment entered thereon and from an order denying it a new trial defendant appealed.

[1] For the purpose of this case it is immaterial whether plaintiff was in the mine by direction or invitation of the defendant. The court instructed the jury that the defendant owed to plaintiff the duty to exercise reasonable care and diligence for his safety. This instruction was given without objection from either party and became the law of the case upon that subject.

Plaintiff and McDonald testified that plaintiff had given one bell and was in the act of giving the second one when the cage was moved, and that plaintiff was proceeding in the customary manner without unnecessary or unreasonable delay between bells. The engineer testified very positively that he had received a complete signal, not a signal to raise men to the surface, however, but the proper signal to hoist ore or the empty cage to the surface, or the cage with men to the next level above, and that he took the cage to the 600 level.

It is stated in appellant's brief that "this testimony is not susceptible to contradiction by inference." It is, however, contradicted by the direct evidence of plaintiff and McDonald; but, however this may be, it has been said:

"It is a wild conceit that any court of justice is bound by the mere swearing. It is swearing

creditably that is to conclude its judgment." The *Odin*, 1 A. Rob. 248; *Zibbell v. Southern Pac. Co.*, 160 Cal. 237, 116 Pac. 513; *Rood v. Murray*, 50 Mont. 240, 146 Pac. 541.

[2] The engineer based his conclusion that the signal was complete upon the fact that he observed the bell cord slacken, and not upon the fact that he waited a reasonable time to ascertain whether the bell would be sounded again. The rules and regulations of the mining inspector were binding upon defendant and its engineer (§ 1724, Rev. Codes), and for damages proximately caused by the unauthorized act of the engineer, in substituting a code of his own, the defendant is liable (5 *Labatt on Master & Servant*, § 1888). In other words, a violation of the prescribed code constituted legal negligence. *Melville v. Butte-Balaklava Copper Co.*, 47 Mont. 1, 130 Pac. 441.

[3] It is not seriously contended, however, that the evidence is insufficient to prove negligence on the part of the engineer. The principal contention is that the admission in the reply and the evidence introduced by plaintiff established contributory negligence as a matter of law. The standard by which to measure plaintiff's conduct is that of the average man under similar circumstances. In this instance he was to be governed in giving the signals by the customs and usages of reasonably prudent, experienced miners.

The evidence introduced by plaintiff was to the effect that the position assumed by him while giving the signal (one foot on the cage and the other on the floor of the station) was the position assumed by careful, prudent, experienced miners generally while performing that task in the Granite mine. There is a conflict in the evidence upon this subject, but that conflict it was the peculiar province of the jury to resolve.

[4] It is said by appellant that the position assumed by plaintiff was fraught with danger, while there was available to him another method of performing the service, which was safe, or at least less dangerous than the method which he pursued. It will not do to say that because plaintiff placed himself in a position of danger he may not recover in this action. All underground mining operations are dangerous. If, however, the evidence were undisputed that the position assumed by plaintiff to give the signal was more dangerous than another position which he might have assumed, and that, with full knowledge and appreciation of the facts and of the consequences likely to follow, he voluntarily assumed the more dangerous position, he would be guilty of negligence as a matter of law. *Mullery v. Great Northern Ry. Co.*, 50 Mont. 408, 148 Pac. 323.

In the application of the rule of choice of ways, and particularly in the imputation to plaintiff of knowledge that the position assumed was more dangerous than the alterna-

tive suggested by defendant, regard must be had to the circumstances, and these include the right of plaintiff to assume that the engineer, whose negligence alone could jeopardize him, would proceed with reasonable care and not move the cage until the signal was completed. The alternative position suggested by defendant's evidence was that plaintiff should have stood with both feet on the cage, held to the safety bar with one hand, and pulled the lever with the other; but plaintiff testified that he could not pull the lever with one hand, and the effect of his evidence is that, if he had stood with both feet on the cage and used both hands to pull the lever, his position would have been more hazardous than the position he assumed.

[5, 6] The rule is well established, in reason and authority, that in balancing ways for the purpose of making a choice between them plaintiff was not required to make a choice unerring in the light of after events, but only such a choice as, under all obvious circumstances, a reasonably prudent man might have made. *Killeen v. Barnes-King Dev. Co.*, 46 Mont. 212, 127 Pac. 89; *Mullery v. Great Northern Ry. Co.*, above. While customary negligence of others would not excuse plaintiff, the fact, which the evidence tended to prove, that careful, prudent, experienced miners working in the Granite mine generally assumed the position taken by plaintiff in giving the signal to hoist men, indicates forcibly that plaintiff did not choose the more dangerous of the two positions; but whether, under all the circumstances he did or did not—whether he was guilty of negligence in making the choice which he did make—was a question properly submitted to the jury, and the general verdict absolves him from the imputation of negligence.

[7, 8] Error is predicated upon the refusal of the court to give defendant's offered instructions I, K, and L. The subject-matter of I and K (choice of ways) was fully covered by instructions 13 and 14, given by the court. There are also objections to the phraseology employed in each of these offered instructions. Instruction L is essentially erroneous. It imposed upon plaintiff the burden of proving defendant's negligence and his own freedom from contributing fault. This case falls clearly within the general rule that the defense of contributory negligence is a special one, to be pleaded and proved by the defendant, and that the burden of proving want of care on the part of plaintiff which contributed to his injury cannot be imposed upon him. *Stephens v. Elliott*, 36 Mont. 92, 92 Pac. 45; *Melzner v. Raven Copper Co.*, 47 Mont. 351, 132 Pac. 552.

In their supplemental brief counsel for appellant suggest that, if the complaint had stated the facts fully—that is, if it had contained the statement that plaintiff was stand-

ing with one foot upon the cage and the other upon the floor of the station—it would not have stated a cause of action; but this argument proceeds upon the theory that plaintiff was guilty of negligence as a matter of law, in the absence of excusatory allegations or the showing of an emergency, and this we have determined is not the fact.

[9] While we may agree with counsel that the slightest want of ordinary care on the part of plaintiff would constitute negligence, we do not agree with the conclusion presumably to be deduced therefrom, viz. that negligence on the part of plaintiff necessarily precludes recovery. It is only such negligence on his part as constitutes a proximate or contributing cause of his injury that will bar his recovery. *Stewart v. Pittsburg & Montana Copper Co.*, 42 Mont. 200, 111 Pac. 723.

The judgment and order are affirmed
Affirmed.

BRANTLY, C. J., and HURLY, PATTEN,
and COOPER, JJ., concur.

(56 Mont. 321)

ROGERS-TEMPLETON LUMBER CO. v.
WELCH et al. (No. 4032.)

(Supreme Court of Montana. Oct. 17, 1919.)

1. MECHANICS' LIENS ⇨154(4)—AFFIDAVIT
BY SECRETARY OF CORPORATION ON FILING
LIEN SUFFICIENT.

Where the statements in affidavit were in full accord with requirements of Rev. Codes, § 7291, relating to the filing of mechanics' liens, and were such that if untrue would render the maker guilty of perjury, the lien notice was sufficient, although the affidavit was made by a secretary of a corporation who probably did not know the truth of the statements sworn to.

2. MECHANICS' LIENS ⇨281(5)—NOTICE OF
LIEN PRIMA FACIE EVIDENCE OF FACTS STAT-
ED.

Where Rev. Codes, § 7291, has been scrupulously followed in filing a lien notice and affidavit, etc., the papers are to be regarded as showing prima facie that a valid lien was filed.

3. APPEAL AND ERROR ⇨1106(5)—FINDINGS
OF FACTS TO BE IN WRITING.

Where Rev. Codes, § 6763, providing that the court must file written findings with the clerk, is not complied with, an appeal from the judgment must be remanded for further proceedings.

4. MECHANICS' LIENS ⇨132(11)—TIME FOR
FILING NOTICE OF SEPARATE ACCOUNTS.

Where a materialman's claim for \$1,600 was a separate and independent account with an owner of land, claimant must file his notice of lien within 90 days after the last item was furnished.

5. MECHANICS' LIENS ⇨277(3)—ADMISSIBILITY OF EVIDENCE OF DEFENDANT THAT ITEMS WERE NOT PART OF OPEN ACCOUNT.

In an action to foreclose mechanics' lien, where defendant pleaded an account stated as to certain items and that such items did not form part of an open account as claimed in the complaint, court erred in granting a motion of plaintiff to strike out all evidence given under such defense.

6. ACCOUNT, ACTION ON ⇨8(5)—ACCOUNT STATED SUPPORTS ACTION ON OPEN ACCOUNT.

Evidence showing an account stated is sufficient to support cause of action on an open account.

7. MECHANICS' LIENS ⇨288(2)—WHETHER MATERIALS AND LABOR WERE UNDER ONE CONTRACT QUESTION OF FACT.

In an action to foreclose a mechanics' lien, question whether materials furnished and labor performed were under one general contract or under separate contracts was one of fact.

8. MECHANICS' LIENS ⇨279—BURDEN OF PROOF ON OWNER TO REBUT PRIMA FACIE CASE.

Where a materialman in an action to foreclose a mechanics' lien has shown that he furnished the materials and that they were used for the enhancement of the property, the burden then shifts upon the owner to introduce evidence to rebut the prima facie case thus made.

9. MECHANICS' LIENS ⇨5—STATUTES TO BE LIBERALLY CONSTRUED.

The statute giving materialmen and laborers liens on improved property is remedial in character and is to be liberally construed.

10. MECHANICS' LIENS ⇨281(1)—SUFFICIENCY OF PROOF THAT MATERIALS WENT INTO BUILDING.

In an action to foreclose mechanics' lien, where materialman shows that materials for use in the building were contracted for and were delivered in pursuance of the contract, and that the building was completed, it is fair to conclude, in the absence of evidence to the contrary, that the materials in fact did go into the building.

Appeal from District Court, Chouteau County; John W. Tattan, Judge.

Action by the Rogers-Templeton Lumber Company against W. D. Welch, doing business under the firm name and style of W. D. Welch & Co., and others. From a judgment in its favor for only part of the relief demanded, plaintiff appeals. Reversed and remanded.

I. W. Church and Fletcher Maddox, both of Great Falls, for appellant.

O. W. Belden, of Lewistown, and McKenzie & McKenzie, of Great Falls, for respondents.

COOPER, J. Action to foreclose a mechanic's lien for materials alleged to have been furnished and used in the construction of a store building upon lots 17 and 18, in

the town of Geraldine, Chouteau county, Mont.

The complaint alleges the purchase, by defendant Welch, of materials for use in the construction of said store building of the value of \$2,661.91; that the items so furnished and used constituted an open account between the plaintiff and defendant Welch from the 2d day of August, 1914, to the 16th day of January, 1915, inclusive; that said amount is still due and unpaid; that a mechanic's lien covering all of said items was filed within 90 days after the date of the furnishing of the last item thereof; and that the defendants, other than Welch, claim some interest in the property involved, as attaching creditors or incumbrancers. The answer of Welch consists of general denials, and affirmative matter to the effect that on or about August 1, 1914, an agreement was entered into between plaintiff and himself to furnish material to build the store building described in the complaint, "for a stated sum"; that the last item thereof was delivered October 10th, and no material was furnished by plaintiff under that agreement after said last-named date; that thereafter, on or about October 15, 1914, said account was closed, and plaintiff and Welch "then and there had an accounting and settlement between them for said materials, and said account was then and there settled, allowed, and agreed to "as being due from defendant for said material.

Defendants Gies, Flanagan, McKenzie, and Belden filed a separate answer, consisting of general denials and an assignment to them as trustees for the benefit of creditors. The plaintiff filed replies, denying all of the affirmative allegations contained in the answers. The cause was tried to the court without a jury.

At the trial, plaintiff offered in evidence the notice of lien to which was attached a statement of account containing the items upon which the lien is based. To its receipt in evidence the defendants objected upon the ground that it was a statement made by G. W. Bulmer, assistant secretary of the plaintiff company; that it did not state that the same was made for plaintiff; that it did not contain a statement "that the matters set forth in the account, and the description of the property, are true; that it recites that all the facts that are stated in the notice and in the statement are true; but it does not state that the matters stated in the lien are true as required by law." This objection, when made, was overruled; but the lien finally was stricken out, on motion of defendants, upon the ground that it was not verified in accordance with the statute, and that it was "not shown by competent proof" that "any of the items mentioned in the lien

as having been furnished in the months of December and January entered into and became part of the construction of the building against which the lien is claimed." Plaintiff, at the same time, moved the court to strike out "all the evidence introduced under the new matter pleaded in the answer as defense, alleging an account stated as of October 10, 1914." A stipulation was entered of record "between counsel and the court" that the motions might be passed upon at the time of the rendition of the final decision by the court. Written requests for findings were also presented to the court for adoption. In the final judgment, plaintiff's motion to exclude all evidence in support of the new matter contained in defendants' answers was granted, as well as defendants' motion to "strike the lien from the record." The court found in favor of the plaintiff and against defendant Welch for the full amount claimed in the complaint, and entered judgment accordingly. The appeal is from the judgment.

Upon this record we are to review the proceedings had in the court below resulting in the judgment appealed from. Appellant asserts that twelve errors were committed by the trial court, culminating in the exclusion of plaintiff's lien claim. If the rejection of plaintiff's claim of lien was error, the other specifications need not be noticed.

In ruling as it did, the trial court doubtless had in mind the rule of construction several times applied by this court to section 7291 of the Revised Codes, to the effect that, in the pursuit of its purely statutory benefits, the various steps necessary to secure and perfect the lien are indispensable. *Wertz v. Lamb*, 43 Mont. 477, 117 Pac. 89; *Crane & Ordway Co. v. Baatz*, 53 Mont. 438, 164 Pac. 533. Is the lien notice deficient or defective? We think not. The statements in the affidavit are in full accord with the requirements of section 7291, and evince a faithful adherence to all its commands.

[1] Respondents' counsel, in their brief, however, say they are unable to distinguish any difference between the affidavit, which was obviously made on information and belief, and an affidavit that recites that it was so made, citing *Western Plumbing Co. v. Fried*, 33 Mont. 7, 81 Pac. 394, 114 Am. St. Rep. 799. In that case, the affidavit merely stated:

That affiant "is president of the [plaintiff] company, * * * and as such makes this affidavit; that he has read the foregoing claim of lien, knows the contents thereof; and that the matters and things therein stated are true, to the best of his knowledge, information, and belief."

Of that affidavit, Mr. Justice Holloway, speaking for this court, said:

"The statute provides that the lien is made up of: First, the account; second, the descrip-

tion of the property; and, third, the affidavit. The account is required to be a just and true one, showing the amount due the claimant after allowing all credits, and there must be a correct description of the property to be charged with the lien. * * * Therefore, if there was no affidavit attached to the account and description, there was in fact no lien, and the court properly excluded the pretended one offered in evidence."

Indeed, we may here add the suggestion that an affidavit so worded is in no sense equivalent to a declaration under oath that the matter contained therein is true.

In the affidavit before us, Bulmer swears positively that he is assistant secretary of the plaintiff corporation; that the statement of account of the lumber and materials is a just and true account, and they were furnished and delivered for the purpose of being used in the building in question; that the notice contains a correct description of the property to be charged with said lien; and that all the facts therein stated are true. What more than a literal compliance with the statute could be demanded? Certainly, it is not to be presumed that perjury has been committed in its making. In that respect, however, the rights of the owner are effectively safeguarded by the pains and penalties the perjury statute imposes upon those who violate its provisions. As was said by Mr. Justice Sanner, in *Crane & Ordway Co. v. Baatz*, supra:

"The account must be a just and true one, 'after allowing all credits,' and must be verified as such. The purpose of the affidavit is clear enough. It is not merely to entitle the lien claim to record, but to furnish a sanction for it in such an oath as will subject the affiant to punishment for perjury if it be false in material particulars."

[2] The statute having been scrupulously followed, the paper in question is to be regarded as showing prima facie that a valid lien was filed. As was said by Mr. Justice Holloway, in *Wertz v. Lamb*, supra:

"Our present Code provision is substantially the same as section 6, c. 40, p. 510, of the Laws of 1871-72, and in *Black v. Appolonio*, 1 Mont. 342, this court in construing that section said: 'It appears to us that all our statute requires is that a person wishing to avail himself of the benefits of it should honestly state his account.' And this has been accepted as a correct interpretation ever since. *Western Iron Works v. Montana P. & P. Co.*, 30 Mont. 550, 77 Pac. 413; *Mills v. Olsen*, 43 Mont. 29, 115 Pac. 53."

See, also, *McIntyre v. MacGinniss*, 41 Mont. 87, 98, 108 Pac. 353, 137 Am. St. Rep. 701.

Plaintiff's claim of lien was therefore improperly excluded.

[3] For another reason this case must be remanded for further proceedings. Section 6763, Revised Codes, provides as follows:

"Upon a trial of a question of fact by the court, its decision or findings must be given in writing and filed with the clerk within twenty days after the case is submitted for decision."

The statement on appeal shows that the cause came on for trial on July 6, 1915; requests for findings filed on August 30, 1915; and judgment rendered and entered November 28, 1916. No findings, however, are to be found in the record. The remarks of this court, in *City of Helena v. Hale*, 38 Mont. on page 484, 100 Pac. on page 612, are pertinent here:

"But it is contended that this is a case of defective findings, and counsel cites the case of *Bordeaux v. Bordeaux*, 82 Mont. 159, 80 Pac. 6. In that case, Mr. Chief Justice Brantly said: 'There is in the record no bill of exceptions showing that the defendant, at the close of the evidence and argument in the cause, made written request for findings upon the subject of recrimination, or any other issue.' But we regard this as a case of total lack of findings, rather than defective findings. The findings, if there are any, are so lacking in substance as to be no findings at all. The defendant properly requested general findings. Rev. Codes, §§ 6763, 6764, 6766. It then became the duty of the court to make findings."

Indeed, the trial was not completed until this requirement had been fully met.

The respondents seriously contend that the court erred in striking out all the evidence given in support of the new matter set forth in their answers. The complaint states a cause of action upon an open and running account, and plaintiff founds its cause upon that theory. The answers of defendants are framed upon the theory that the materials were sold under two or three separate and distinct contracts.

Respondents, in their brief, insist that—

"Exhibit 1, an itemized statement of account running from July 24 to October 10, 1914, became an account stated for said amount and that the account up between plaintiff and Welch was no longer an open account. * * * That to the extent of \$1,600 plaintiff's right to a lien is foreclosed by limitation of time, since the right accrued obviously not later than November 3d, when the last of the items of August 17th were delivered. * * * That all of the items shown on the lien that appeared in the statement under date of October 10th were likewise foreclosed by reason of the plaintiff's failure to file the lien."

[4, 5] Upon these conflicting theories the case was tried. In any view to be taken of the matter, the testimony was all material and pertinent under the issues made by the pleadings. If the item of \$1,600 constituted a separate and independent account, and the lien was not filed within 90 days after the last item was furnished, the lien claim was imperfect to that extent. But that did not warrant the court in striking out all the testimony in support of the new matter set

up in the defendants' answers, nor justify its refusal to consider and give effect to testimony concerning the furnishing and delivery of materials which went into the building with a view to its completion, occupancy, and use for the purposes for which it was constructed. It is in evidence that the statement containing the \$1,600 item was delivered to Welch about November 4th, at which time he stated he would look it over; that he knew what it was; and that he did look it over "a few days after that, or a couple of weeks." The evidence also shows that those items were carried forward in monthly statements of account, together with other materials furnished for use in the construction of the building, up to December 29th, and at the end of each month presented to Welch, without objection on his part, so far as the record discloses.

[6, 7] As said by Mr. Chief Justice Brantly, in *Roy v. King's Estate*, 55 Mont. 573, 179 Pac. 821:

"Evidence showing an account stated is sufficient to support a cause of action on an open account. 1 Cyc. 485, and cases cited in note."

"The question whether the materials furnished and labor performed were under one general contract or under separate contracts was one of fact." *Western Iron Works v. Montana P. Co.*, 80 Mont. 559, 77 Pac. 417; *Helena Steam-Heating & Supply Co. v. Wells*, 16 Mont. 65, 40 Pac. 78; *Perkins v. Boyd*, 16 Colo. App. 266, 65 Pac. 350; 27 Cyc. 328.

The Supreme Court of Minnesota, in *Dennis v. Smith*, 38 Minn. 496, 38 N. W. 696, has this to say upon the question:

"There is nothing in the point that the parties have converted the open account into an account stated. This does not change the nature of the claim, but, like the giving of a note, is a mere adjustment of the amount due."

See, also, *Treusch v. Shryock*, 51 Md. 162.

In *Missoula Mercantile Co. v. O'Donnell*, 24 Mont. 65, 72, 60 Pac. 594, 596, this court said:

"The burden is upon the plaintiff to establish his lien (*Boisot, Mech. Liens*, § 618), and, to support this burden, he must show, not only that he furnished the materials, but also that they were used for the enhancement of the property to which he claims he has a right to resort as security for the debt thus created. In the absence of this showing, his equity does not arise. *Silvester v. Mine Co.*, 80 Cal. 510, 22 Pac. 217; *Weir v. Barnes*, 88 Neb. 875, 57 N. W. 750; *Chapin v. Paper Works*, 30 Conn. 461 [79 Am. Dec. 263]; *Hunter v. Blanchard*, 18 Ill. 318; *Taggard v. Buckmore*, 42 Me. 77; *Schulenberg v. Prairie Home Institute Co.*, 65 Mo. 295. This is evidently the meaning of the statute (section 2190 of the Code of Civil Procedure)."

[8, 9] The burden, then, is placed upon the owner to introduce evidence to rebut the prima facie case thus made. In so far as granting the lien is concerned, the statute

is remedial in character and to be liberally construed. *Western Iron Works v. Montana P. Co.*, supra; *Crane & Ordway Co. v. Baatz*, supra.

[10] The only remaining question arises upon the contention that there was a failure to prove that all the materials furnished by plaintiff and included in its claim went into the construction of the building. The testimony was sufficient, in our opinion, to make a prima facie case of delivery and use in the construction of the building in question. A materialman is not obliged to stand by and watch the progress of a structure to see that every piece of lumber and other material supplied by him is used, before he can make the required affidavit. To so hold would render the mechanic's lien law more of a burden than a benefit. When materials for use in a proposed building are contracted for, if they are delivered in pursuance of such contract, and the building is completed, it is fair to conclude, in the absence of evidence to the contrary, that such materials did, in fact, go into the building. *Greenway v. Turner*, 4 Md. 296; *Maryland Brick Co. v. Spilman*, 76 Md. 337, 25 Atl. 297, 17 L. R. A. 599, 35 Am. St. Rep. 431; *Union Trust Co. v. Casserly*, 127 Mich. 183, 86 N. W. 545; *Phillips on Mechanics' Liens*, § 229.

The evidence is conflicting concerning the delivery of some of the materials incorporated in the lien claim, as to when they were furnished, as to whether or not they were lienable articles and tended to enhance the value of the property, and as to whether they were all furnished under an open and running account or under one general contract. These were all questions of fact upon which the court should have made written findings. Having failed to do so, the judgment must be reversed, with directions to proceed according to the views herein expressed.

Reversed and remanded.

BRANTLY, C. J., and HOLLOWAY and HURLY, JJ., concur.

(56 Mont. 299)

SMITH v. HOFFMAN. (No. 4023.)

(Supreme Court of Montana. Oct. 17, 1919.)

1. APPEAL AND ERROR ⇨1009(4)—REVIEW OF FINDINGS IN EQUITY.

Findings by the trial court in an equitable action will not be reversed on appeal, except where the evidence clearly preponderates against them.

2. DEEDS ⇨99—AND WRITTEN CONTRACT PART OF SAME TRANSACTION.

Under Rev. Codes, § 5031, providing that several contracts relating to the same matters are to be taken together, a deed and a written

contract which obligated the grantee to make certain payments and limited the estate held part of one transaction, regardless of whether they were executed on the same day, or whether the contract was executed on the day following execution of the deed as claimed by the grantee.

3. DEEDS ⇨155—SUBJECT TO CONDITION SUBSEQUENT.

Where a grantor, as part of the same transaction, required the grantee to sign a written memorandum, providing that the grantee should make monthly payments to a named individual, and that the estate should continue until grantee's marriage or death, held that, under Rev. Codes, § 4902, defining a condition subsequent as one referring to a future event upon the happening of which the obligation becomes no longer binding upon the other party, and in view of section 4623, the deed must be deemed subject to a condition subsequent, and non-payment of the amount stipulated or remarriage of the grantee would entitle the grantor to recover the property.

4. DEEDS ⇨166—WAIVER OF FORFEITURE UNDER CONDITION SUBSEQUENT.

Where a grant was on condition subsequent, requiring the grantee to make monthly payments to a named individual, the condition may be waived, and in view of Rev. Codes § 4906, declaring that a condition involving a forfeiture must be strictly interpreted against the party for whose benefit it is created, the grantor cannot insist on a forfeiture because of the grantee's failure to make payments, where the grantor notified the grantee that payments need be continued no longer.

5. DEEDS ⇨166—ESTOPPEL TO URGE FORFEITURE, THOUGH WAIVER WAS WITHOUT CONSIDERATION.

Where a deed was subject to a condition subsequent, requiring the grantee to make payments to a third party, the grantor is estopped from insisting on a forfeiture, where she notified the grantee that payments need be continued no longer, regardless of the fact that the waiver of the condition was without consideration.

6. DEEDS ⇨166—WAIVER OF CONDITION WITHOUT CONSIDERATION.

Where, as part of the same transaction, the grantor required the grantee to sign a contract providing for monthly payments by the grantee to a third person, and further providing that the land should revert to the grantor on the grantee's marriage, the fact that the grantor wrote the grantee that payments need be continued no longer, etc., does not extinguish the condition, and operate to give the grantee a fee-simple title; there being no consideration for the grantor's waiver of the condition.

Appeal from District Court, Fergus County; Roy E. Ayers, Judge.

Action by Mary M. Smith against Sadie Hoffman. There was a judgment for defendant, and, plaintiff's motion for new trial having been denied, plaintiff appeals. Reversed and remanded, with directions.

McIntire & Murphy, of Helena, for appellant.

Belden & DeKalb, of Lewistown, for respondent.

HURLY, J. In brief, the plaintiff asks for the cancellation of a deed executed and delivered by the plaintiff March 14, 1910, by reason of the alleged breach, in October, 1910, of the condition of a contract (hereinafter referred to as the memorandum or contract) entered into between the parties at the time of the execution of said deed, as follows:

"A written contract between two parties, Mary Smith, party of the first part, and Sadie Hoffman, party of the second part, concerning the deed to Hoffman House, that no less than \$50 per mo. be paid to Mrs. J. A. McNaught for an unlimited time and the deed then will stand good until the marriage or death of the party of the second part, Sadie Hoffman, when it goes back to party of the first part, Mary Smith, if alive, if not to her heirs.

"[Signed and Sealed] Mary Smith.
"Sadie Hoffman."

We believe further reference to the pleadings is unnecessary, as the court's findings clearly indicate the nature of the defense.

Trial was had in the district court in June, 1914, and special findings were made by a jury, but such findings were not adopted, and under date of January 5, 1917, the court made independent findings. To these findings, to the conclusions based thereon, and to the refusal of the court to adopt findings proposed by the plaintiff, and to other rulings on the trial, and to the order denying a motion for new trial, exceptions were taken and error predicated thereon in these appeals.

It appears that the Smith Bros. Sheep Company (hereinafter referred to as the company or corporation), was organized long prior to the commencement of this action, and that John M. Smith (husband of the plaintiff) was the principal stockholder and manager thereof. The testimony indicates very friendly relations, at all times prior to the initiation of the suit, between both parties, and between defendant and Mr. Smith during his lifetime, despite the act that defendant obtained a divorce from her husband (plaintiff's brother) shortly after establishing a legal residence within the state. About the year 1896 Mrs. Hoffman, who was then living in the East, came to Montana and for many years thereafter, and until the erection of the building hereafter referred to made her home with the Smiths. In 1902 the corporation purchased the lots in controversy, and erected thereon a lodging house or hotel, known as the Hoffman House, partially at least furnishing the same. The defendant was put in charge of it as manager, upon its completion in 1903, under an agreement that she should operate the same and

retain one half the net proceeds, and turn over the other half to the corporation. The defendant contends that it was further agreed that when the half of the proceeds so turned over to the corporation should equal the amount of its investment in the premises, the property should be conveyed to her. This is denied by the plaintiff. No deed was ever made by the corporation to the defendant; but it appears that under date of August 23, 1906, the corporation for a consideration of \$10,000 conveyed the premises to the plaintiff, and that, possibly, plaintiff acquired the title to prevent a sale by the corporation to some one other than defendant. This conveyance had not been placed of record at the time of the trial. Plaintiff's husband died in November, 1908.

In the summer of 1906, defendant left Lewistown, and was absent therefrom for some weeks, or possibly months. During her absence, believing that she did not intend to return, the property then bringing in but small returns, and being dissatisfied with defendant's management thereof, the company placed one Herman Brown in charge as manager. Upon her return, defendant was employed by the corporation as matron or housekeeper, under Brown, at an agreed compensation of \$50, and, so far as appears from the record, did not assert, then or afterwards, either to the corporation or this plaintiff, that her rights under the agreement had been violated. Some time thereafter an oral agreement was entered into for the rental of the property by defendant from plaintiff, and up to the date of the execution of the deed, March 14, 1910, defendant remained in possession of the property as plaintiff's tenant, paying Mrs. Smith rental therefor. On this last date, defendant called upon plaintiff at her home in Pasadena, Cal., and informed her that defendant had to have money for the repairing of the house. Mrs. Smith stated that she was not in position to put any more money into the place, defendant then suggesting that plaintiff execute a deed (which defendant had caused to be prepared in Lewistown before going to Pasadena) for the premises, so that she could borrow money on the property for improving it. Mrs. Hoffman concedes that in part her object in going to Pasadena was to obtain a deed from plaintiff, so that she could raise money on the property for placing improvements thereon, and contends that she also thought she was entitled to a deed for the property because of the alleged agreement between herself and the corporation, though the record does not show that she asserted this claim to Mrs. Smith at this or any previous time. There was no direct testimony concerning their conversation and subsequent dealings, except that of the parties themselves.

Mrs. Smith testified that she looked over the deed, and that, as it did not express her

wishes, she said to Mrs. Hoffman, "If I sign this deed, will you sign a contract with me?" and that defendant said, "I will do anything you ask," and that after further talk between them, the contract was prepared by plaintiff and signed by both. Plaintiff testified, on cross-examination, that the intention was that when Mrs. Hoffman had provided for Ollie (meaning Mrs. McNaught) "the house was to belong to her until she married or died. That was the understanding." Mrs. Hoffman testified that they talked over the situation of the estate of plaintiff's husband and the financial condition of Mrs. McNaught, and that plaintiff said she was unable to help her sister as she desired, until the affairs of the estate were settled, and that plaintiff said, "Will you send Olivia (Mrs. McNaught) \$50 per month until I can make some other arrangement for her?" to which defendant says she assented, and that Mrs. Smith then said, "Well, I will give you the deed to the house; you have worked hard for it and earned it, and I want you to have it." This talk, she says, was had both before and after the signing of the deed, though she testified that nothing was said about the signing of a contract until the following day. On cross-examination she said that the memorandum was to the same effect as the talk had between her and plaintiff, both before and after signing the deed. Following this talk, either on the same day and immediately before or after the signing of the deed (as contended by plaintiff), or on the next day (as contended by defendant), the memorandum referred to in the complaint was signed by both parties.

The testimony is that there was no consideration for the conveyance, except the agreement concerning the payments to be made to Mrs. McNaught. Defendant made payments to Mrs. McNaught of \$50 per month, until after the receipt of Exhibit 1, in October, 1910.

Other letters were also written by plaintiff to defendant, but Exhibits 1 and 2 are the only ones we deem of importance as bearing upon the issues. The material portions of these letters follow:

Exhibit No. 1.

"Oct. 9 (1910).

"Dear Sadie: * * * Now a little business dear. We signed a contract while you were in Calif. when I go back I will burn it up. You can have the Hoffman House, grounds and its furnishings, and when you are through with it, it can go to Mabel for I feel you have earned it. It will always give you a support should you lease it, when you get too (lazy) to run it not (too old). So you need make no other deed. * * * Sincerely, Mary M. Smith."

Exhibit No. 2.

"Sept. 17 (1911).

"Dear Sadie: Since I was there I know you can't do more than you are doing and I swear

you shall have no more trouble coming, it will all be fixed up some way. I will give Mc. and Ollie a chance I will send them down on my place in Calif. where they can root a hog or die. I have 820 acres of choice alfalfa land. I will sell one-half, and they can run the other for half. They should do well, for you can raise anything. I intended to let it out for half, but instead I will give them the show. If it pays taxes and interest on the money for me, is all I ask. Now I want you to be happy and not worry, you shall have no more trouble if I can help it, and I will try most mightily. I want you to have what you have earned by hard work and management. * * * Love to you, my dear, and success. Mary."

In addition to this correspondence, it appears that plaintiff on several occasions asked Mrs. Hoffman to send money to Mrs. McNaught, and that Mrs. Hoffman said she did not have it to send.

The testimony further shows that Mrs. Hoffman, after acquiring the deed, did not borrow money upon the property for the purpose of repairing or furnishing the same, but that in 1913 she mortgaged the premises, the proceeds being used by her to purchase land near her homestead in the country and none for improving the hotel property. She did, however, pay out considerable money in repairing the property and in refurnishing the same, the money for the cost thereof being derived from the proceeds of the business.

The record is voluminous, but the foregoing is a summary of the testimony bearing upon the material issues, though additional references will be made to other portions in considering the findings.

[1] The rule is well settled by numerous decisions of this court that the findings of a district court will not be reversed except where the evidence clearly preponderates against them, and citation of such authorities is not necessary herein.

The trial court found that it was agreed between the defendant and the company that when the defendant should have paid the company a sum equal to the cost of the premises and furnishings, title would pass to the defendant; that plaintiff was familiar with the terms of this agreement, and, with full knowledge thereof, purchased the premises; and that pursuant thereto plaintiff leased the property to the defendant, receiving rents from the defendant until March 14, 1910; but that the sums so paid "were not paid strictly as rental, but more in the nature of compensation in accordance with the said original understanding which plaintiff was endeavoring to carry out."

Even if the theory of the defendant should be sustained as to the original agreement between her and the corporation, her own testimony shows an abandonment of the agreement, whatever it may have been, in accepting employment on a monthly salary without complaint after she had been supplanted as manager, and later recognizing plaintiff's title

by leasing the property from her in 1906 and continuing as her tenant from that time until the execution of the deed, Exhibit A, on March 14, 1910.

In our opinion, the evidence clearly preponderates against these findings of the trial court.

[2] The court found that on the day of the execution of said deed, and on the following day, plaintiff and defendant discussed the situation of plaintiff and Mrs. McNaught, and that plaintiff requested defendant to pay Mrs. McNaught \$50 per month until the plaintiff could make other provision for her, and that the defendant promised to make such payments, and that on the day following the execution of the deed, the parties entered into the memorandum or contract, but that the execution of the deed and the making of the said memorandum were separate transactions, and that the making of the memorandum was not the consideration for the execution of the deed, nor was it intended as a condition or limitation, nor did it create a trust, upon the property, but was a personal and independent contract for convenience of the plaintiff in temporarily caring for Mrs. McNaught and to obviate trouble with the company and the heirs of the estate of plaintiff's husband; and that the deed was executed and delivered as one of the steps in completing the agreement, heretofore referred to, between the corporation and the defendant.

The court determined that by the letters of October 9, 1910, and September 17, 1911, the memorandum or contract was canceled and revoked, and that the defendant was justified in believing the "unlimited time" contemplated by said memorandum had expired, and that defendant was under no further obligation thereunder to Mrs. McNaught, even though the memorandum was not actually destroyed; that after the writing of said Exhibit 1, plaintiff requested defendant to continue the payments to Mrs. McNaught, and that defendant failed to comply therewith, but that such requests were made, not because plaintiff believed there was any obligation to comply therewith, but because of pressure upon plaintiff by some person or persons.

Our Code, section 5031, provides:

"Several contracts relating to the same matters, between the same parties, and made as parts of substantially one transaction, are to be taken together."

In *Talbott v. Heinze*, 25 Mont. 4, 63 Pac. 624, this court held that contracts dated on September 26th, and a note dated October 21st of the same year, "relating to the same matters, were between the same parties, were made as parts of substantially one transaction, and * * * should be taken together as one contract." See, also, *Lyon v. Dailey Copper Co.*, 46 Mont. 108, 126 Pac.

931; *Cornish v. Woolverton*, 32 Mont. 456, 81 Pac. 4, 108 Am. St. Rep. 598; *Bartels v. Davis*, 34 Mont. 285, 85 Pac. 1027; *Ford v. Drake*, 46 Mont. 314, 127 Pac. 1019; *Dodd v. Vucovich*, 38 Mont. 192, 99 Pac. 296.

The evidence clearly shows that the matters referred to in the memorandum or contract were fully discussed by the parties, both before and after the signing of the deed, and defendant herself admitted that the contract was to the same effect as the conversation had. In view of the statute, what we consider the weight of authority, and the testimony as to the conversation leading up to the signing of the memorandum, and the terms of the memorandum itself, we deem it as conclusively established that the two writings constitute but one transaction, regardless of whether they were executed on the same day or otherwise.

[3] This, then, brings us to the question whether the provisions of the memorandum contract constitute limitations or conditions upon the deed.

Our Code defines a condition subsequent as follows:

"Sec. 4902. A condition subsequent is one referring to a future event, upon the happening of which the obligation becomes no longer binding upon the other party, if he chooses to avail himself of the condition."

In the case of *Barker v. Cobb*, 36 N. H. 344, the grantor conveyed land by warranty deed to certain of his children. On the back of the deed, and not embraced therein, was an additional writing, in effect as follows:

"The conditions of the within deed are such that if the within named [grantee] shall well and truly * * * provide" support for grantor and wife "then the within deed to be good and valid, otherwise null and void."

The court, in construing same, stated:

"The deed conveyed * * * an estate upon condition; for although the condition was not contained in the body of the deed, yet, being upon the same paper and executed at the same time, the intent of the parties appears plain. There was but one contract and, in legal effect, but one instrument. By the condition of the conveyance the grantee was to provide for and support [the grantor] and his wife during their natural lives. Otherwise the deed was to be null and void. In a deed of this kind, though an estate be conveyed, yet it passes to the grantee subject to the condition."

See, also, *Munson v. Munson*, 24 Conn. 115.

In *Glocke v. Glocke*, 113 Wis. 305, 89 N. W. 118, 57 L. R. A. 459, there was an absolute conveyance by deed. By separate instruments made at the same time it was provided that the grantee should pay yearly certain articles for the support of the grantor, mother of the grantee. The provision was held to be a condition subsequent.

In *Gall v. Gall*, 126 Wis. 390, 105 N. W. 953, 5 L. R. A. (N. S.) 603, the court said:

"The conveyance of the premises, * * * in consideration of support, maintenance, medical treatment, * * * and a home upon the premises conveyed, created an estate upon condition subsequent, subject to be defeated upon the nonperformance of such condition."

See, also, 2 Devlin on Deeds, p. 1823; *Horne v. Chicago, M. & St. Paul Ry. Co.*, 38 Wis. 165; *Blake v. Blake*, 56 Wis. 392, 14 N. W. 173; *Houston v. Greiner*, 73 Or. 304, 144 Pac. 135.

Our Code further provides:

"Sec. 4623: When a grant is made upon condition subsequent, and is subsequently defeated by the nonperformance of the condition, the person otherwise entitled to hold under the grant must reconvey the property to the grantor or his successors by grant, duly acknowledged for record."

Under all the circumstances and the weight of authority, we deem the deed to have been made upon a condition subsequent imposed by the memorandum contract, and that upon a breach of such condition the plaintiff would become entitled to a rescission or cancellation, unless there was a waiver of the condition.

[4] The plaintiff contends that there has been an absolute breach of the condition, and that she is entitled to the relief prayed for, and asserts that the letters in question, having no consideration to support them, did not relieve the defendant from the obligations imposed by the contract. Defendant, on the other hand, claims a full compliance with the terms of the contract, and that she has been relieved from further compliance by the letters, and, even if not so relieved, that plaintiff has waived her right to declare a forfeiture.

In *Hubbard v. Hubbard*, 12 Allen (Mass.) 586, one of the conditions in the deed was that the grantor and his wife should be allowed to reside on the homestead during their respective natural lives, in return for which the grantees promised support. Action was brought to determine the estate for a breach of this condition. The trial court held for the grantees. The Supreme Court granted a new trial, on the theory that the evidence showed a breach of the conditions. The case again went to the Supreme Court, and as reported in 97 Mass. 188, 93 Am. Dec. 75, on the second appeal, the court said:

"It was held in this case, when it was before us at a previous term, that the condition in the demandant's deed to the tenant had been broken, and that the estate was forfeited. On a new trial, the tenant relied upon a waiver of the breach and forfeiture, and we are of opinion that the rulings at the trial were right, and that the defense was maintained. It is optional with the grantor of an estate upon condition, in case a breach of the condition occurs, whether he will avail himself of the same as a forfeiture of the estate thus granted. To do this requires action on his part. * * * It is equally well settled that a mere breach of con-

dition will not re-vest an estate in a grantor upon condition, except at his election; and that he may waive the breach and forfeiture. *Co. Lit.* 211; *Coon v. Brickett*, 2 N. H. 163; 1 *Shep. Touchstone*, 153; *Pennant's Case*, 3 Co. 64."

In *Harwood v. Shoe*, 141 N. C. 161, 53 S. E. 616, an action involving the failure of a grantee to carry out his contract of maintenance, the court held:

"Where the failure * * * to carry out his contract * * * was due to the acts and conduct of the heirs at law of the grantor, they cannot profit by their wrongful acts," and "one who prevents the performance of a condition, or makes it impossible by his own act, will not be permitted to take advantage of the nonperformance."

In *McCue v. Barrett*, 99 Minn. 352, 109 N. W. 594, the court held:

"Conditions subsequent are to be strictly construed and taken most strongly against the grantor to prevent a forfeiture of the estate. A forfeiture for a breach of a condition subsequent may be waived by acts as well as by express agreement, and, once waived, the grantor can never take advantage of it, but mere silence of the grantor after the breach is not sufficient to constitute a waiver of forfeiture. A waiver, however, may result from the failure of the grantor for an unreasonable time to act after knowledge of the breach, or where he consents to the breach"—citing 13 Cyc. 689, 708, and numerous cases.

See, also, *Barrie v. Smith*, 47 Mich. 130, 10 N. W. 168; *McWhorter v. Heltzell*, 124 Ind. 129, 24 N. E. 743.

In *Sharon Iron Co. v. City of Erie*, 41 Pa. 341, the court said:

"A condition that destroys an estate is to be taken strictly, and it is established law that a condition once dispensed with, in the whole or in part, is dispensed with forever. * * * The doctrine that a forfeiture may be waived by the party who has the right to avail himself of the breach of a condition, and that he may do this by acts as well as by express agreement, is a familiar one."

The rule laid down by Washburn on Real Property (6th Ed.) 951 et seq., which is cited with approval by many authorities, is as follows:

"A forfeiture may be saved though a condition may have been broken, if the party who has the right to avail himself of the same waives this right, which he may do by acts as well as by an express agreement." *Bredell v. Westminster College*, 242 Mo. 317, 147 S. W. 105; *Huntley v. McBrayer*, 172 N. C. 642, 90 S. E. 754; 13 Cyc. 706.

In *Jones v. Williams*, 132 Ga. 782, 64 S. E. 1081, the court said:

"The law inclines to construe conditions subsequent so as to render their breach remediable in damages rather than by forfeiture; but where the plain words of the grant declare that a breach of the condition shall defeat the estate

granted, there is no room for construction. No precise technical words are required to create a condition subsequent, and the construction must always be founded upon the intention of the parties as disclosed in the conveyance. * * * The clause of the deed construed by the court in the instruction to which exception is taken created a condition subsequent, upon the breach of which the grantor, at his election, could have availed himself of the forfeiture. If the grandfather relieved the granddaughter from the obligation of caring for him, after she left his home, or if it was through his fault that she failed to continue her services, he could not claim a forfeiture from a failure to comply with the condition. As was said in *Moss v. Chappell*, 126 Ga. 196, 54 S. E. 968 [11 L. R. A. (N. S.) 398], "forfeitures resulting from the breach of a condition may be expressly released, or may be the subject of a waiver, and a waiver may result from circumstances as well as express language to that effect. All this is well settled; and, where the release or waiver extends to the whole forfeiture, of course all benefit to be derived from the forfeiture is gone."

See, also, *Bain v. Parker*, 77 Ark. 168, 90 S. W. 1000, and cases there cited; *Carbon Block Coal Co. v. Murphy*, 101 Ind. 115; *Vicksburg, etc., v. Ragsdale*, 54 Miss. 200; *Brown v. Wrightman*, 5 Cal. App. 391, 90 Pac. 467.

The great weight of authority sustains the proposition that a condition involving a forfeiture may be waived, and likewise that a provision constituting a forfeiture must be strictly construed against the party for whose benefit it is created. Besides, our statute, section 4906 of the Revised Codes, provides:

"A condition involving a forfeiture must be strictly interpreted against the party for whose benefit it is created." See *Finley v. School District*, 51 Mont. 411, 153 Pac. 1010.

Such being the case, and giving to Mrs. Smith's letters the interpretation which we think their language requires, we feel that, so far as this proceeding is concerned, Mrs. Hoffman was justified in treating the letters referred to as relieving her from the necessity of making any further payments to Mrs. McNaught.

While Mrs. Smith says that she came to Montana from California every year, and while in Lewistown on each trip talked to the defendant about the money due Mrs. McNaught, the last definite conversation fixed by the testimony was one in the fall of 1911, prior to the 17th day of September, at the homestead of the defendant at which Mrs. Hoffman expressed her inability to pay further. Following this conversation, Exhibit 2 was written by plaintiff to defendant. It must be assumed that Mrs. Smith had that conversation in mind when she said, in the letter of September 17, 1911:

"Since I was there I know that you can't do more than you are doing and I swear you shall have no more trouble coming. It will all be

fixed up some way. * * * Now I want you to be happy and not worry. You shall have no more trouble if I can help it and I will try most mightily. I want you to have what you have earned by hard work and management."

Even if we disregard the letter of October 9, 1910, the defendant was justified in assuming that plaintiff, in the letter of September 17, 1911, intended what she there said. It would certainly be unjust to penalize defendant for the nonperformance of that which the plaintiff herself had said she would excuse. Certainly, so far as this action is concerned, defendant had a right to rely on these statements.

The whole case is barren of acts of fraud, and no attempt is made by either party to suggest actual fraud on the part of the other. It is simply one of those instances in which a party has made a contract impulsively or out of generosity, not based upon business principles, which has caused dissension, when scrutinized and criticized by business associates and relatives. But the parties have made the situation, and we are not responsible therefor.

[5] The point is made that the letters, in order to be binding or cognizable at law or in equity, must be founded upon a consideration, or the promises or agreements therein must have been fully executed. This is not an action in damages. Whether the letters release defendant from damages because of her failure to make the payments in question is not a matter to be passed upon here. In a proceeding involving that question, the effect of letters or promises not based upon a consideration might perhaps be considered. But the rule is well established that where acts or conduct of a party are such as to estop him from insisting upon the right claimed to have been relinquished, no consideration is necessary. 40 Cyc. 264, and cases cited. In the cases heretofore referred to it will be found that in practically all of them the waivers adverted to were without consideration.

We hold that plaintiff by her acts and conduct waived the right to declare a forfeiture.

[6] The defendant contends that the letters from plaintiff to her not only constitute a waiver of plaintiff's right to declare a forfeiture, but also in effect that, the provision for support of Mrs. McNaught having been lost or waived, even if the deed was made upon condition, the memorandum contract is extinguished, and the deed should be treated as conveying a fee simple title to defendant. Holding, as we do, that the contract and deed were but one transaction, it needs no citation of authority to sustain the conclusion that at the time of the execution of the papers the estate conveyed was but a life estate, or one determinable upon defendant's remarriage, with reversion in favor of plaintiff or her heirs. There was no consideration for the letters. Their terms do not per-

mit the construction that they amount to a conveyance of the fee. *Phillips v. Swank*, 120 Pa. 76, 13 Atl. 712, 6 Am. St. Rep. 691; *In re Goetz Estate*, 13 Cal. App. 198, 109 Pac. 145; *Bank v. Rice*, 4 How. 225, 226, 11 L. Ed. 949; *Adams v. Reed*, 11 Utah, 480, 40 Pac. 724. The situation as to the title has not changed since the execution and delivery of the deed and contract. Plaintiff should have decree in accordance herewith.

The judgment is reversed, and the cause remanded to the district court, with directions that judgment and decree be made therein, that defendant's title constitute a life estate, unless the defendant remarry, in which event her estate shall terminate, with reversion to plaintiff, her heirs or assigns. Reversed and remanded.

BRANTLY, C. J., and HOLLOWAY, PAT-
TEN, and COOPER, JJ., concur.

(94 Or. 90)

STATE v. FRASIER.

(Supreme Court of Oregon. Nov. 12, 1919.)

BANKRUPTCY — 242(2) — TESTIMONY OF BANKRUPT USED AGAINST HIM IN CRIMINAL PROSECUTION.

Bankruptcy Act 1898, § 7 (U. S. Comp. St. § 9591), providing that no testimony given by bankrupt shall be offered against him in any criminal proceeding, does not apply to the language and acts of a bankrupt who in the course of his examination upon the witness stand commits a fresh crime, such as perjury or the uttering of a forged instrument.

Department 2.

Appeal from Circuit Court, Benton County; J. W. Hamilton, Judge.

On petition for rehearing. Denied.
For former opinion, see 180 Pac. 520.

Weatherford & Wyatt, of Albany, Whitten Swafford, of Eugene, and Wm. P. Lord, of Portland, for appellant.

Arthur Clarke, of Corvallis, and L. L. Ray, of Eugene, for respondent.

BENSON, J. With but one exception, the points upon which the correctness of the original opinion herein is challenged were presented fully upon the former argument, and received our careful consideration, and our views thereon remain unchanged.

For the first time, our attention is now called to a provision found in section 7 of chapter 3 of the Bankruptcy Act of July 1, 1898, c. 541, 30 U. S. Stat. 548 (U. S. Comp. St. § 9591), which, after reciting various duties of the bankrupt, directs that he shall "submit to an examination concerning the conducting of his business; the cause of his bankruptcy, his dealings with his creditors and other per-

sons, the amount, kind, and whereabouts of his property, and, in addition, all matters which may affect the administration and settlement of his estate; but no testimony given by him shall be offered in evidence against him in any criminal proceeding."

It is now urged that it was error to admit any evidence of what was said by the defendant in relation to the check in controversy, when upon the witness stand before the referee in bankruptcy, by reason of the above statute. The obvious purpose of the statutory provision is to obtain from the bankrupt a full and frank history of his past business transactions, and at the same time remove any justification for a refusal to answer in relation thereto, upon the ground that his evidence might tend to convict him of a crime. Our view in this respect is confirmed by the cases which are cited by appellant in his brief upon rehearing. It follows, therefore, that the statute does not and cannot apply to the language and acts of a bankrupt, who, in the course of his examination upon the witness stand, commits a fresh crime, such as perjury, or the uttering of a forged instrument. Any other interpretation would make it folly to administer an oath to a bankrupt as a preliminary to his giving evidence in such a proceeding, and would, in effect, nullify the statute denouncing perjury. This conclusion is directly supported by *Glickstein v. United States*, 222 U. S. 189, 32 Sup. Ct. 71, 56 L. Ed. 128, and *Cameron v. United States*, 231 U. S. 710, 34 Sup. Ct. 244, 58 L. Ed. 448. The petition for rehearing is therefore denied.

McBRIDE, O. J., and BEAN and BEN-
NETT, JJ., concur.

(106 Wash. 278)

LOCOMOTIVE EXCHANGE v. RUCKER BROS. et al. (No. 15036.)

(Supreme Court of Washington. July 1, 1919.)

COSTS — 234 — ON MODIFICATION OF JUDGMENT.

Where an appellant obtained a substantial modification of the judgment of the lower court, costs should be awarded against the respondent.

Department 1.

Appeal from Superior Court, Snohomish County; Ralph C. Bell, Judge.

On motion for rehearing. Remittitur ordered amended.

For former opinion, see 179 Pac. 859.

Coleman & Fogarty and W. P. Bell, all of Everett, for appellants.

Edwin H. Flick, of Seattle, for respondent.

PER CURIAM. The clerk inadvertently omitted to include the interest in the judg-

ment in this cause. Appellant also claims that, inasmuch as it obtained a substantial modification of the judgment of the lower court, under the decisions of this court, the costs should be awarded against respondent. This contention is undoubtedly correct.

It is therefore ordered that the remittitur be amended to include the omitted interest as above, and to award the costs of the action against respondent.

(32 Idaho, 498)

ADAMSON v. MOYES et al.

(Supreme Court of Idaho. Oct. 21, 1919.)

1. CHATTEL MORTGAGES §219 — PURCHASER OF MORTGAGED PROPERTY WITH CONSENT OF MORTGAGEE.

The purchaser of mortgaged personal property takes the title free from the lien of the mortgage, if the sale was made with the express or implied consent of the mortgagee.

2. CHATTEL MORTGAGES §225(2) — ACTION FOR TAKING MORTGAGED PERSONALTY WITH CONSENT OF MORTGAGEE.

An action for tortious taking of mortgaged personal property cannot be maintained by a mortgagee, where the taking was with his consent.

Appeal from District Court, Twin Falls County; Wm. A. Babcock, Judge.

Suit by William Adamson against W. G. Moyes, Frank M. Weinheimer, and the Amalgamated Sugar Company, in which defendant Moyes defaulted, and defendant Weinheimer answered and filed a cross-complaint. Judgment for plaintiff, Adamson, against defendant Moyes and the Amalgamated Sugar Company, and judgment for defendant and cross-complainant Weinheimer against Moyes and against the Amalgamated Sugar Company, and the Amalgamated Sugar Company appeals from that part of the judgment affecting it in personam. Reversed.

T. Bailey Lee, of Burley, for appellant.

E. L. Ashton, of Twin Falls, for respondent Weinheimer.

BUDGE, J. Respondent Weinheimer owned certain land in Twin Falls county, which he rented to respondent Moyes for the period extending from March 1, 1915, to March 1, 1916; Moyes giving Weinheimer a chattel mortgage for \$650 upon the crop to be grown thereon during the season of 1915, upon which Moyes paid the sum of \$130. Respondent Adamson performed work and labor on the crop for Moyes, of the reasonable value of \$315, which was not paid when due and a claim of lien was filed therefor. Moyes sold the beets, which constituted a part of said crop, to the appellant, Amalgamat-

ed Sugar Company. Before all of the beets were dug, Weinheimer notified the sugar company of the mortgage by mail, in a letter which reads as follows:

"Twin Falls, Idaho, Oct. 21, 1915.

"Sugar Beet Company, Burley, Idaho—Gentlemen: Mr. Moyes, of Murtaugh, Idaho, has my farm rented, and when the beets are harvested, and you get ready to settle, please notify me at Twin Falls, for I have a mortgage on their [his] crop, and it might save trouble in settling up with him if the check is made out to me.

"Resp.,

F. M. Weinheimer."

While the beets were being delivered, Weinheimer's attorney again notified the sugar company of the mortgage, and the company replied in writing that Moyes' check would be held subject to Weinheimer's order. After the beets were delivered to the sugar company, the Utah Implement & Vehicle Company brought an action against Moyes in the probate court of Cassia county, and garnished the sugar company. This action finally went to judgment in favor of the Utah Implement & Vehicle Company, and the sugar company was required, upon proceedings supplementary to execution, to pay over to the sheriff the amount of the judgment in the latter action, \$428.35.

Adamson then brought suit to foreclose his laborer's lien, making Moyes, Weinheimer, and the sugar company defendants. Moyes defaulted, Weinheimer answered, and filed a cross-complaint, and the sugar company answered. The cause was tried before the court. Findings of fact and conclusions of law were filed, and judgment entered in favor of Adamson, against Moyes and the sugar company, for the total amount of his claim, attorney fees, and costs, and the same declared to be a first lien against the proceeds from the sale of the beets to the sugar company, amounting to \$712.17. Weinheimer was given judgment against Moyes for the full amount of his claim, with attorney fees, and against the sugar company for the balance of the proceeds in their hands after deducting the amount of Adamson's judgment; the court having found as a conclusion of law that Weinheimer's mortgage was a second lien against the proceeds of the beet crop. This appeal is from that portion of the judgment which affects the sugar company in personam.

[1] It appears that Adamson's claim has been paid. The specifications of error relating thereto, consequently, raise only a moot question, and will not be discussed.

The remaining specifications predicate error upon the conclusion of the court that Weinheimer's crop mortgage was a second, or any, lien against the proceeds in the hands of the company, that Weinheimer was enti-

tled to judgment against the company for such part of the proceeds as remained after payment or deduction of Adamson's judgment, and in entering a personal, or any, judgment in favor of Weinheimer against the sugar company.

Although the court's conclusion and decree seem to be predicated upon the theory that the Weinheimer crop mortgage was a lien against the proceeds of the beet crop, the cause of action stated in his cross-complaint is for damages for the wrongful taking by appellant of the property covered by his mortgage without his consent. Respondent's theory of the nature of his cause of action is concisely stated in the first paragraph of his brief, as follows:

"The mortgagee claims that the beets were sold without his consent, that the taking was a tort, and he seeks to have the company indemnify him for his loss."

He relies upon the cases of *Chittenden v. Pratt*, 89 Cal. 178, 26 Pac. 626, and *Bollen v. Wilson Creek Union Grain & Trading Co.*, 90 Wash. 400, 156 Pac. 404.

[2] A necessary element of the right to recover upon respondent's cause of action, as alleged in his cross-complaint, is that the mortgaged property was taken without his consent. The evidence in the case, however, shows conclusively that the beets were purchased by appellant with the consent of respondent. Respondent argues that he could waive the tort and sue upon an implied promise to pay as upon conversion of the property, but in order to sustain that theory he must allege and prove a wrongful conversion by appellant.

The judgment against appellant Amalgamated Sugar Company in personam is reversed. Costs are awarded to appellant, against respondent Weinheimer.

MORGAN, C. J., and RICE, J., concur.

(106 Kan. 515)

Ex parte GUBER.

GUBER v. MATHIAS et al.

(No. 22290.)

(Supreme Court of Kansas. Nov. 8, 1919.)

(Syllabus by the Court.)

HABEAS CORPUS §99(3)—PLACING CUSTODY OF CHILD IN THIRD PERSON WITHIN THE ISSUES.

In a habeas corpus proceeding by a father to obtain custody of his infant daughter from her maternal grandparents, it appeared the father was not at the time fitted to have care and custody of the child, and that she had a good home where she was, but that the grandparents

were so hostile to the father they substantially denied him opportunity to visit the child. Held, an order placing the child in custody of a suitable stranger was within the issues.

Appeal from District Court, Franklin County.

Habeas corpus by H. H. Guber against D. B. Mathias and wife to obtain custody of petitioner's infant child, Charline Guber. From a judgment that child be placed in the custody of a third person, respondents appeal. Affirmed.

Ralph E. Page, of Ottawa, for appellants.
F. M. Harris, of Ottawa, for appellee.

BURCH, J. The proceeding was one of habeas corpus, commenced by a father to obtain custody of his child from its maternal grandparents. The judgment was that the child be placed in the custody of a third person. The respondents appeal.

The child is a girl, who was some 6½ years old when the proceeding was commenced. Her father and mother had been divorced, and in the divorce action she was given to her mother. The mother lived with the respondents for several years, remarried, and removed to Missouri. She died shortly before the present proceeding was instituted, and the child was left with the respondents. The court found that the father was not, at the time of the trial, a proper person to have care and custody of the child. She had a good home with her grandparents, but bad feeling existed between them and the father. The evidence was clear that the father's right to visit his daughter, and thus improve meager occasion to gratify his affection for her and stimulate her affection for him, could not be indulged and protected if she remained with her grandparents; hence the order placing the child in the custody of a suitable woman not related to any of the contestants.

The defendants argue that the issues made by the writ and the return were whether or not the respondents unlawfully held possession of the child, and whether or not the father was a fit person to be entrusted with her custody; that both these issues were found in favor of the respondents; and hence that the judgment is erroneous because outside the issues.

Welfare of the child is always an issue in this class of cases. Rights of parents and claims of grandparents must all yield, under proper circumstances, to the best interest of the child, and in a habeas corpus proceeding the court may award custody accordingly. Right of a parent to visit his child is a restricted form of that right to society which may be enjoyed in full by virtue of custody. Forfeiture of right of custody does not of necessity forfeit right of visitation, and in a proper case a claim of the unrestricted socie-

ty which is embraced in and consequent upon custody may be granted in part by providing for visitation. In this instance the court concluded the father's right, and the little girl's welfare required that they should enjoy each other's society to a limited extent, free from exposure to the baneful influences and consequences of the hostility of the grandparents toward the father.

The judgment of the district court is affirmed.

All the Justices concurring.

(181 Cal. 425)

FLICKENGER et al. v. INDUSTRIAL ACCIDENT COMMISSION et al.
(S. F. 8889.)

(Supreme Court of California. Oct. 10, 1919.)

1. MASTER AND SERVANT §367 — DISTINCTION BETWEEN "EMPLOYÉ" AND "INDEPENDENT CONTRACTOR."

A motor truck owner doing a truck business, who is engaged to do hauling for another without agreement as to compensation and without being required to report before going to work or after, and who is allowed to haul as he pleases, except that he is expected to do a day's work, and expecting the customary pay covering operating expenses and services of men and trucks, *held* an "independent contractor" and not an "employé," as those terms were used prior to adoption of Workmen's Compensation Act of 1917.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Employé; Independent Contractor.]

2. MASTER AND SERVANT §367—WHAT CONSTITUTES INDEPENDENT CONTRACTOR WITHIN WORKMEN'S COMPENSATION ACT.

Workmen's Compensation Act 1917, § 8(b), providing that all persons rendering service are employés, "except those who render services other than manual labor for a specified recompense for a specified result, under the control of his principal as to the result of his work only and not as to the means" of its accomplishment, restricts the term "independent contractor," and consequently enlarges to a corresponding degree the meaning of the term "employé."

3. MASTER AND SERVANT §347 — STATUTE CHANGING TERMS "EMPLOYÉ" AND "INDEPENDENT CONTRACTOR" UNCONSTITUTIONAL.

Workmen's Compensation Act 1917, § 8(b), in so far as it restricts the term "independent contractor" and enlarges the meaning of the term "employé," is unconstitutional as attempting to change the scope of Const. art. 20, § 21, as amended 1911.

4. MASTER AND SERVANT §347—CONSTITUTIONAL AMENDMENT AS AFFECTING CONSTITUTIONALITY OF WORKMEN'S COMPENSATION ACT.

A contention that, if any doubt remains upon the question of the constitutionality of

Workmen's Compensation Act 1917, § 8(b), defining "employé" and "independent contractor" as attempting to modify Const. art. 20, § 21, that the same was removed by the adoption of a new constitutional amendment in 1918, is without force in a proceeding where a personal injury resulted before the latter amendment.

In Bank.

Proceeding under the Workmen's Compensation Act by Lillian Reeves for compensation for the death of her husband, Tarvin A. Reeves, against M. P. Flickenger, employer, and the Aetna Life Insurance Company, insurer. An award was made by the Industrial Accident Commission, and the defendants, insurer and employer, bring certiorari. Award annulled.

Redman & Alexander and E. L. Stockwell, all of San Francisco, for petitioners.

Christopher M. Bradley, of San Francisco (Warren H. Pillsbury, of San Francisco, of counsel), for respondents.

LAWLOR, J. This is a writ of certiorari to review an award made by the Industrial Accident Commission against the Aetna Life Insurance Company as insurance carrier for M. P. Flickenger, in favor of Lillian Reeves in the sum of \$4,346 as compensation for the death of her husband, Tarvin A. Reeves, who was killed while hauling hay for Flickenger.

For some time prior to the accident Reeves was the owner of an automobile truck and was engaged in the "truck business" in the city of Bakersfield. He received most of his calls through a telephone which he had in a cigar store. Reeves had formerly done hauling for one W. A. Ferguson, using his own motortruck and receiving \$15 per day for his services. Not long before Reeves was killed Ferguson retired from the trucking business and turned it over to Reeves. Thenceforward Reeves was ready to do a general trucking business on his own account, and any calls that thereafter would come to Ferguson were to be referred to him.

Flickenger, who was in the feed and fuel business, was engaged in hauling with his own truck a quantity of hay to some sheep and cattle that were starving on a ranch about 8 miles from Edison, a small town 10 miles distant from Bakersfield. It was raining and the roads were in very bad condition. The work of moving the hay was not progressing rapidly enough with one truck, and hence Flickenger found it necessary to secure help, and so he engaged Reeves and two others to assist in hauling the hay. The deceased went to work on the morning of March 9, 1918, and about the middle of the afternoon of March 11th, while crossing the Santa Fé track with his truck, was struck by a locomotive and sustained injuries from which he died a few hours later.

[1] The chief question presented here is as to the status of Reeves in performing this service: Was he an independent contractor or an employé of Flickenger? The facts in this regard are these: Flickenger testified that, owing to the condition of the roads and the fact that no certain amount of work could be accomplished in any given time, no definite price was agreed upon and no time set for the completion of the work, but that he told Reeves "to go out and haul hay and keep at hauling it and we will not make any definite arrangement, but when you are through hauling, why you will find you will not be dissatisfied with the terms of settlement." He testified further that he sent one of his employés with Reeves the first trip to show him the best road and where to unload the hay. After that Flickenger left Reeves to haul as he pleased, and did not require him to report either before or after work, though he expected him to put in a full day. Mrs. Reeves testified that deceased had told her that it was "day work" and that he supposed he would get \$15 a day, which was the price he was accustomed to get when he worked with his truck. Flickenger further testified that he had paid each of the other men \$15 a day. This amount included, not only the services of the men and the trucks, but also covered all necessary expenses for oil, gasoline, repairs, and the like in connection with the operation of the trucks.

From these facts the Industrial Accident Commission found:

"That said injury arose out of and in the course of such employment, was proximately caused thereby, and occurred while the employé was performing service growing out of and incidental to the same."

It was further found:

"That at the time of said injury the employé was not engaged in any of the occupations or employments excluded by section 8 of the Workmen's Compensation, Insurance and Safety Act of 1917 from the provisions of said act."

In addition to the death benefit of \$4,346 there was an award of \$100 for funeral expenses and \$30 for medical expenses.

Petitioners contend that the facts do not support the finding that deceased was the employé of Flickenger, but that he "was an independent contractor as that term was used prior to the adoption of the Compensation Act," that the award can be sustained only under the statutory definition of the term "employé" appearing in section 8(b) of the Compensation Act of 1917, and that section 8(b) is therefore unconstitutional. In other words, the position of petitioners is this: Section 8(b) of the Compensation Act of 1917 has changed and enlarged the meaning of the term "employé," by restricting the definition of what constitutes an "independent contractor," so as to include in the for-

mer classification persons who, under the law, as it stood prior to the constitutional amendment of 1911, authorizing the creation of the commission, and prior to the passage of section 8(b), would have come under the latter designation; that this section is unconstitutional because it is an attempt to extend the jurisdiction of the Industrial Accident Commission beyond the limits prescribed by section 21, art. 20, of the Constitution, which confines the authority of the Industrial Accident Commission to the settlement of disputes arising between employers and employés, by bringing into the list of "employés" persons who prior to this legislative enactment were classed as "independent contractors." Section 8(b) reads as follows:

"(b) Any person rendering services for another, other than as an independent contractor, or as expressly excluded herein, is presumed to be an employé within the meaning of this act. The term 'independent contractor' shall be taken to mean, for the purposes of this act: Any person who renders service, other than manual labor, for a specified recompense for a specified result, under the control of his principal as to the result of his work only and not as to the means by which such result is accomplished." Stats. 1917, p. 835.

The terms "employé" and "independent contractor" had been frequently defined by the courts of this state prior to the amendment to the Constitution authorizing the creation of the Industrial Accident Commission. Article 20, § 21. In *White v. City of Alameda*, 124 Cal. 95, 56 Pac. 795, it is said:

"There is no necessary distinction between the terms 'servant' and 'employé.' * * * The term 'employé' may sound more euphonious than the term 'servant,' but there is no substantial difference between the two except as the statute makes a difference."

Section 2009 of the Civil Code defines a servant as "one who is employed to render personal service to his employer, otherwise than in the pursuit of an independent calling, and who in such service remains entirely under the control and direction of the latter, who is called his master."

The status of employé has been distinguished from that of an independent contractor in the following cases: *Boswell v. Laird*, 8 Cal. 469, 68 Am. Dec. 345; *Du Pratt v. Lick*, 38 Cal. 691; *Bennett v. Truebody*, 66 Cal. 509, 6 Pac. 329, 56 Am. Rep. 117; *Abern v. McGeary*, 79 Cal. 44, 21 Pac. 540; *Hedge v. Williams*, 131 Cal. 455, 63 Pac. 721, 64 Pac. 106, 82 Am. St. Rep. 366; *Louthan v. Hewes*, 138 Cal. 116, 70 Pac. 1065; *Green v. Soule*, 145 Cal. 96, 78 Pac. 337; *Houghton v. Loma Prieta Lumber Co.*, 152 Cal. 500, 93 Pac. 82, 14 L. R. A. (N. S.) 913, 14 Ann. Cas. 1159; *Houghton v. Loma Prieta Lumber Co.*, 152 Cal. 574, 93 Pac. 377; *Pearson v. Potter Co.*, 10 Cal. App. 245, 101 Pac. 681.

In *Bennett v. Truebody*, supra, it was said:

"The plumber was left to produce the desired result in his own way. If that did not constitute him an independent contractor, we do not know what would. There was no stipulation as to the amount to be paid for the work, but that is an immaterial circumstance in this case."

The court there referred to and cited with approval the early case of *Milligan v. Wedge*, 12 Adol. & B. 737, where a butcher hired a drover to drive a bullock from one specified place to another. Coleridge, J., held that the drover was an independent contractor.

So, also, the difference between an employé and an independent contractor has been clearly stated in a number of decisions in this state since the creation of the Industrial Accident Commission, which definitions are in entire accord with those laid down in the authorities above cited. In *Western Indemnity Co. v. Pillsbury*, 172 Cal. 807, 159 Pac. 721, where the question involved was whether the injured teamster was an employé or an independent contractor, it was said:

"It is undisputed that the contract between Stevens and Tittle did not cover any definite period. It is also undisputed that the latter's foreman directed Stevens and his driver in the matter of the materials to be hauled. There was no agreement regarding the bulk of matter or the number of loads per day, but each wagon was to be used for the period of eight hours a day both in removing the rubbish and surplus sand. * * * Neither did he pay Mr. Stevens a certain sum for use of the teams and another sum for personal services. * * * But it is urged with much force that since the foreman for Tittle Company directed Stevens in the matters of the materials to be hauled, the latter was not an independent contractor—that the test of what constitutes independent service lies in the control exercised, and that the driver being under the supervision of the foreman was, therefore, an employé of Tittle. It is true that many authorities specify 'control' of the person performing work as the means of differentiating service from independent employment. The test of 'control,' however, means 'complete control.' For example, the citizen who hires a taxicab to take him to a certain place exercises that amount of control over the driver, but he does not thereby become the man's employer. * * *

"It is well settled that where one person is performing work in which another is beneficially interested, the latter may exercise over the former a certain measure of control for a definite and restricted purpose, without incurring the responsibilities, or acquiring the immunities, of a master, with respect to the person controlled." * * * In the case at bar confusion arose out of the fact that Stevens drove his own team, but we see nothing in that fact which made him a servant and not a contractor. * * * It has been said that the true test of a contractor is that he renders service in the course of an independent occupation, following his employer's desires in the results, but not in the means used, * * * but in weighing the control exercised we must carefully distinguish between authoritative control and mere suggestion as to detail or the necessary co-

operation where the work furnished is part of a larger undertaking. * * * In *Chisholm v. Walker & Co.*, 2 B. W. C. C. 261, a case very much like the one at bar, arising under a workman's compensation statute, it was held that the man who received a certain sum per day for the work of himself and his horse was not engaged in a 'contract of service.' A similar ruling was made in *Ryan v. County Council of Tipperary*, 5 B. W. C. C. 578."

See, also, *Donlon Bros. v. Industrial Accident Comm.*, 173 Cal. 250, 159 Pac. 715; *Fidelity & Deposit Co. v. Brush*, 178 Cal. 448, 168 Pac. 890; *Parsons v. Industrial Accident Comm.*, 173 Pac. 585.

In *Fidelity & Deposit Co. v. Brush*, supra, it was said:

"It has been said that the true test of a contractor is that he renders service in the course of an independent occupation, following his employer's desires in the results, but not in the means used (1 *Shearman & Redfield on Negligence* [8th Ed.] 396), but in weighing the control exercised we must carefully distinguish between authoritative control and mere suggestion as to detail or the necessary co-operation where the work furnished is part of a larger undertaking. *Standard Oil Co. v. Anderson*, 212 U. S. 221, 222, 53 L. Ed. 480, 29 Sup. Ct. Rep. 252. The same principles are announced in *Fink v. Missouri Furnace Co.*, 82 Mo. 276, 52 Am. Rep. 376."

Applying the principles of the foregoing authorities to the instant case, it becomes apparent that Reeves was an independent contractor and not an employé. As we have seen he was engaged in the "truck business," which is an independent occupation, and not only had his own patronage, but had taken over Ferguson's as well. He had his own truck and was doing a general hauling business. Flickenger merely told him what he desired to have hauled and Reeves loaded his truck in his own way at times suited to his own convenience; he never reported before going to work or after; no one controlled his actions at any time, except that he was expected to do a full day's work. Reeves was obliged to furnish his own appliances and pay all expenses in the operation of the truck and was not subject to any "authoritative control" at any time. In other words, Flickenger was interested only in the result to be attained, but not in the means by which it was to be accomplished.

[2] We may now consider whether a different result will be reached if we accept the definition of an "independent contractor" as it appears in section 8(b) of the Compensation Act of 1917. That section divides persons who render service into two classes: "Employés" and "independent contractors." All persons rendering service are employés except those who render service "other than manual labor, for a specified recompense for a specified result, under the control of his principal as to the result of his work only

and not as to the means by which such result is accomplished." We are of the opinion that the effect of this definition is to restrict the term "independent contractor" and consequently enlarge to a corresponding degree the meaning of the term "employé."

[3] To apply the test "other than manual labor" and exclude thereby from the classification of "independent contractors" all those persons who perform manual labor, and bring them into the classification of "employés," is a distinct enlargement of the latter class, and a consequent extension of the jurisdiction of the Industrial Accident Commission beyond the limits of the original constitutional grant of authority to the legislature. Article 20, § 21, Const. And, likewise, if we give effect to the phrase "for a specified recompense," as it appears in section 8(b), we are bringing into the definition of what constitutes an independent contractor an element which, according to the foregoing authorities, did not exist at the time of the adoption of the constitutional amendment, and which was not a part of the definition prior to the passage of the Compensation Act of 1917. That the effect of this clause would be to enlarge the meaning of the term "employé" and thus extend the jurisdiction of the Industrial Accident Commission needs no demonstration. Though if we make the test by applying the rule to the facts in the instant case it at once becomes apparent that the decedent would have been the employé of Flickenger and not an independent contractor for the service he performed was not "for a specified recompense." If this view be correct, and we entertain no doubt that it is, section 8(b) must be held to be unconstitutional to the extent which we have indicated that it is an attempt to enlarge the jurisdiction of the commission. This court in a recent decision in passing upon the constitutionality of section 30 of the Workmen's Compensation Act of 1917, speaking through Mr. Justice Wilbur, had this to say:

"The terms 'employers,' 'employés' and 'employment,' as used in section 21, art. 20, of the Constitution, as amended in October, 1911, must be construed in the light of their meaning at the time of the adoption of the amendment and cannot be extended by legislative definition, for such extension would, in effect, be an amendment of the Constitution, if accepted as authoritative." *Pacific Gas & Electric Co. v. Industrial Accident Comm.*, 181 Pac. 788.

[4] Respondents contend, however, that—

"If any doubt remains upon the question of constitutionality, it has been removed by the adoption by the people in 1918 of a new constitutional amendment authorizing workmen's compensation, which definitely ratifies and affirms the scope of the act."

While it is not so designated, the reference must be to section 21 of article 20, as amend-

ed in 1918. But there is no merit in this contention. It is sufficient to point out that this constitutional provision went into effect eight months after Reeves was killed and six months after the commission decided this case, and consequently can have no application here.

It follows that the award must be annulled, and it is so ordered.

We concur: ANGELLOTTI, C. J.; WILBUR, J.; LENNON, J.; SHAW, J.; MELVIN, J.; OLNEY, J.

(181 Cal. 336)

OSBORN et al. v. HOYT et al. (L. A. 5213.)

(Supreme Court of California. Oct. 7, 1919.
On Petition for Rehearing, Nov. 6, 1919.)

1. PLEADING ⇨8(6) — THAT CONTRACT WAS ILLEGAL, CONCLUSION OF LAW.

An allegation that a contract to will property was "against public policy and wholly illegal and void" was merely the averment of a conclusion of law, and would not put in issue the question of the violation of U. S. Rev. St. § 2290 (U. S. Comp. St. § 4531), relating to contracts concerning unpatented homesteads.

2. WILLS ⇨68 — CONVEYANCE DEFEATING CONTRACT TO DEVISE PROPERTY SUBJECT TO ATTACK BEFORE DEATH.

Where one who had contracted to will specific property conveyed it to others, an action brought before his death to have a trust declared in the property was not prematurely commenced.

3. EVIDENCE ⇨448—PAROL EVIDENCE THAT WRITTEN CONTRACT TO DEVISE WAS FOLLOWED BY ELEMENTS OF DEFENDANT'S CONDITION ADMISSIBLE.

In an action to have a trust declared in land, in that defendant had contracted to will such property to plaintiffs, and had then conveyed it, oral testimony as to "certain improvements" made upon the property, and how they tended toward the "amelioration and betterment" of defendant's condition, was competent to explain the circumstances of the agreement and the matters to which it related; Civ. Code, § 1647, making such evidence admissible.

4. WILLS ⇨59—IMPROVEMENTS SUFFICIENT CONSIDERATION FOR CONTRACT TO DEVISE.

Improvements made upon land, tending towards the amelioration and betterment of the owner's condition, is a sufficient consideration for a contract to will such property to the persons making the improvements.

5. WILLS ⇨65 — UNCERTAINTY OF CONSIDERATION OF CONTRACT TO DEVISE NOT AVAILABLE OF SUBSEQUENT GRANTEES.

Where one claiming under a contract to devise land seeks to have a trust declared in the land as against the grantees in a convey-

ance executed by the prisoner after the making of the contract, the grantees cannot complain of uncertainty as to the consideration for the contract, where the conveyance was without consideration.

6. VENDOR AND PURCHASER @235—WHERE GRANTEES WITHOUT CONSIDERATION KNEW OF OTHERS' RIGHTS, EQUITABLE CONSIDERATIONS NOT AVAILABLE.

Where a deed is given without consideration to grantees possessing full knowledge of the rights of persons injuriously affected by it, no equitable considerations are available to them.

7. APPEAL AND ERROR @181—OBJECTIONS NOT MADE BELOW NOT REVIEWABLE.

Alleged errors asserted for the first time on appeal will not be considered.

Department 2.

Appeal from Superior Court, Los Angeles County; W. A. Anderson, Judge.

Action by Earl R. Osborn and Will E. Chapin against Silas Hoyt and others. Judgment for plaintiffs is affirmed in the District Court of Appeal and rehearing is denied in Supreme Court.

H. C. Millsap and F. E. Davis, both of Los Angeles, for appellants.

Frank C. Collier and John Schlegel, both of Los Angeles, for respondents.

MELVIN, J. Plaintiffs sued to have a trust declared in their favor to certain real property which, as alleged, had been deeded by Silas Hoyt, in fraud of plaintiffs and in violation of their rights, to said Hoyt's daughters, defendants Mary E. Hicks and Rachel H. Jolley, charged with full knowledge of the right of plaintiffs and of the fraud. The asserted rights of plaintiffs arose from a written agreement by the terms of which Silas Hoyt promised to make a will giving and devising to plaintiffs all of his right, title, and interest in and to the land in question which he then had or might thereafter acquire. During the trial Silas Hoyt died. A decree was given in favor of plaintiffs to the effect that upon the death of Hoyt plaintiffs became the owners and entitled to the possession of the land, and that defendants Mary E. Hicks and Rachel H. Jolley hold the land in trust for plaintiffs, and commanding that they execute a proper deed of the property to plaintiffs. From the judgment Mrs. Hicks and her sister and their husbands, who were joined with them as defendants, take this appeal.

A most interesting state of facts is developed from this record. Hoyt was an eccentric man, living alone upon wild land in Big Tejuanga Canyon, in Los Angeles county. His daughters had long been alienated from him and were living in the East. Plaintiffs desired the hunting privileges on this land,

and went there to gain permission from the occupant. That was in 1902. They found Mr. Hoyt a feeble man, 82 or 83 years of age. He was in abject poverty, was very weak physically, and was living in a filthy log cabin. The hunters divided their food with the feeble and apparently starving man, and were glad to see him apparently growing stronger. Their interest in him grew, and during the years following they did much to make his surroundings better and his physical condition more comfortable. Among other things they directed him in the matter of changing his occupation of the land from that of a mere squatter to a claimant of rights which later culminated in his securing a patent to the land (160 acres in area) in the early part of 1913. They piped water to his cabin and garden; installed ditches that enabled him to irrigate a garden patch; built a good road from near the mouth of the canyon to his property (a distance of about three miles); built a clubhouse on the land, and stocked it with provisions, to which the old man was given access without charge; furnished a stable and feed for his horses; financed the survey of the property; sent for his daughters, so that the old man's last years might be comforted by their society; and did many other things for him.

On June 16, 1902, Hoyt leased to plaintiffs the property occupied by him from July 1, 1902, for the term of five years. Mr. Hoyt agreed to be caretaker, and was to receive a rental of \$50 per annum. He was to continue to live on the property, and the plaintiffs, according to the terms of the lease, agreed "to begin improvements upon the said property within one year" from the date of the instrument. On June 23, 1902, certain water rights were conveyed to plaintiffs, and all water rights were conveyed to them by another writing early in July of that year. On September 1, 1902, the agreement upon which this suit is based was executed. Among other things there was the following recital:

"And whereas, the said Chapin and Osborne have undertaken and promised to carry to completion certain improvements upon the said ranch in the Big Tejuanga Canyon; and whereas, the said improvements all tend towards the amelioration and betterment of the physical and temporal condition of the said Hoyt, and greatly conduce to his comfort and convenience; and whereas, the said Hoyt appreciates the physical and temporal and financial benefits that accrue to him through such improvements; and whereas, the said Hoyt is desirous of providing such a remuneration in return therefor as is within his power." And in consideration of the premises Hoyt promised "to give, devise, bequeath, and will unto the said Chapin and Osborne, at the time of his death, all his right, title, and interest in and to that certain tract of land above mentioned and being

known as Hoyt's ranch, in the Big Tejuanga Canyon, county of Los Angeles, state of California, together with all water rights which the said Hoyt may have as incident or perquisite thereto in accordance with former documents."

This was followed in the next year by a deed from Hoyt of certain mining rights, and on April 19, 1912, the plaintiffs executed a writing reciting a consideration of \$10, for which they bargained, sold, and surrendered all of their "rights, interest, title, and demand in and under that certain lease * * * dated June 16, 1902, and recorded in Book 56, page 25, of leases, Los Angeles county records," together with any claim they might have in any land or premises therein mentioned and the term of years therein yet to come. The instrument concludes as follows: "And, further, we hereby certify that said hereinbefore described lease has been canceled, and that all our rights thereunder have been terminated."

This is the instrument by which appellants insist the plaintiffs denuded themselves of all claim of every sort against Hoyt or the property. There is no basis for such contention. The instrument relates to the lease, and not to the agreement to make a will.

But the counsel for appellants argue that this release was made in order that Hoyt might comply with the homestead law of the United States, and make oath that his application was for his exclusive use and benefit, and not directly or indirectly for the use or benefit of any other person. They contend that the enforcement of the contract to make a will would amount to sanctioning a fraud upon the government, and in this behalf they cite *Anderson v. Carkins*, 135 U. S. 483, 10 Sup. Ct. 905, 34 L. Ed. 272, *Hafemann v. Gross*, 199 U. S. 342, 26 Sup. Ct. 80, 50 L. Ed. 220, and similar authorities, holding that a homestead right cannot be perfected without perjury by the homesteader where there has been an alienation or a contract for alienation.

[1] Respondents insist that there was no real issue upon the supposed violation of public policy in the making and enforcement of the agreement by which Hoyt promised to make a will in their favor. In their answer the defendants denied that there were written and oral agreements or negotiations between plaintiffs and Hoyt, as set forth in the second amended complaint, but averred that, if there were any such contracts, then they were and each was "against public policy and wholly illegal and void"; making special reference to the agreement to make a will. This was merely the averment of a conclusion of law, unsupported by any allegation of facts, and we cannot avoid holding that by it the question of the violation of public policy was not put in issue. *Callahan v. Broderick*, 124 Cal. 80, 56 Pac. 782; *Del*

Campo v. Camarillo, 154 Cal. 647, 98 Pac. 1049; *Moran v. Bonyng*, 157 Cal. 295, 107 Pac. 312. Appellants assert, however, that in the absence of demurrer to the answer, and in view of the fact that at the outset their counsel set forth orally their theory that the contract was void because in violation of section 2290, United States Revised Statutes (U. S. Comp. St. § 4531), this court must assume that respondents waived the infirmity in the pleadings by proceeding to trial without objection to said statement. But, even if we accept this interpretation of the law, the record fails to reveal any proof of the procedure by which Mr. Hoyt obtained his patent, or any showing that in fact it was given to him under the homestead law. This conclusion relieves us from all necessity for discussing the very interesting question whether or not an agreement to make a will was an alienation or promise to alienate property in contravention of the statutes of the United States.

[2] There is no force in the contention that the action was prematurely commenced in the lifetime of the testator. It is true that in *Rogers v. Schlotterback*, 167 Cal. 35, 138 Pac. 728, this court held that where one is promised a child's share under the laws of succession the statute of limitations does not begin to run until the promisor's death, and that under the contract therein considered *James Taylor Rogers* "had no enforceable right under his contract in regard to such land or any other property prior to the death of William H. Rogers." In further discussion of the subject the court, by the present chief justice, then an associate justice, used the following language:

"He [James Taylor Rogers] had no right of action of any character against William H. Rogers and his grantees at any time during the life of said Rogers, except that possibly he might have maintained an action in equity to obtain a decree protecting him against future possible injury to his rights, as was done in *Van Duyn v. Vreeland*, 12 N. J. Eq. 142, 153, where the chancellor said that 'if this court does not interfere now for the protection of the complainant, and secure this property at the death of Vreeland, it may have passed into the hands of a bona fide purchaser, and the complainant then be remediless.' The case just referred to was, however, one where the conveyance was clearly and unmistakably in violation of the agreement, as the plaintiff was entitled thereunder to all the property that the deceased might leave."

The case at bar comes clearly within the rule announced in the New Jersey case, because the contract now before us was one whereby the promisor agreed to make a will devising *specific* property, which was, as alleged in the bill of plaintiffs, virtually all of his estate.

[3] Appellants attack certain rulings of the court admitting oral testimony. All of

this testimony was necessary to describe the "certain improvements upon the said ranch," and how they tended "towards the amelioration and betterment" of the old man's condition. This testimony was competent to explain the circumstances of the agreement and the matters to which it related. Sec. 1647, Civ. Code; *Snyder v. Holt Manufacturing Co.*, 134 Cal. 324, 66 Pac. 311.

[4] That the agreement is supported by an adequate consideration is evident from the facts recited herein.

[5, 6] Nor was the agreement too uncertain for enforcement. Hoyt's duty under it is expressed in no uncertain terms, and appellants are not in a position to complain of any other uncertainty, because there is no denial in the answer of the allegation in the complaint that the deed was without consideration. Where a deed is given without consideration to grantees possessing full knowledge (as did Mr. Hoyt's daughters) of the rights of the persons injuriously affected by it, no equitable considerations are available to them. *Rogers v. Schlotterback*, 167 Cal. 85, 138 Pac. 728.

The finding of fraud was amply supported.

[7] In the closing brief appellants assert that there is no proof that Hoyt died intestate, or, having died leaving a will, that he failed to comply with his contract. They also complain because the representative of his estate was not made a party to the action after his death. These alleged errors are asserted for the first time on appeal, and, even if material, would receive no attention.

The judgment is affirmed.

We concur: LENNON, J.; WILBUR, J.

On Petition for Rehearing.

PER CURIAM. In denying the petition for rehearing we would say that it was not intended either to hold or to imply that there need be an issue raised by the pleadings as to the illegality of the contract sought to be enforced by the action in order that the question of illegality may be considered. *Kreamer v. Earl*, 91 Cal. 112, 27 Pac. 735. But in the present case no facts showing the contract to be illegal were either pleaded, shown in evidence, or found.

The application for a rehearing is denied.

(181 Cal. 443)

CARY v. LONG, Mayor, et al. (S. F. 9228.)
(Supreme Court of California. Oct. 20, 1919.)

1. JUDGMENT ⇨720—CONCLUSIVENESS ON OVERRULING OBJECTIONS TO AWARD OF ARBITRATORS.

Where a city agreed with the tenant of land, a portion of which was taken for a highway,

that the matter should be submitted to arbitration, and the award of the arbitrators was duly filed in the superior court, pursuant to Code Civ. Proc. § 1283, *held* that, the award which was attacked in that court on the ground of misconduct, fraud, error, and excess in amount having been sustained, and an appeal from the judgment of the superior court having been dismissed, the award and judgment cannot thereafter be attacked by the city on the ground that it was not made in good faith, etc.

2. MUNICIPAL CORPORATIONS ⇨1011—ARBITRATION OF CLAIMS FOR DAMAGES FOR TAKING LAND FOR HIGHWAY.

Under Code Civ. Proc. § 1281, providing that persons capable of contracting may submit to arbitration any controversy which might be the subject of a civil action between them, a city may through its regularly constituted officials agree to submit to arbitration claims for damage arising out of the taking of real property for highway, urged by an occupant of the property.

3. MUNICIPAL CORPORATIONS ⇨865(2) — JUDGMENT ON ARBITRATORS' AWARD BASED ON TORT NOT WITHIN DEBT INHIBITION OF CONSTITUTION.

Where a city stipulated with an occupant that it should be allowed to proceed with the construction of a highway over his premises, and that the question of damages should be ascertained thereafter, and the condemnation action was abandoned, the route of the highway having been changed, and the occupant, asserting that he had been injured, entered into an agreement with the city for the submission of his claim for damages to arbitration, the award of the arbitrators and judgment thereon were based on tort, which may be enforced under St. 1901, p. 794, by compelling city authorities to make provision in the budget for payment of the claim, and was not within the inhibition of Const. art. 11, § 18, limiting contractual indebtedness which may be incurred by cities.

4. MANDAMUS ⇨176—TO COMPEL PAYMENT OF JUDGMENT AGAINST CITY, LEAVING TERMS DISCRETIONARY.

Under Act March 23, 1901 (St. 1901, p. 794), which is an act to provide for the payment of judgments against counties, cities, and towns, officers having authority to levy taxes may provide at their option for payment of the judgment in annual installments spread over successive years, provided that no payment shall be less than one-tenth of the whole of the judgment; hence a writ of mandate to compel municipal officials to make provision for payment of a judgment against the municipality should leave the officials free to exercise their discretion in determining whether the judgment should be paid by single levy or by ten annual levies.

In Bank.

Application by Julian E. Cary for writ of mandate, to be directed to J. N. Long, as Mayor of Richmond, and others, requiring provision to be made in the budget to pay a judgment. Writ issued.

Beverly Hodghead and T. John Butler, both of San Francisco, for petitioner.

D. J. Hall, of Richmond, and Alvin Gerlack of San Francisco, for respondents.

PER CURIAM. In this case the following opinion, prepared by Mr. Justice Richards, was filed in the District Court of Appeal of the First Appellate District, Division 1:

"Application for a writ of mandate, whereby the petitioner seeks to have the respondents, who are the properly constituted officials of the city of Richmond, commanded to include in the tax levy of said city for the current year an amount sufficient to pay a judgment which the petitioner holds against said city for the sum of \$17,000, with interest. The facts out of which the claim of said petitioner, which ripened into said judgment, arose, are practically undisputed and are briefly as follows:

"On the 22d day of June, 1913, the city of Richmond commenced an action in the superior court of Contra Costa county against the Atchison, Topeka & Santa Fé Railway Company, Julian E. Cary, the petitioner herein, and certain other defendants, to condemn certain lands described in the complaint in said action for the purpose of constructing a highway from the central portion of the city of Richmond to the outer harbor. The line of said highway, according to the averments of said complaint, ran across certain lands of the Atchison, Topeka & Santa Fé Railway, of which the said defendant Cary was in possession under an arrangement with the railway company which permitted him to use said lands for or in connection with a brickyard. After the inception of said suit, and in order to expedite the construction of said highway, a stipulation was entered into between the attorneys of record for the parties to said action, by the terms of which the city was permitted to immediately proceed with the construction of said highway over the lands described in said complaint as belonging to said railway company and as occupied by said Cary, without first ascertaining the amount of damages to be paid to the said defendants for the taking and use of said lands. By the express terms of the stipulation entered into between the attorneys of record for the plaintiff in said action and the attorneys of record for said defendant Cary 'the question of the amount of damage which shall be sustained by said J. E. Cary by the taking of said property and the construction of a highway thereover by the city of Richmond as described in said complaint is to be determined at the trial of said cause, and said plaintiff hereby agrees that it will pay to said J. E. Cary promptly the amount of any judgment which may be awarded and fixed as the damage herein and without appeal therefrom, unless plaintiff should abandon said proceedings within the time and in the manner provided by section 1255a of the Code of Civil Procedure of the state of California.' Subsequent to the making of said stipulation the city of Richmond, being unable to make satisfactory terms with Cary as to his claim for damages, a resurvey of the line of the highway was made, which removed its route from the lands occupied by Cary, and the construction of said highway proceeded to completion along its new alignment. In the meantime the said plaintiff,

the city of Richmond, made a settlement with the railway company by which it agreed to pay a certain sum for the damages caused by the taking of such portion of the lands of said corporation as were occupied by the highway according to its new alignment. Having thus disposed of the claims, both of the railway company and of said Cary, in so far as these related to the taking of the lands owned or held in use by either for the purposes of said highway, the condemnation suit was not pressed to trial, and was in fact practically abandoned, since the purposes for which it was instituted had been fully subserved. There remained, however, certain claims for damages which were insisted upon by Cary as having been suffered by him through the construction of said highway, and which were asserted by him to have arisen by reason of the destruction of a spur track connecting his brickyard with the main line of the Santa Fé Railroad, and also by reason of the interruption in his business and the restriction of his storage facilities and certain other items of incidental damage resulting from such construction. These various elements of alleged damage were itemized in 17 specific claims which he presented against said city, and upon which apparently he threatened to bring an action against the municipality. In order to arrive at an adjustment of these claims as between itself and said Cary, the city of Richmond, through its duly constituted officials, entered into an agreement for the arbitration thereof. This agreement of arbitration, which was executed by the respective parties thereto on the 29th day of July, 1916, proceeded to recite the fact of the institution of said condemnation suit and of the making and substance of the aforesaid stipulation therein, and then provided that 'whereas, said highway has been constructed and completed, and disputes and differences have arisen and still exist between the parties hereto as to the amount of damage which said city should in justice pay to said Cary as sustained by him by reason of the construction of said highway or boulevard, whether the matter of his said claim for damages be strictly involved in said action above named or not: Now, therefore, it is hereby agreed that all said disputes and differences shall be referred to arbitration.' It then proceeds to appoint arbitrators and to set forth such other matters as may be properly provided for in arbitration agreements in pursuance of section 1283 of the Code of Civil Procedure.

"Upon the execution of this agreement of arbitration the arbitrators named therein duly qualified and proceeded to hear and determine the matters which were by its terms submitted to them, and, having taken a considerable amount of evidence with respect to the asserted claims of said Cary against said city, proceeded to make an award, and in so doing allowed to said Cary the sum of \$17,000 as the aggregate amount of his damages, which award was, in accordance with the terms of the arbitration agreement, duly filed with the county clerk of the county of Contra Costa in pursuance of the aforesaid section of the Code of Civil Procedure. Thereafter the city of Richmond, being dissatisfied with the amount of said award, moved the superior court of said county for an order vacating the same, and, after said hearing, being submitted to the judge of said court for deci-

sion, was decided against the contention of the said city of Richmond and in favor of said Cary. From the decision thus rendered an appeal was taken to the Supreme Court, which was later, on motion, dismissed, and the judgment of the said arbitrators and the order of the superior court confirming the same thereby became a finality and became in force and effect a final and general judgment in favor of said Carey and against the said city of Richmond, and is still in full force and effect as such. The said judgment not having been paid by said city, and no steps having theretofore been taken looking to the satisfaction thereof, the petitioner herein instituted this proceeding, whereby he seeks by a writ of mandate to compel the properly constituted officials of the city of Richmond to include in their tax levy for the current year an amount sufficient to pay said judgment.

"This action upon the part of said petitioner is predicated upon the provisions of the act of the Legislature approved March 23, 1901, entitled 'An act to provide for the payment of judgments against counties, cities, cities and counties and towns.' Stats. 1901, p. 784.

"The respondents in this proceeding have appeared and filed an answer, setting forth in substance the facts above recited, and also undertaking to set forth certain facts impeaching the good faith and proper conduct of the arbitrators in said arbitration proceeding, and also assailing their award as excessive, unjust, and fraudulent. The said respondents also in their answer assert that the said agreement for arbitration was and is void, for the reason that the making of the same was beyond the power of the city of Richmond or its officials.

[1] "As to these latter contentions, they may be briefly disposed of. With respect to the integrity of the judgment itself, we are of the opinion that the award of the arbitrators, having been duly filed in the superior court of the county of Contra Costa in pursuance of the provisions of the Code of Civil Procedure relating to arbitrations, and having been there assailed by the said municipality upon the various grounds of misconduct, fraud, error, and excess in amount, which are set forth in the answer of the respondents herein, and the said award having upon hearing as to these various matters before said court been sustained, and the decision of said court thereon having become final upon a dismissal of the appeal, the integrity of said award and said decision sustaining the same can no longer be made the subject of assault, and that, therefore, in so far as the portions of the respondents' answer herein, which undertake to assail the same, are concerned, we are not at liberty to consider them.

[2] "As to the contention of the respondents herein that the action of the city of Richmond through its regularly constituted officials in agreeing to submit to arbitration the claim or claims for damages insisted upon by the petitioner herein, and which might otherwise have been the subject of a civil action, was ultra vires, we are of the opinion that a municipal corporation, like an individual, has power to submit to arbitration any controversy which might be the subject of a civil action against it. Section 1281 of the Code of Civil Procedure broadly provides that 'persons capable of contracting may submit to arbitration any contro-

versy which might be the subject of a civil action between them.'

[3] "This brings us to the main contention of the parties to this proceeding. On the part of the petitioner herein it is contended that the claims which he asserted against the city of Richmond, and which were made the subject of arbitration between himself and it, were claims for damages for a tort or series of torts arising by reason of the construction by the city of Richmond of that certain highway which was originally the subject of the condemnation suit, and that the judgment based thereon, having its foundation in tort, is such a judgment as may be enforced through the processes provided by the statute of 1901. On the other hand, it is the contention of the respondents herein that the claims of the petitioner which ripened into said judgment were claims arising solely out of a stipulation entered into in the aforesaid condemnation suit and out of the agreement to arbitrate which was predicated thereon, and hence that the said judgment which the petitioner holds is one having its foundation in contract, and that, this being so, it comes within the inhibition of section 18 of article 11 of the state Constitution, and is therefore a judgment the superior court of Contra Costa county had no power to enter, and one which the petitioner herein has no constitutional right to have enforced, either under the provisions of the statute of 1901 or in any other manner, against the said municipality.

"We are of the opinion that the contention of the petitioner herein must be sustained. In the recent case of Metropolitan Life Ins. Co. v. Deasy, 183 Pac. 243, it was decided by this court that a creditor of a municipality, holding a general judgment against it which was founded upon a claim for damages sustained by said judgment creditor through the construction of a tunnel, which caused certain injuries to his property, was entitled to have the benefit of the provisions of the statute of 1901 for the enforcement and collection of said judgment. This decision by this court was based upon the decision of the Supreme Court in the case of City of Long Beach v. Lisenby, 179 Pac. 198, which deals with the question of the constitutionality of the act of the Legislature in question. While it is true, as the respondents herein contend, that the matter out of which the claims for damages which the petitioner herein asserted against the said municipality had their inception in the institution by the city of Richmond of the condemnation suit above referred to, and that as between the attorneys of record for the respective parties in said action a stipulation was entered into which provided that the amount of damages which should be sustained by the petitioner herein through the taking of the property described and the construction of a highway thereover should be left to determination at the trial of said cause; and it is also true that thereafter the said municipality, the plaintiff in said action, changed the routes of its proposed highway so as to exclude therefrom the property which the petitioner herein held in possession, by which exclusion any amount of damage which he might have suffered through the taking of said property was eliminated; and while it is also the fact that after the completion of said highway along the route of its new alignment, and after said condemnation suit

had ceased to be a living litigation, the said petitioner herein was still found to be asserting claims for damages resulting from the construction of said highway, and consisting in the main of elements of damages which would not have been the proper subject of admeasurement or determination in said condemnation proceeding, especially in view of the changed route of said highway; and it is also true that as between the petitioner herein and the said city of Richmond an agreement for the arbitration of said claims was entered into, which agreement contained certain recitals with respect to the institution of said condemnation suit, and with respect also to the said stipulation made between the attorneys of record therein—we are still of the opinion that these facts, engagements, and agreements between the parties did not operate to change the fundamental nature and basis of the petitioner's claim for damages against said municipality which ripened finally in the general judgment which he seeks to have enforced in this proceeding. In so far as the stipulation which was entered into between the attorneys for the respective parties in the condemnation suit is concerned, the only purpose and effect of said stipulation was to postpone the hearing and determination of the question of the amount of damage which the petitioner, Cary, as the defendant in said action, might sustain by the taking of the lands which he held in possession until the trial of said suit. Said stipulation could have had no other or further effect, for the reason that the attorneys of record for the parties to said action had no authority to bind their respective clients further than that which was conferred upon them under the provisions of section 283 of the Code of Civil Procedure. In so far as the agreement for an arbitration is concerned, it cannot be held to have created any new or contractual obligation as between the said municipality and the petitioner herein beyond the obligation and agreement to submit whatever claims for damages the petitioner herein held against said municipality to arbitration. Such an agreement in no respect altered the nature or character of the petitioner's claims against said city. They remained after said agreement—as before it—claims for damages arising out of the construction by said city of a highway in proximity to the business and property of the petitioner, and in respect to claims of this nature we can perceive no difference between them and the claims for damages which were asserted in the case of *Metropolitan Life Ins. Co. v. Deasy*, supra, which claims we held were in the nature of claims sounding in tort, and hence the proper subject of a general judgment against the municipality. This being so, it is our conclusion that the petitioner in this case, as in that case, is entitled to a writ of mandate compelling the performance on the part of the officials of the city of Richmond who are named as respondents herein of those acts specially enjoined upon them under the provisions of the aforesaid statute of 1901, supra, for the levy and collection of a tax sufficient to pay the amount of the general judgment which the petitioner herein holds against said city."

We are entirely satisfied with this opinion, and adopt the same as part of the opinion of this court.

[4] The transfer to this court was ordered because we were of the opinion that the writ of mandate directed by the judgment of the District Court of Appeal was too broad in its terms, in view of the provisions of the act under which the writ was sought ("An act to provide for the payment of judgments against counties, cities, cities and counties, and towns," approved March 23, 1901 [Stats. 1901, p. 794]). Under these provisions the officers having authority to levy taxes may provide, at their option, for the payment of the judgment in successive years in annual installments, with the proviso that no fractional levy and payment shall be less than one-tenth of the whole amount of the judgment. We see no good reason to doubt the validity of this part of the act. Any writ issued should leave the officers free to exercise this option. The petitioner asked for a writ requiring the inclusion of the whole amount of the judgment in this year's tax levy. The judgment of the District Court of Appeal was that "the writ issue as prayed for."

It is ordered that a peremptory writ of mandate issue, requiring respondents to provide in accord with the provisions of this act for the payment of the judgment referred to, together with interest thereon.

ANGELLOTTI, C. J., and WILBUR, SHAW, OLNEY, LAWLOR, LENNON, and MELVIN, JJ., concur.

(181 Cal. 433)

STARR PIANO CO. et al. v. INDUSTRIAL ACCIDENT COMMISSION et al.
(L. A. 5751.)

(Supreme Court of California. Oct. 11, 1919.
Rehearing Denied Nov. 10, 1919.)

1. MASTER AND SERVANT ⇨375(2)—INJURIES BEFORE REACHING WORKSHOP.

To entitle an employé to compensation for injuries, he need not have reached the place of employment and actually begun to render service, but it is sufficient if he has come to the employer's premises and is seeking entrance by a means of access provided by the employer or reasonably used by the employé.

2. MASTER AND SERVANT ⇨375(2)—INJURY ON WAY TO EMPLOYMENT.

If an employé is merely on his way to his employment and is injured, the injury is not one sustained in the course of the employment within Workmen's Compensation Act.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Course of Employment.]

3. MASTER AND SERVANT ⇨375(2)—INJURIES TO EMPLOYÉ OF TENANT IN ELEVATOR SHAFT.

A lessee's employé, injured by falling into an elevator shaft in an attempt to use the ele-

vator in going to his work *held* entitled to compensation as injured in the course of his employment, though the elevator was controlled by the owner of the building.

4. MASTER AND SERVANT \Rightarrow 405(4)—INJURED EMPLOYÉ ACTING WITHIN AUTHORITY.

In proceedings for compensation for injuries to an employé who fell into the elevator shaft of a building occupied by his employer, evidence *held* to justify the finding that claimant was legitimately seeking to reach his place of work by a reasonable means of access.

Shaw and Melvin, JJ., dissenting.

In Bank.

Proceedings for compensation under the Workmen's Compensation Act by J. W. Steinkamp, opposed by the Starr Piano Company, employer, and the Ocean Accident & Guarantee Corporation, insurer. Compensation was awarded by the Industrial Accident Commission, and the employer and insurer apply for certiorari to annul the award. Award affirmed.

Redman & Alexander, of San Francisco, and Griffith R. Williams, of Oakland, for petitioners.

Christopher M. Bradley and Hugo D. Newhouse, both of San Francisco, for respondents.

OLNEY, J. The petitioners seek the annulment of an award by the Industrial Accident Commission in favor of respondent Steinkamp. Steinkamp was in the employ of the petitioner, Starr Piano Company, which rented space on the fourth floor of the Manufacturers' Exhibition Building in San Francisco. He was hurt by falling into the elevator shaft of the building in an attempt to use the elevator on his way to the fourth floor, there to perform services for his employer. The elevator was one solely under the control of the owner of the building, and maintained and operated for the common use of all the tenants and so used. The only question is as to whether or not the accident by which Steinkamp was injured was one "arising out of and in the course of his employment," as prescribed by the Workmen's Compensation Act (St. 1917, p. 831). Two reasons are advanced by the petitioners why the accident was not of this character.

[1] The first reason is that at the time of the accident Steinkamp had not yet reached his place of employment, but was merely on his way there, and accordingly had not yet entered upon his employment. On the one hand, it is not doubted that it is not necessary, in order to entitle the employé to compensation, that at the time of accident he have reached the place of employment and have actually begun there to render service. It is sufficient if he has come to the employer's premises and is seeking entrance thereto by a

means of access provided by the employer or reasonably used by the employé. A typical, if not the leading, case of this character is *Moore v. Manchester Liners, Ltd.*, 3 B. W. O. C. 527, where compensation was allowed for the death of a fireman employed on a steamer, who was drowned while returning to his ship from a personal errand of his own, by falling from a ladder provided for the purpose of access from the quay to the ship.

[2] On the other hand it is not doubted that, if the employé is merely on his way to his employment and is injured, the injury is not one sustained in the course of his employment. A typical case of this sort is *Ocean Accident Co. v. Industrial Accident Comm.*, 178 Cal. 318, 154 Pac. 1041, L. R. A. 1917B, 336, where it was held that compensation could not be awarded for the death of a seaman drowned while seeking to make his way over a wharf and across other vessels to his own ship. In the latter case the authorities dealing with these two classes of cases and making the distinction between them are reviewed at length.

The question here is under which of these rules does an accident come which is suffered by an employé on the way to his employment and when he has reached the building in a part of which his employer's premises, so to speak, are located, and when he is using a means of access, such as stairs or an elevator, supplied by the owner of the building, as distinct from the employer, for the common use of all the tenants of the building, of whom the employer is but one. This question may be solved, we believe, by means of an approach to the facts of the case from the facts of those in which, as we have said, it is undoubted that an award of compensation is proper.

[3] Under the rule first stated, if the employer were the owner of the building and the employé were injured on the elevator or stairs in reaching his place of work on a certain floor, it cannot be doubted that compensation is payable under the statute. The employé has reached the employer's premises and is using a means of access specially provided for that very purpose. It would seem to follow that if the employer did not own the building, but rented it all, compensation would still be payable, even though the employer did not operate or control the elevator, or have the control or care of the stairs, but such operation, control, and care remained with the owner of the building. The operation, control and care of the elevator and stairs in such a case would seem to be a matter wholly between the employer and the owner of the building. It would not enter as between employer and employé and would be entirely extraneous to the employment. As to the employé it would be a matter of indifference whether the elevator or stairs

necessary for access to the spot where he is to work are by the employer's lease operated and controlled by the latter or by the owner of the building, provided only that they are in fact furnished so that access by the employé may be had. There would seem to be no reason for allowing compensation where the employer controls the elevator for instance, and refusing it where he does not, when the fact as to who controls it is extraneous to the employment and the theory upon which compensation is now allowed under the Workmen's Compensation Act is not, as before, that the employer, either directly or through some agency or instrumentality under his control, has been guilty of some breach of duty toward the employé. So far as the employé is concerned, the elevator or stairs are a special means of access furnished him to get to his place of work, and, in effect, furnished him by his employer. By the lease the tenant has the right as an appurtenance of the premises leased to the use of the elevator or stairs for the purposes of access, and, so far as the tenant's employés are concerned, the elevator and the stairs are, in effect, a part of the employer's premises. See *Judson Iron Works v. Industrial Accident Comm.*, 184 Pac. 1.

Nor is the situation in this respect changed by the fact that the employer is but one of several tenants, all of whom have the right to the use of the elevator and stairs. The right to their use still remains an appurtenance of the employer's premises, the only difference being that the right is now one enjoyed in common with others instead of exclusively. The essential thing, that the elevator and stairs are in effect a part of the employer's premises covered by his lease, still remains.

A decision directly in point is *In re Sundine*, 218 Mass. 1, 105 N. E. 433, L. R. A. 1916A, 318, where an employé, going from her place of work for lunch, was injured upon the stairs of the building in which the employers leased a floor. Upon the point under discussion the court said:

"Nor do we regard it as decisive against the petitioner that she was injured while upon stairs of which neither Olsen nor F. L. Dunne & Co. had control, though they and their employés had the right to use them. These stairs were the only means available for going to and from the premises where she was employed, the means which she practically was invited by Olsen and F. L. Dunne & Co. to use. In this respect, the case resembles *Moore v. Manchester Liners*, *ubi supra*; and that case, decided under the English act before the passage of our statute, must be regarded as of great weight. *McNichol's Case*, 215 Mass. 497, 499 [102 N. E. 697, L. R. A. 1916A, 306]. It is true that before the passage of St. 1911, c. 751, the petitioner could not have held her employer for this injury. *Hawkes v. Broadwalk Shoe Co.*, 207 Mass. 117 [92 N. E. 1017]. But that now is not a circumstance of much importance; for one of

the purposes of our recent legislation was to increase the right of employés to be compensated for injuries growing out of their employment.

"It was a necessary incident of the employé's employment to use these stairs. We are of opinion that according to the plain and natural meaning of the words an injury that occurred to her while she was so using them arose 'out of and in the course of' her employment."

The present case also comes within the language at least of *Nelson, etc., Co. v. Industrial Commission*, 236 Ill. 632, 122 N. E. 113, to the effect "that it makes no difference that the injury occurred off the premises of the employer if the employé were using premises which he had a right to use, and which provided the only available way to reach the point to which he was going for lunch."

The language in *De Constantin v. Public Service Commission*, 75 W. Va. 32, 83 S. E. 88, is too broad if it was intended thereby to include injuries sustained on a public road or way, but the fundamental idea is sound when applied to a private means of access appurtenant, so to speak, to the employer's premises. The language is:

"Since injury after termination of actual work, while on the premises of the employer and in pursuit of the usual way of leaving the same, is held to be within the course of employment and to have arisen out of the same, it seems clear that an injury to a workman while coming to his place of work on the premises of the employer and by the only way of access, or the one contemplated by the contract of employment, must also be regarded as having been incurred in the course of the employment and to have arisen out of the same. If, in such case, injury does not occur on the premises, but in close proximity to the place of work and on a road or other way intended and contemplated by the contract as being the exclusive means of access to the place of work, the same principle would apply and govern. If the place at which the injury occurred is brought within the contract of employment, by the requirement of its use by the employé, so that he has no discretion or choice as to his mode or manner of coming to work, such place and its use seem logically to become elements or factors in the employment, and the injury thus arises out of the employment and is incurred in the course thereof."

See, also, *Nole v. Wadsworth*, 6 B. W. C. C. 129.

[4] The second contention of the petitioners is that the injury to Steinkamp did not arise out of his employment because he was injured when by means of a key surreptitiously obtained he had entered the building on a Sunday when it was closed, and was proceeding without authority to run the elevator himself in the absence of an operator. In our former opinion the award was held invalid on this ground. A rehearing was granted, not because of any doubt as to the invalidity of the award upon such a state of facts, but because of doubt as to whether the commission was not justified in finding a differ-

ent state of facts. A re-examination of the evidence has satisfied us that the commission was justified in so finding.

The home office of the Starr Piano Company is in Los Angeles. Steinkamp was employed by it as traveling salesman and its San Francisco representative and to take charge of its exhibit in the building where the accident occurred. He had both the freedom and the responsibility incident to his position as local representative. He was not held to regular hours at a particular place, but was supposed to give as much time as was required to discharge his duties efficiently, and it was expected of him that he would at times work evenings and on Sundays. This, in effect, was testified to by the secretary and treasurer of the piano company. It further appears that at the time when the piano company, through its secretary, was arranging to rent its space in the building, Steinkamp brought up the matter of his being permitted to use the building evenings or Sundays, and the agent of the building told the secretary and Steinkamp that while the building was not ordinarily used evenings or Sundays, it could be arranged that Steinkamp might do so if necessary. Steinkamp did work frequently in the building evenings and Sundays, and the evidence shows that this was known both to his employer and the agents of the building. On the Sunday when he was hurt, he was in the building to attend to some business for the piano company. Being there for that purpose, it follows from the facts just previously stated that he was legitimately there in the course of his employment, although there out of business hours and when the building was closed.

This would hardly be questioned were it not for the manner by which he effected an entrance. He obtained entrance by means of a key which he had had made from one loaned him temporarily by a representative of the building after he had been refused a key by another representative and by the janitor.

But in the first place, assuming that he had the key surreptitiously, the only bearing which that fact would seem to have would be to indicate that he was not in the building legitimately. If he were rightly there, how he got there would seem to be immaterial, since he was not hurt getting there, but afterwards. That he was there legitimately hardly admits of serious question upon the other facts already stated.

In the second place, there was evidence sufficient to justify the conclusion by the commission that, no matter how Steinkamp first obtained his key, his continued possession and use of it was not surreptitious. Numerous other tenants had keys and used them. It was no exceptional thing for a tenant to have a key. Steinkamp himself was frequently in the building out of hours to the knowledge of the agents, and when, if he were supposed

not to have a key, the question must have occurred to them as to how he had got in. It also appears that after he had been refused a key by the janitor, the latter observed him in the building out of hours, and reported that fact to one of the responsible agents for the building, but nothing was said or done about it. The whole course of conduct warrants the conclusion that Steinkamp, having in some manner obtained a key, the agents of the building acquiesced in his retaining and using it.

The remaining questions in the case pertain to Steinkamp's attempt to use the elevator in the absence of the operator. He was hurt in an attempt so to use it, and, unless he had authority to do so, he was not using a means of access to his employer's premises then open to him, and was not hurt in the course of his employment. Furthermore, authority so to use an elevator cannot reasonably be presumed, but must affirmatively appear.

There were two elevators in the building, both operated by electric power, one a freight elevator, the other a passenger elevator. No operator was supplied for the freight elevator, and any tenant desiring to use it either applied to the janitor or was at liberty to operate it himself. On the other hand, an operator was supplied for the passenger elevator, and during business hours at least this elevator was operated by no one else. When the operator left, the power was left on. Why this was done does not appear. The agents for the building deny that any one was authorized to use the passenger elevator in the absence of the operator. Whether its method of operation was different from or more difficult than that of the freight elevator, which the tenants were permitted to run, does not appear, but it is a matter of common observation that there are electric elevators which do not require any considerable skill or experience for their operation. As against the general statement of the agents of the building that no one was authorized to use the passenger elevator in the absence of the operator, there is the testimony of Steinkamp that the manager and secretary of the building himself showed Steinkamp how to operate it; that other tenants operated it themselves; that he had operated it himself on several previous occasions, and that no objection to such use had ever been made to his knowledge by the agents of the building. This testimony is corroborated by that of one Nelson, a mechanic employed by the piano company to install some phonographic booths. He testifies that on going to the building he was given a key by the manager and secretary and told to use the elevator; that he did use it a number of times; that on one occasion he found the elevator door open and the elevator not there, it having been taken to a floor above by a tenant, and

that he investigated and found the door was apt to rebound on being closed, and reported the matter to the agents of the building. The manager and secretary of the building contradict Steinkamp's testimony that he showed him how to operate the elevator, but, admits that he showed him how to open the door into the elevator compartment. Why he did this, if not in order that Steinkamp might operate the elevator, does not appear.

It is clear that upon the foregoing testimony of Steinkamp and Nelson, taken in conjunction with the other evidence stated, the commission was justified in concluding that, unusual as it might be, Steinkamp and other tenants were in fact permitted to operate the passenger elevator, themselves. In fact, the petitioners hardly contend to the contrary. The point on which they rely in this connection is that while Steinkamp may have been permitted by the owners of the building to run the elevator, this fact and the fact that he was doing so were wholly unknown to Steinkamp's employer, and was not acquiesced in by it. This is true so far as appears. It is likewise true that acquiescence by the owner of the building in some unreasonable and dangerous use of some appurtenance of the building by an employé of a tenant, unknown to the tenant, would not be the equivalent of acquiescence by the tenant in such use by his employé. But in such a case as this, where Steinkamp was largely a free and responsible agent, it must be taken that his employer acquiesced in his use of the building in any reasonable way permitted by the owner of the building. The award of the commission cannot therefore be annulled, unless it appear that Steinkamp's using and operating the elevator himself was unreasonable and dangerous. There is no evidence upon this point; and, while it might be said in the case of some kinds of elevators that their use without a skilled and trained operator was unreasonable and dangerous as a matter of common knowledge, it does not appear that the elevator here involved was of that character. Certainly there are some electric elevators which can be operated with safety by a person without particular experience or skill, and the acquiescence by the owners of the building in the use of this particular elevator by such persons, if the testimony of Steinkamp and Nelson be believed, is some indication that it was of that character.

It follows that the commission was justified in finding that Steinkamp was not injured in endeavoring to reach his employer's premises by an unreasonable and dangerous means of access which he was not authorized to use, but, on the contrary, that he was injured while legitimately seeking to reach his place of work by a means of access appurtenant thereto and which he was justified in using.

This being the case, it follows that the finding that his injury arose out of and in the course of his employment must be sustained. Award affirmed.

We concur: LENNON, J.; WILBUR, J.; LAWLOR, J.

SHAW, J. I dissent for reasons similar to those stated in my dissenting opinion in *Judson Mfg. Co. v. Industrial Accident Comm.*, S. F. 9039.¹ In my opinion the court in these decisions is creating a liability itself and is imposing on the community and on employers a burden not contemplated or warranted either by the Constitution or by the statute.

I concur: MELVIN, J.

(181 Cal. 460)

LONDON GUARANTEE & ACCIDENT CO.,
Limited, v. INDUSTRIAL ACCIDENT
COMMISSION et al. (S. F. 9139.)

(Supreme Court of California. Oct. 24, 1919.
Rehearing Denied Nov. 21, 1919.)

1. DIVORCE ¶169—INTERLOCUTORY JUDGMENT AS "CONTRACT" OR "AGREEMENT."

An interlocutory judgment of divorce, under Civ. Code, § 131, so far as it determines the rights of the parties, is a contract or agreement between them, within section 175, freeing the husband from liability for support when the wife lives separate from him by agreement, and, though temporary and provisional, settles their rights for the time being until some action, proceeding, or motion is begun to change their status, and some order is made thereon having such effect, or until they become reconciled and resume marital relations, restoring their mutual obligations.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Agreement; Contract.]

2. MASTER AND SERVANT ¶388—NO PRESUMPTION UNDER COMPENSATION ACT OF DEPENDENCY OF DIVORCED WIFE.

Husband and wife, after interlocutory judgment of divorce for the wife, rendered under Civ. Code, § 131, and making no provision for her support, *held* living separate by agreement not providing for the wife's support, so that, under section 175, the husband was not personally liable for her support, and she was not entitled to the presumption of total dependency created by Workmen's Compensation Act, § 14, subd. a(1).

In Bank.

Proceedings under the Workmen's Compensation Act by Eva Oberg and Mary Oberg, to secure compensation for death of their husband and son, John M. Oberg, the employé. Compensation was awarded, and the London Guarantee & Accident Company, Limited, the insurer, applies for certiorari to, review

¶ For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

¹ 184 Pac. 2.

the order of the Industrial Accident Commission. Award annulled, and cause remanded.

Walter H. Linforth, of San Francisco, for petitioner.

A. E. Graupner, of San Francisco, for respondents.

SHAW, J. This is an application to review a decision of the Industrial Accident Commission awarding compensation to Eva Oberg and Mary Oberg on account of the death of John M. Oberg, who at the time of his death was the husband of Eva Oberg. Mary Oberg was the mother of said John M. Oberg. It is admitted that the injuries which caused the death of John M. Oberg were caused by accident arising out of and in the course of his employment. The only questions for consideration relate to the amount of compensation to be awarded and the rights of the beneficiaries to receive the same.

The injury occurred on November 30, 1918. Oberg and his wife at that time had not been living together for nearly two years. In December, 1917, Eva Oberg began an action for divorce against John M. Oberg, alleging in the complaint as cause for divorce the willful failure of said Oberg to provide her with the common necessities of life for more than a year prior to the beginning of the action. The complaint did not ask alimony or other provision for her support or for an award of property. Oberg was a nonresident of the state, and summons was served by publication only. In that action, on April 16, 1918, she obtained an interlocutory judgment of divorce, declaring that she was entitled to a divorce from said John M. Oberg on the ground stated in the complaint. It made no provision whatever for any alimony or maintenance and no reservation of any right or power thereafter to award alimony or maintenance or to entertain any application therefor. This judgment became final, in the sense that no appeal could be taken therefrom, on June 16, 1918. Mary Oberg, the mother of John M. Oberg, had been receiving financial aid from John M. Oberg prior to his death. His contributions to her for the year preceding his death did not exceed \$125. The commission found that Eva Oberg was the wife of John M. Oberg at the time of his death, and that he was legally liable for her support; that Mary Oberg was partially dependent on him for support at the time of his death, and thereupon it awarded full death benefits, and, as it is authorized to do by subdivision "e" of section 14 of the Workmen's Compensation Act (Stats. 1917, p. 845), reassigned the same by giving one half of the amount to the mother and the other half to the wife.

It is the contention of the petitioner that said John M. Oberg was not legally liable for the support of said wife at the time of his death, and consequently that full compensa-

tion could not be awarded and subsequently reassigned in the manner stated, but that the only allowance that could be made under the provisions of the section was \$100 for burial expenses and an additional sum to the mother, as a death benefit, not exceeding three times the annual amount devoted to the support of said mother by said deceased in his lifetime, and not exceeding the equivalent of three times his average annual earnings, as provided in section 9, subdivision "c" (2) of the Workmen's Compensation Act (Stats. 1917, p. 840). This contention would be correct, if the wife be not legally entitled to compensation under the act.

The act provides that if the wife was living with the husband at the time of his death, or if he "was legally liable at the time of his death" for her support, she is "conclusively presumed to be wholly dependent for support" upon her husband, so as to be entitled to compensation under the act as such dependent. Section 14, subd. a(1). The commission was of the opinion that, under the circumstances above narrated, and notwithstanding the entry of the interlocutory decree of divorce between Eva Oberg and her said husband, he was legally liable for her support at the time of his death. The correctness of this conclusion is the question to be considered in the case.

The question depends mainly upon the meaning and effect of sections 131 and 132 of the Civil Code. The provisions of these sections, applicable to this case, are that in an action for divorce, if the court determines that a divorce should be granted, "an interlocutory judgment must be entered, declaring that the party in whose favor the court decides is entitled to a divorce" (section 131); and that after the lapse of one year from the entry of such interlocutory judgment the court "may enter the final judgment granting the divorce, and such final judgment shall restore them to the status of single persons," and that the court may then give "such other and further relief as may be necessary to complete disposition of the action" (section 132).

The petitioner claims that where the complaint in such action does not ask for alimony, support, or maintenance, nor for any relief regarding property and the interlocutory judgment does not reserve the questions of alimony, support, or disposition of property for further consideration, the right of the wife to demand subsequent support from the husband is terminated by the interlocutory judgment, and that he is thereby relieved from the obligation to support her during the interval between the interlocutory judgment and the final judgment. In support of this claim it cites *Howell v. Howell*, 104 Cal. 45, 37 Pac. 770, 43 Am. St. Rep. 70, *O'Brien v. O'Brien*, 124 Cal. 422, 57 Pac. 225, *McKay v. McKay*, 125 Cal. 68, 57 Pac. 677, *O'Brien v. O'Brien*, 130 Cal. 409, 62 Pac. 598, and *Har-*

lan v. Harlan, 154 Cal. 348, 98 Pac. 32. These decisions all related to the effect of final judgments, which made no provision for future alimony or support and did not reserve that subject for subsequent disposition. They are put upon the ground that, inasmuch as the court in those cases had rendered final judgment without reserving the question of support or alimony for further consideration, and such judgment had become final in that court, it had lost jurisdiction over the action, and that as the final judgment dissolved the marriage absolutely, the woman was no longer his wife, and the personal liability of the husband for her subsequent support had ceased to exist, and that all her former rights to support from him had become merged in the judgment. The interlocutory judgment is provisional or temporary only by the terms of the statute, and does not of itself dissolve the marriage relation, and therefore these reasons do not apply.

We have considered the effect of sections 131 and 132 in *Deyoe v. Superior Court*, 140 Cal. 476, 74 Pac. 28, 98 Am. St. Rep. 73, *Perlera v. Perlera*, 156 Cal. 9, 103 Pac. 488, 23 L. R. A. (N. S.) 880, 134 Am. St. Rep. 107, *Estate of Dargie*, 162 Cal. 51, 121 Pac. 320, *Estate of Seiler*, 164 Cal. 181, 128 Pac. 334, Ann. Cas. 1914B, 1093, *Estate of Walker*, 169 Cal. 403, 146 Pac. 888, and *Brown v. Brown*, 170 Cal. 1, 147 Pac. 1168. The principal proposition established by these cases is that the marriage relation is not dissolved by the interlocutory judgment, and that for all the purposes involved in those cases it remained in existence until the final judgment of divorce. Neither the *Perlera* Case nor the *Deyoe* Case contained anything concerning the liability of the husband for support after the interlocutory judgment. In *Estate of Dargie* the parties had become reconciled after the interlocutory judgment, and were living together as husband and wife at the death of the husband, but the interlocutory judgment had not been set aside. It was held that the marriage relation was not dissolved, and that she was entitled to the benefit of the provisions of the Code of Civil Procedure declaring a surviving wife entitled to a family allowance out of the estate of the husband. In *Estate of Seiler* and *Estate of Walker* it was held that when the husband died after the interlocutory judgment the surviving wife was his widow, and was entitled to administration upon his estate, under the provisions of section 1365, Code of Civil Procedure. In *Brown v. Brown*, the interlocutory divorce had been granted to the wife on the default of her husband upon a complaint for divorce on the ground of willful neglect, and which alleged that there was no community property at the time the action was begun. During the interval between the interlocutory judgment and the final judgment the husband acquired community property, and after the final judgment the wife began the action to

establish her title as tenant in common with him in such property. It was held that the final judgment upon such a complaint and default was a determination that there was no community property in existence at the time the action was begun, but that it did not conclude the wife with respect to the subsequent acquisition of property by the husband, and that she was entitled to show such acquisition and to claim her share thereof after the final judgment had been rendered. The case went upon the theory that the judgment had left the after-acquired community property undisposed of, and that they therefore became tenants in common thereof, each holding a half interest. *De Godey v. Godey*, 39 Cal. 162. The divorce was not granted upon either the ground of cruelty or adultery. The decision holds that the statute declaring what shall constitute community property continues applicable after the interlocutory judgment and until the final judgment, unless the interlocutory judgment in some manner adjudicates the matter.

[1, 2] These decisions do not reach the point presented in the case now in hand. This case presents the question whether section 155 of the Code, declaring that the husband and wife contract toward each other obligations of mutual support, continues in existence notwithstanding the rendition of an interlocutory judgment rendered upon a complaint by the wife which alleges a cause of divorce against the husband for willful neglect and does not ask alimony or any other provision for her support. Certain other provisions of the Civil Code are important. Section 159 declares that the husband and wife "may agree, in writing, to an immediate separation and may make provision for the support of either of them and of their children during such separation." Section 175 provides that he is not liable for her support if she abandons him without cause, until she offers to return, "nor is he liable for her support when she is living separate from him, by agreement, unless such support is stipulated in the agreement." Here the husband and wife had been living separate and apart for nearly two years prior to his death and for about a year prior to the time when she began the action for divorce. The wife began the action asking for a divorce and seeking no relief whatever from him for her support. This was, in effect, a waiver by her, for the purposes of the action, of her right to support from him, at least until such time as she should apply therein for some order to enforce such obligation. To this complaint he made no answer, and suffered the interlocutory judgment to be taken against him by default. This was equivalent to a consent on his part that she should have the divorce as prayed for upon the allegations of her complaint. It is said that "a judgment is a contract, in the highest sense of the term." *Wallace v. Eldredge*, 27 Cal. 499. This is

well settled in this state. *Stuart v. Lander*, 16 Cal. 372, 76 Am. Dec. 538; *Bean v. Loryea*, 81 Cal. 153, 22 Pac. 513; *Dore v. Thornburgh*, 90 Cal. 66, 27 Pac. 30, 25 Am. St. Rep. 100; *Weaver v. San Francisco*, 146 Cal. 732, 81 Pac. 119. An interlocutory judgment of divorce is therefore, so far as it determines the rights of the parties, a contract between them. It is temporary and provisional in its nature, it is true, but it settles the rights of the parties for the time being, and until some action, proceeding, or motion is begun to change the status, and some order is made thereon which has that effect, or until they become reconciled and resume marital relations, in which event their mutual obligations are, for the time being at least, restored. *Olson v. Superior Court*, 175 Cal. 250, 185 Pac. 706, 1 A. L. R. 1589. The following passage from *Brown v. Brown*, *supra*, although it refers to a final judgment, is applicable also to an interlocutory judgment so far as it declares the same to be a contract:

"Where a defendant is served with a summons and complaint stating the facts upon which he is required to act, and he makes default, he is presumed to admit all the facts which are well pleaded in the complaint. The judgment which follows upon this sort of admission is, in contemplation of law, a complete adjudication of all the rights of the parties embraced in the prayer for relief and arising from the facts stated in the complaint, including the facts in his favor as well as those against him. The defendant here is presumed to have acceded to the proposition embraced in the complaint, and to have consented that plaintiff should obtain the relief therein prayed for, upon the conditions and facts set forth in the complaint. The proceeding is equivalent to a statement by Brown to plaintiff that he did not object to a divorce for the cause alleged, based upon the theory that there was no community property existing at the time the action was begun. When judgment is rendered upon such a complaint and default, it becomes, in effect, a contract between the parties that the judgment shall be final with respect to everything properly embraced within the allegations of the complaint and in the prayer for relief."

So in the present case the interlocutory judgment, although not final, was conclusive between the parties for the purposes of that action during the period elapsing before the final judgment should be entered, unless by some proceeding or agreement it became in some manner modified. Perhaps the wife would have had the right during that interval to apply in that action for further relief in the way of support and maintenance or for alimony, but until she did so the rights of each with respect to the personal marital obligations of the other remained as declared by the interlocutory judgment, and it was binding on each of them. It is true it had no effect on the operation of the statutes which declare her rights in the property of which

he dies possessed, nor upon the statutes declaring the status of the property acquired by him during the marriage, because, until the final judgment, the marriage status continues. But the personal obligations between them remain in abeyance until changed by some subsequent action or agreement which is binding upon the husband. They are, by virtue of the interlocutory judgment, living separate by agreement, and if that judgment makes no provision for her support by him, they are living separate by an agreement which does not provide for her support, and under section 175 he is not, during that interval, personally liable for her support. The judgment has the effect of a contract for that purpose. Until that contract is in some manner changed, either in the action or in some independent proceeding, or by a reconciliation, her right to support is suspended. In the present case no change was made in their status up to the time of his death. They were living apart under this contract evidenced by this judgment. He was not at that time legally liable for her support, and, therefore she does not come within the aforesaid provisions of the Workmen's Compensation Act. It follows that the award cannot be sustained. It will be necessary for the commission to readjust the matter under the principles we have stated, giving the wife no compensation whatever and allowing the mother such compensation as the evidence may show she is entitled to under the provisions of the act.

The award is annulled and the cause remanded for further proceedings.

We concur: ANGELLOTTI, C. J.; OLNEY, J.; WILBUR, J.; LENNON, J.; LAWLOR, J.; MELVIN, J.

(181 Cal. 452)

IN RE MATHEWSON'S ESTATE.

WARD v. MATHEWSON.

(L. A. 6162.)

(Supreme Court of California. Oct. 23, 1919.)

1. HUSBAND AND WIFE \S 151(7)—ALLOWANCE TO HUSBAND AS WIFE'S ADMINISTRATOR OF FUNERAL EXPENSES.

Where husband owned property worth \$7,050, and was joint tenant with his deceased wife, whose administrator he was, of property worth \$8,000, incumbered to \$8,000, which property he held by right of survivorship, the income being sufficient to pay interest and taxes, and not having sufficient income to pay funeral expenses, the court properly allowed him \$512.50 for reasonable funeral expenses.

2. EXECUTORS AND ADMINISTRATORS \S 510 (8)—NO REVERSAL FOR IMMATERIAL ERROR.

Order settling final account, and allowing an amount for reasonable funeral expenses, will not be reversed for lack of verification of the inventory; the only omission from the inven-

tory being a small amount of property which was nevertheless duly charged in the account, and all distributed in kind.

Department 1.

Appeal from Superior Court, Los Angeles County; John M. York, Judge.

In the matter of the estate of Ada Hays Mathewson, deceased. From an order settling final account of J. Everett Mathewson, as administrator, Margaret Ward appeals. Order affirmed.

E. A. Miller and Stewart & Stewart, all of Los Angeles, for appellant.

James S. Bennett, of Los Angeles, for respondent.

SHAW, J. This case is an appeal from an order settling a final account and allowing the husband, who was the administrator of the estate, the amount of \$512.50 for the reasonable funeral expenses of his wife's burial. The only heirs of the decedent were the appellant, who was her mother, and the respondent, who was her husband.

The first point assigned as error is the allowance for funeral expenses. Upon that subject the court found that the husband was the owner of property in his own right of the value of \$7,050; that he was a joint tenant with his wife of certain property of the value of \$8,000, incumbered to the amount of \$6,000, which property he succeeded to and holds by right of survivorship upon the death of his wife; that the income from the property was about sufficient to pay the interest upon said incumbrance and taxes; that he had borrowed money since the wife's death for his necessary living expenses, and did not have sufficient income to pay the funeral expenses; and that \$512.50 was "a reasonable and proper sum to be allowed as funeral expenses, in view of her manner of living, her position in society, and the amount of her estate in her lifetime."

[1] In support of the appeal the case of Estate of Weringer, 100 Cal. 345, 34 Pac. 825, is cited. That case, in our opinion, justifies an allowance to the husband, as administrator of the wife's estate, of funeral expenses, if, when the circumstances of the parties, their mode of living, and the amount of the estates of the wife and husband, respectively, are taken into consideration, it is reasonable to do so. This case comes up without the evidence. The findings aforesaid show facts which justified the exercise of the discretion of the court in making the allowance of the funeral expenses.

[2] The other objection urged on the argument is that the inventory was not verified, and therefore that it was improper to take it into account at all. Just what is meant by this objection we do not know. It is not claimed that any property of the estate was

not included in the inventory, except a small amount which the court found had been omitted therefrom and which was properly charged in the account. None of the property was sold, and it is all distributed in kind. It is therefore manifest that the fact that the inventory was not verified has not injured any one. The principle that error which does not produce injury does not justify a reversal is well exemplified in this case.

The other objections are too trivial to be worthy of mention.

The order is affirmed.

We concur: **LAWLOR, J.**; **OLNEY, J.**

(43 Cal. App. 191)

CITY OF OAKLAND v. ALBERS BROS. MILLING CO. (Civ. 2933.)

(District Court of Appeal, First District, Division 1, California. Sept. 5, 1919.)

MUNICIPAL CORPORATIONS §986(1) — IMPROVEMENTS BY CITY'S LESSEE NOT TAXABLE.

A dock and warehouse which by terms of lease, given by city, of public lands granted by state to city in trust for certain purposes under St. 1911, p. 1238, lessee was to construct, and which when so constructed were to become and remain the property of the lessor, are within the express provisions of Const. art. 13, § 1, and Pol. Code, 3607, that property of a municipal corporation is not taxable.

Appeal from Superior Court, Alameda County; Edgar T. Zook, Judge.

Action by the City of Oakland against Albers Bros. Milling Company. Judgment for defendant, and plaintiff appeals. Affirmed.

Ezra W. Decoto, Dist. Atty., J. M. Koford, Asst. Dist. Atty., H. L. Hagan, City Atty., and John J. Earle, Asst. City Atty., all of Oakland, for appellant.

Sullivan & Sullivan and Theo. J. Roche, all of San Francisco, for respondent.

Fitzgerald, Abbott & Beardsley, of Oakland, amici curiæ.

RICHARDS, J. This action was instituted by the city of Oakland to collect from the defendant certain taxes alleged to be due said city. The cause was submitted to the trial court for decision upon an agreed statement of facts which may be summarized as follows: On February 16, 1916, the plaintiff and the defendant entered into a certain written lease of certain lands upon the western water front of the said city of Oakland, the same being a portion of the public lands granted by the state to the city of Oakland in trust for certain purposes under the pro-

visions of an act of Legislature approved May 1, 1911 (Stats. 1911, p. 1258). By the terms of said lease the lessee was to construct certain substantial buildings and improvements consisting of a dock and warehouse, which were to be used by it during its tenancy of the premises, for which the lessee was to be repaid by a system of warehouse and dockage charges as specified in said lease; it being expressly provided therein that—

"The said dock and warehouse when so constructed shall become and remain the property of the lessor."

It was upon these specific improvements that the tax officials of the city of Oakland undertook during the fiscal year 1917-18 to levy and collect the taxes which are the subject of this suit, and the sole question presented to the trial court and to this court upon appeal is as to whether the said improvements upon the said public property of the plaintiff is subject to taxation. The trial court held that it was not, and rendered its judgment accordingly in the defendant's favor. From such judgment the plaintiff prosecutes this appeal.

The case upon which the appellant chiefly relies to sustain its contention upon this appeal is the case of *San Francisco v. McGinn*, 67 Cal. 110, 7 Pac. 187. A careful examination of that case convinces us that it has no application to the case at bar, the essential difference between the two cases being that in the former case the court based its ruling that the defendant therein, who had placed the improvements in question upon the lands of the city of San Francisco, was to be held to be their owner for the purposes of taxation; while in the case at bar the improvements in question are expressly made the property of the city of Oakland, and hence the defendant herein could not have for any purpose any ownership in them. Under the express provisions of section 1 of article 13 of the state Constitution, and also of section 3607 of the Political Code, the property of a municipal corporation in this state is not the subject of taxation. In the presence of these constitutional and statutory provisions, it is needless to cite the earlier cases showing that this is and has long been the settled law of this state; but in the recent case of *San Pedro, etc., Railroad Co. v. City of Los Angeles*, 179 Pac. 393, the Supreme Court declared void an attempted assessment of a breakwater built by a lessee of submerged public lands, as "improvements," holding that while, as conceded by the parties in that case, the breakwater was not an "improvement" within the meaning of section 3617 of the Political Code, even if it were so considered to be, it would be such an improvement as would become fixed to the realty itself,

"the fee of which was in the state, and hence not subject to assessment."

Judgment affirmed.

We concur: WASTE, P. J.; BARDIN, Judge pro tem.

(43 Cal. App. 226)

CHASE v. PETERS et al. (Civ. 2991.)

(District Court of Appeal, Second District, Division 1, California. Sept. 8, 1919. Rehearing Denied by Supreme Court Nov. 6, 1919.)

LANDLORD AND TENANT §291(17) — TIME WITHIN WHICH TENANT MUST PAY DEFAULTED RENT INTO COURT.

Under Code Civ. Proc. § 1174, in unlawful detainer against a tenant which has defaulted in its payment of rent, if, after judgment for plaintiff landlord, the tenant had desired to retain the premises, it should have tendered into court the rent found due within five days after judgment was entered, and it did not have a continuing right to be restored to possession during the whole of the period consumed by its appeal, which resulted adversely to it, and for five days after return of remittitur.

Appeal from Superior Court, San Diego County; W. A. Sloane, Judge.

Action by Charles A. Chase against Homer H. Peters, Jr., and others. From an order refusing application for an order to restore defendant Peters Investment Company to possession of certain realty, the investment company and its trustees appeal. Order affirmed.

See, also, 174 Pac. 116.

Riley & Heskett and Wright & McKee, all of San Diego, for appellants.

James E. Wadham, of San Diego, James S. Bennett, of Los Angeles, and Frank J. Macomber, of San Diego, for respondent.

JAMES, J. This is an appeal taken by the Peters Investment Company, a corporation, and certain other persons named, who are designated as trustees of said corporation. The appeal is from an order of the superior court refusing an application for an order to restore the Peters Investment Company to the possession of certain real property from which it had been ousted by process authorized under a judgment for unlawful detainer. For convenience, we will designate the appellant in this case under the general name of investment company.

Prior to May, 1917, the investment company held possession of the real property in question under an assignment made by the lessee of the plaintiff. Default had been made in the payment of the rental fixed by the lease, and the lessor had also been compelled to pay certain taxes which under the

lease the lessee had agreed to discharge. An action for the unlawful detainer of the property was brought, after a due notice given to the lessee and the investment company to either pay the rental or surrender possession of the premises. In that action there were two counts or causes, in one of which was contained a statement of the several installments of rental which were due and unpaid. In the second cause of action there were detailed various amounts which the lessor had paid on account of the tax charges. The investment company did not deny that the rental charges had accrued as alleged, but insisted that there could be no recovery for taxes paid by the lessor, because that cause of action was improperly joined to the cause of action for the unlawful detainer of the property. The court made findings of fact which separately and distinctly found the various amounts of rental which were due, and separately the items of tax charges that had been paid by the lessor. After the entry of judgment in May, 1917, no stay having been granted, and five days having elapsed from the entry of the judgment, writ of restitution was issued and the lessor was restored to the possession of the premises leased. The investment company appealed, and this court held that there could be no recovery for taxes paid in an action for the unlawful detention of real property. The cause of action under which that recovery was had being separately stated in the complaint, and the findings being complete upon the matter of the rental charges due, the judgment on appeal was to the effect only that the judgment of the lower court be modified by striking therefrom the amount which the superior court had found to be owing to the plaintiff on account of the tax charges. The opinion rendered on that appeal more fully states the facts of the case than we have included in the foregoing statement. See *Chase v. Peters et al.*, 174 Pac. 117. Upon the going down of the remittitur in that case the investment company, within five days after the remittitur had been received in the clerk's office of the county of San Diego, made application to the superior court to be restored to possession of the real property upon payment of the amount of rent which the judgment of the court had fixed. It is from the order denying that application that this appeal is taken.

In section 1174 of the Code of Civil Procedure, which refers to the form and substance of a judgment in an unlawful detainer suit, it is provided:

"When the proceeding is for an unlawful detainer after default in the payment of rent,

and the lease or agreement under which the rent is payable has not by its terms expired, execution upon the judgment shall not be issued until the expiration of five days after the entry of the judgment, within which time the tenant, or any subtenant, or any mortgagee of the term, or any other party interested in its continuance, may pay into court, for the landlord, the amount found due as rent, with interest thereon, and the amount of the damages found by the jury or the court for the unlawful detainer, and the costs of the proceedings, and thereupon the judgment shall be satisfied and the tenant be restored to his estate; but if payment as here provided be not made within the five days, the judgment may be enforced for its full amount, and for the possession of the premises. In all other cases the judgment may be enforced immediately."

It is the contention of the investment company on this appeal that the five days mentioned in the provision quoted did not commence to run as against it, because of the appeal taken, until after remittitur had been returned. Under the facts of the case as they have appeared, we think that the investment company was not entitled to the relief asked and that its application came too late. If it had desired to retain possession of the premises, it should have made tender into court of the amount of rent found due, as the section provides, within the five days after the judgment was entered. There was no order of reversal made as to that judgment. In fact, we have noted that the investment company did not dispute the amount claimed by the lessor on account of rent. The case appears to us to be in all respects the same as though the judgment appealed from in the former suit was a judgment for rent only, and that that judgment had been affirmed upon appeal. In such a case there would seem to be no room to argue that the defaulting tenant was given a continuing right to be restored to possession of the premises from which he had been ousted, all during the period consumed by the appeal and for five days after remittitur had been returned. This was clearly not the intent of the Legislature; such a construction of the statute would work a hardship against a lessor seeking to rid himself of a tenant who would not pay his rent, for it would compel the landlord to hold the property in readiness to be restored during the whole time that was consumed by the taking of the appeal and until the determination thereof. This, to our minds, would be directly contrary to the whole design of the special remedy provided against defaulting tenants of real property.

The order appealed from is affirmed.

We concur: CONREY, P. J.; SHAW, J.

(43 Cal. App. 194)

McKENZIE v. NICHELINI et al.
(Civ. 2844.)

(District Court of Appeal, First District, Division 1, California. Sept. 5, 1919. Rehearing Denied by Supreme Court Nov. 3, 1919.)

1. BOUNDARIES ⇐8—PROPORTIONAL METHOD RE-ESTABLISHING GOVERNMENT CORNERS NOT CONTROLLING ON STATE COURT.

The rule as to use of the proportional method in re-establishing government corners, as laid down by the Surveyor General of the United States, is for the guidance of United States deputy surveyors in running lines in which the government is interested, and cannot control a state court in its choice of means for establishing such a fact as the point where the government surveyor originally placed a section or quarter section corner, when the question properly arises within its jurisdiction.

2. BOUNDARIES ⇐37(3) — EVIDENCE RELOCATING CORNERS OF GOVERNMENT SURVEY.

In ejectment by the owner of the south half of the northwest quarter and north half of the southwest quarter of a section against claimants of the south half of the southwest quarter, who had taken possession, by virtue of their claim, of land which according to plaintiff constituted part of the north half of the quarter, evidence *held* to have justified the court in locating quarter corners on the west and south sides of the section as it did without resorting to proportional method to re-establish government corners.

Appeal from Superior Court, Napa County;
Henry C. Gesford, Judge.

Action by Roderick McKenzie against A. Nichelini and others. From judgment for plaintiff, defendants appeal. Affirmed.

Percy S. King, of Napa, and Chas. L. McEnerney and Leo J. McEnerney, both of San Francisco, for appellants.

John T. York, of Napa, for respondent.

RICHARDS, J. The plaintiff, being the owner of the south half of the northwest quarter and the north half of the southwest quarter of section 24, township 8 north, range 4 west, Mt. Diablo base and meridian, brought an action in ejectment against the defendants, who claimed ownership of the south half of the last-named quarter section, but who had entered into possession of land by virtue of such claim which, according to the plaintiff, constituted part of the north half of said southwest quarter.

The court, after a lengthy trial, in which much evidence was taken of surveyors and others as to monuments, witness trees, courses, distances, and topography, found in favor of the plaintiff, and gave judgment accordingly. The defendants appeal; their main contention being that the finding of the court as to the location of the plaintiff's land upon which its judgment is based is wholly un-

supported by the evidence and is contrary thereto.

The deciding factor in the case, as admitted by the appellants, is the location of the line dividing the north and south halves of the southwest quarter of section 24 above referred to. According to the contention of the appellants, the true method for locating this line is first to find the legal center of the section—a point, as they remark, which is not set by the government surveyor, but which is found by running a straight line from the quarter section corner on the north boundary of the section to the quarter section corner on the south line thereof, and then by intersecting this line by one drawn from the quarter section corner on the west side of the section to the opposite quarter section corner on the east, the point of intersection of these two lines being the legal center of the section. Having thus obtained the interior boundaries of the four quarters of the section, the north and south halves of the southwest quarter will be found by similarly intersecting that quarter section by an east and west line equidistant from its north and south boundaries, to do which it is, of course, necessary to know in addition to the points already obtained the quarter corner on the south boundary of the section (identical with the southeast corner of the southwest quarter) and the southwest corner of the section (identical with the same corner of the quarter section). It is the appellants' contention that the evidence offered by the plaintiff shows that the lines were not run in this manner, from which they argue that the court's finding as to the location of the line in dispute is not supported by the evidence.

It will be observed, however, that, given a section of land 80 chains square, the southwest quarter thereof will be bounded by four straight lines, each 40 chains in length, one running from the southwest corner to the west quarter corner of the section; a second running from the said southwest corner to the south quarter corner; a third running from the west quarter corner easterly and parallel to the last-mentioned line; and the fourth running from the quarter corner on the south northerly and paralleling the first-mentioned line. The north and south halves of this quarter section will be found by running a line from a point 20 chains north of the southwest corner to a point 20 chains north of the southeast corner thereof. And since the dispute between the parties to this appeal is only as to the location of the line between the north and south halves of the quarter section involved in its relation to north and south, the degree of extension easterly or westerly of this line becomes immaterial; for no right of appellants to land to the east or west of this quarter section is in question, and the judgment of the court has not ejected them from any land so located.

Turning now to the evidence upon which the court based its finding as to the relative location of the north and south halves of this quarter section, there is testimony in the record that the entire section is approximately 80 chains from north to south; that the plaintiff's surveyor, for the purpose of locating the plaintiff's land, started at the southwest corner of the section, which corner he had known as the established government corner for many years; from that point he ran north 20 chains, and there located the westerly end of the line dividing said southwest quarter into north and south halves; from there he ran 40 chains north, and there located the westerly end of the line dividing the northwest quarter of the section into north and south halves; to ascertain the precise direction in which he should run the north and south boundaries of plaintiff's land (having ascertained that there were no established government corners on the east side of the section now to be found), he measured the whole township line from south to north between townships 3 and 4, the eastern boundary of section 24 being part of this line, and, finding it 7 chains short of the correct distance, he prorated the deficiency between the six sections on the east side of the township, which gave him as the direction in which the north and south boundaries of section 24 should be run a course north 83 degrees east. He accordingly ran two such lines 40 chains in length for the north and south boundaries of plaintiff's land, and joined the eastern extremities of these lines by a line parallel to the western boundary already described. This direction of north 83 degrees east, however, was not accepted by the court as correctly locating the plaintiff's land. The government field notes of certain lines of the section in question were in evidence, among them the south boundary thereof, which was a line run due east from the southwest corner of the section; and from testimony as to the topography of the land traversed by a line run east from said corner the court concluded that such testimony was sufficient to establish as the true direction of said south boundary a line due east as given in said field notes, and in its findings adopted this direction for the north and south boundaries of plaintiff's land, the latter of which is the dividing line between plaintiff and defendants. It further appears that the northwest corner of this section as established by the government could not be found, but that a line drawn from the corner common to sections 14, 15, 22, and 23 (located one mile west of section 24) to a point on the east line of the township between said section 24 and section 19 in the adjoining township, located with reference to its relation to a known government corner further east, would pass through or very close to a point 80 chains north of the southwest corner of section 24, the distance called for by the field

notes for the northwest corner of the section. If we regard the north boundary of the section as being coincident with the eastern half of this line (and it is the only testimony in the record with reference to its location), a line drawn from the quarter corner on the north boundary of the section to the corresponding corner on the south boundary would be somewhat longer than 80 chains. If this excess were divided between the four equal parts of this line, it would place the eastern extremity of the line dividing the north and south halves of the section a trifle to the north of where the court found it to be; but the error is so small that we think it is a case for the application of the legal maxim, "The law disregards trifles" (Civ. Code, § 3533), and not of sufficient magnitude to warrant a reversal of the case.

The appellants' contention that the finding of the trial court as to the location of plaintiff's land is not supported by the evidence is also based upon the assertion that the southeast, northeast, and southwest corners, as also of all the quarter corners of section 24, are lost corners, which should be re-established by the proportional method in order to locate the line in dispute in this action. It is not necessary to agree with the appellants that the re-establishment of all of these lines is necessary in order to correctly locate the line in dispute, but their contention may be considered with reference to those corners which the trial court used in reaching its conclusion and which it found by methods other than that urged by appellants, viz, the quarter corners on the west and south sides of the section, and the section's legal center point.

[1] It may first be said that we think the appellants' contention as to the duty of the trial court to resort to the proportional method in re-establishing government corners is entirely too broad. The rule in this respect as laid down by the Surveyor General of the United States is for the guidance of United States deputy surveyors in running lines in which the government is interested. It cannot control a state court in its choice of means for establishing a fact, to wit, the point where the government surveyor originally placed a section or quarter section corner, when that question properly arises within its jurisdiction. But this rule of the General Land Office is itself but a statement in detail, and perhaps an extension of a rule long followed by the courts of the country generally. In *Weaver v. Howatt*, 161 Cal. 77, 84, 118 Pac. 519, 522, our own Supreme Court has indicated the extent to which it will follow the rule. It is there said:

"It is not the province of the court to determine where the corner should have been fixed. This is not an action to vacate the government survey. It must be assumed that the line was measured and the monuments set. Their positions, as set, fix the rights of the parties, re-

gardless of the inaccuracy of the measurements and the errors in distance found in the field notes. The trial court must ascertain, as near as may be, where this monument was set by the government surveyor. If the exact spot cannot be found, it must, if possible, decide from the data appearing in evidence its approximate position, and the proportional method is to be used only when no other reasonable method is possible, and it must be so used that it does not contradict or conflict with the official data that are not impeached, and which, when not impeached, confine the actual position within certain limits. The application of the proportional method must, in that case, be also confined to the same limits."

[2] In the case at bar the trial court was apparently satisfied that the evidence in the case afforded the means of locating the quarter corners on the west and south sides of the section without resorting to the proportional method; and a comparison of the government field notes with the testimony of witnesses relative to the topography of the country traversed by the government surveyor in reaching and placing these points does not enable us to say that it was not justified in locating these corners as it did without resorting to the method claimed by the appellants to be compulsory under the circumstances here presented.

The appellants make the further point that the court failed to find upon a material issue, namely, the claim by the plaintiff, denied by the defendants, of ownership of land in the south half of the southwest quarter of the same section; but, as the court granted the plaintiff no relief under this claim, and the point is made by the appellants for the first time in their closing brief filed after the oral argument of the case, we do not feel called upon to give it consideration.

For the reasons stated, the judgment is affirmed.

We concur: WASTE, P. J.; KERRIGAN, J.

(43 Cal. App. 236)

BLACKBURN v. MARPLE. (Civ. 2298.)

(District Court of Appeal, Second District, Division 1, California. Sept. 8, 1919.)

1. HIGHWAYS ⇐184(3) — NEGLIGENCE OF AUTOMOBILE DRIVER A QUESTION OF FACT.

In an action against an automobile driver for injuries to plaintiff in collision between their cars, whether defendant driver was negligent held a question of fact for the trial court.

2. HIGHWAYS ⇐183—IN AUTOMOBILE COLLISION SPEED LAW NOT VIOLATED.

The driver of an automobile toward a road intersection, who, just previous to collision, had been traveling about 20 miles an hour, but who, on observing defendant 200 feet away,

slowed down his machine so that when it was struck by defendant's it was traveling about 8 miles an hour, did not violate the Motor Vehicle Act of 1913, § 22, subd. (b).

3. HIGHWAYS ⇐183 — DOCTRINE OF LAST CLEAR CHANCE NOT INVOLVED IN AUTOMOBILE COLLISION.

The doctrine of last clear chance held applicable to neither party, plaintiff nor defendant, involved in a collision between their automobiles at road intersection.

Appeal from Superior Court, Los Angeles County; Lewis R. Works, Judge.

Action by Oliver V. Blackburn against R. S. Marple. From judgment for plaintiff, defendant appeals. Affirmed.

Tanner, Odell & Taft, of Los Angeles, for appellant.

Porter C. Blackburn, of Los Angeles, for respondent.

JAMES, J. Plaintiff was awarded judgment for the sum of \$350 against this appellant on account of damages alleged to have been suffered through the negligent acts of the defendant R. S. Marple. The particular act of negligence alleged was that said defendant so operated an automobile driven by him as to cause it to collide with an automobile which was then being operated by the plaintiff. The appeal is taken from the judgment.

The particular facts upon which the judgment was entered are quite fully embraced in the findings of the trial judge, the most material portions of which we quote:

"That on the 14th day of July, 1915, at or about the hour of 6:30 p. m., while it was still light, the plaintiff was driving a Ford automobile along a public highway known as the state highway, leading from the town of Whittier to the town of Fullerton, in an easterly direction, about 1 mile east of the county line of Los Angeles and Orange counties. That the plaintiff was driving his Ford car at a speed of 20 miles per hour. That the plaintiff was seated in the front seat of his car with a small child on his right side, and that his wife and two small children were seated in the rear seat. That the state highway runs in an easterly and westerly direction at the above-mentioned place, and that there is an intersecting highway that enters the said state highway from the south, known as the La Habra road, and that the said La Habra road intersects the said state highway by two long, sweeping curves, one curve turning into the said state highway to the left and one curve turning into the said state highway to the right as the said La Habra road approaches the intersection with the said state highway. That the said La Habra road does not cross the said state highway. That in the center of the two sweeping curves and at the junction with said state highway there is a triangular piece of ground, which is not paved but subject to travel, being oiled and rolled. That the said state

highway and the said La Habra road are about 60 feet wide, with a paved portion in the center of 18 feet, and that said highways are used by the public for travel. That there is a row of electric light poles on the south side of the said state highway near the property line, and a row of orange trees about 4 feet south of the south property line. That the plaintiff, who was driving his Ford car, on approaching the said intersection of the two highways, saw an Overland car, driven by the defendant, approaching the said state highway by the long sweeping curve that branches from the said La Habra to the left as the said state highway is approached from the south. That the plaintiff saw the approaching Overland touring car turning into the said state highway, and immediately turned to his right, and slowed his Ford car down to 8 miles per hour. That the defendant also slowed his car down, but after he had arrived at about the center of the said state highway, and his car was approaching the north side of said state highway, he turned his car abruptly to his left, and continually turned the same to his left, with the same pointed in a southwesterly direction and towards the south side of the said state highway. That the defendant drove his car in such a negligent manner that the same was pointed and directed toward the side of the plaintiff's machine near its front. That the plaintiff kept turning his machine to his right and to the south of the said state highway, whereupon he was forced to turn off the said state highway into an orange orchard, within about 2 feet of an electric light pole, and under the branches of an orange tree, and the plaintiff's machine was struck by the front end of the defendant's machine on the left side and near its front."

[1] Appellant's contentions may be briefly stated under two heads: (1) That under the evidence the court was not justified in making findings against appellant; (2) that, conceding that the evidence showed negligence upon the part of appellant, the evidence also showed contributory negligence upon the part of the plaintiff. There was a conflict in the evidence concerning the manner in which the accident occurred; hence as to findings made under such evidence the conclusions of the trial judge must be here treated as final. Appellant has argued that under all of the evidence it must be concluded that it was impossible that the accident could have happened in the manner described by the plaintiff. After carefully examining the printed transcript of the testimony heard, we cannot agree with this contention. Plaintiff testified that he was traveling easterly along a straight road, and that 200 feet away from where the intersecting road upon which the defendant was traveling emerged he observed the defendant, and immediately slowed down his machine, he then being upon the extreme right of the highway, and that the defendant, instead of keeping to the right and making the turn along the curve of the intersecting road, turned toward the left; that the plaintiff guided his machine off from the highway into the soft dirt on the right-hand

side thereof, and that the defendant's car collided with him. The point of collision was not within any part of the intersecting highways, but was about opposite the most westerly point of the intersecting curve. A physician, who was traveling in an automobile immediately behind the plaintiff, testified that the plaintiff was on the right side of the road and that he (the witness) saw the automobile of the defendant emerge from the road intersecting at the right, and that the defendant's vehicle passed across the front of the plaintiff's machine, and appeared in view at the left thereof, and that the collision occurred immediately thereafter. There was testimony of several witnesses that the appellant stated immediately after the accident that he had become confused, and had thought that the plaintiff intended to travel directly eastward, and that he (appellant) turned to the left to allow the machine of the plaintiff to go on at his right. On the evidence the case was peculiarly one which called for the judgment of the trial court upon the question as to the negligent act of appellant, and we find nothing at all appearing in the transcript of the evidence which would justify us in the conclusion that the findings of the trial judge are in any way unsupported by the evidence.

[2, 3] The findings of the trial court further negative the claim of appellant that the plaintiff had been guilty of contributory negligence proximately causing or contributing to cause the accident. Appellant cites us to a provision of the motor vehicle law, found in the Statutes of 1913, at page 649, which requires that the operator of a motor vehicle, where the view is obstructed, upon approaching an intersecting way must not travel at a greater rate of speed than 10 miles an hour. Just previous to the accident plaintiff had been traveling at the rate of about 20 miles per hour. The evidence showed that his machine was under control, and he himself testified that upon observing the appellant 200 feet away, emerging from the intersecting road, he slowed down his machine and kept to the right. When he was struck by appellant's automobile his machine was travelling about 8 miles per hour. At that point, as we have before noted, he had not entered upon the intersecting way. The intent of the law, as we view it, in restricting the speed at which a motor vehicle may travel at such a point, is that it shall be brought to the speed indicated by the time it shall reach the intersecting way in order that it may be fully under control of the operator. It cannot be said under the evidence it was established that the plaintiff violated the provision of the statute cited. The case of *Cook v. Miller*, 175 Cal. 497, 166 Pac. 316, cited on behalf of appellant, was not the same in its facts as the case here presented. Neither was there anything in

the facts under the evidence which would make the doctrine of the last clear chance applicable to either party.

The judgment appealed from is affirmed.

We concur: CONREY, P. J.; SHAW, J.

(43 Cal. App. 141)

BLACKBURN v. MARPLE. (Civ. 2988.)

(District Court of Appeal, First District, Division 1, California. Sept. 3, 1919.)

1. HIGHWAYS — 184(2) — EVIDENCE SHOWING NEGLIGENCE IN OPERATION OF AUTOMOBILE.

In an action against an automobile driver for injuries to a woman when her husband's car collided with defendant's, evidence held to sustain finding that defendant driver was negligent in the operation of his car.

2. HIGHWAYS — 184(3) — QUESTION OF FACT AS TO WHEN AUTOMOBILE DRIVER SHOULD REDUCE SPEED AT INTERSECTION.

The question as to what distance away from an intersecting road with an obstructed view a driver on the highway, going at a rate otherwise legal, should reduce his speed to 10 miles an hour, under the Motor Vehicle Act of 1913, § 22, subd. (b), is a question of fact, in each particular case, to be determined in view of the particular circumstances.

Appeal from Superior Court, Los Angeles County; Lewis R. Works, Judge.

Action by Fredericka L. Blackburn against R. S. Marple. From judgment for plaintiff, defendant appeals. Affirmed.

Porter C. Blackburn, of Los Angeles, for appellant.

Tanner, Odell & Taft, of Los Angeles, for respondent.

RICHARDS, J. This is an appeal from a judgment in favor of the plaintiff in an action for damages for personal injuries suffered by the plaintiff as the result of a collision between two automobiles.

The facts of the case, as summarized from the findings of the trial court, are as follows: On July 14, 1915, at about the hour of 6:30 p. m., the plaintiff was riding in a Ford automobile, being driven by her husband along the state highway leading from Whittier to Fullerton, going in an easterly direction at a speed not in excess of 20 miles per hour, and was approaching the point upon said highway where a public road known as the La Habre road enters it from the south. The state highway and the La Habre road are each about 60 feet wide at this point, each having a paved center of about 18 feet in width. At the point of entrance of the La Habre road the latter makes two long curves, one turning into the high-

way to the left going west, and the other turning into the highway to the right going east, and the triangle at the point of entrance caused by their separation being unpaved, but oiled and subject to travel. The private property on each side of the La Habre road at its said point of emergence into the highway is well grown up in orange trees standing within 4 feet of the property line, and forming quite an obstruction to the vision either of the highway or of the road by persons approaching the point of contact upon either thoroughfare. There were also some electric light poles at said point further obstructing this line of vision. As the plaintiff's husband, driving the car in which she was seated, approached the said point of emergence of the La Habre road, and was, as is variously stated, at from 150 to 200 feet west of said point, he observed an Overland car, operated by the defendant, turning into the state highway on the westerly curve of the La Habre road, and immediately turned his Ford car to the right of the center of the highway going east, and slowed down his speed to 8 miles an hour. The defendant proceeded on said curve until he had arrived at about the center of the state highway when, instead of proceeding on the course which would have taken his machine to the right of the center of said highway going west, he suddenly turned his car to the left, and without slowing down proceeded to turn directly across the course of the car in which the plaintiff was riding. The plaintiff's husband, seeing this action, turned his car further and further to the right until he was forced off of the paved portion of the highway and onto the dirt strip along it and into the edge of the adjacent orange orchard, where his car was struck by the defendant's car, and badly damaged, and the plaintiff was severely injured by the impact.

The trial court, the cause having been tried without a jury, found from the foregoing facts that the defendant was guilty of negligence in the operation of his car, and that the claim of the defendant that the plaintiff's husband was guilty of contributory negligence could not be sustained, and accordingly rendered judgment in the plaintiff's favor for the sum of \$1,000 damages, from which the defendant prosecutes this appeal.

[1, 2] From our examination of the testimony and particularly of the exhibits before us we are entirely satisfied that the findings of the trial court, of which the foregoing is a brief summary, are abundantly supported by the evidence in the case, and that in point of fact the real cause of the collision was that given by the defendant himself to the plaintiff's husband and also to several bystanders immediately after the accident that, "He got rattled and lost control of the machine."

The only contention of the defendant which saves him from the penalty which would otherwise be justly imposed for taking a frivolous appeal is his contention that the plaintiff's husband was guilty of contributory negligence as a matter of law for a violation on his part of the provisions of subdivision (B) of section 22, p. 649, of the Motor Vehicle Act of 1913, in force at the time of said accident, which required that persons operating motor vehicles on the public highways of this state should operate or drive their cars at no greater speed than 1 mile in six minutes, "where the operator's * * * view of the road traffic is obstructed upon approaching an intersecting way." This point made on behalf of the appellant is also devoid of merit for two reasons: First, the question as to the distance away from an intersecting road with an obstructed view when a driver upon the highway, going at an otherwise legal rate of speed, should reduce his speed to 10 miles an hour under the said provisions of said act is necessarily a question of fact, in each individual case to be determined by the trial court according to such particular circumstances, as the kind of car the operator is driving, the speed at which he was previously going, the brake control of the car, the nature of the obstruction to his view of the intersecting road, etc.; and the point is without merit for the second reason, which is that, according to the evidence in the case, which fully sustains the finding of the court, the plaintiff's husband was from 150 to 200 feet west of the point of emergence of the La Habre road, going at a rate of speed not in excess of 20 miles an hour, when he first discovered the defendant's car coming into the highway, and that he immediately reduced his speed to 8 miles an hour, and took a position on the highway which would have led to an entire avoidance of the accident if the defendant had not, to employ his own language, "got rattled and lost control of his car," with the result that he crossed over unexpectedly to the wrong side of the highway, and there ran the plaintiff's conveyance down in spite of the driver's utmost effort to avoid a collision. Judgment affirmed.

We concur: WASTE, P. J.; BARDIN, Judge pro tem.

(43 Cal. App. 248)

PEOPLE v. WAGNER. (Cr. 853.)

(District Court of Appeal, First District, Division 2, California. Sept. 8, 1919. Rehearing Denied by Supreme Court Nov. 6, 1919.)

1. BURGLARY ~~§~~45—INTENT OF ENTRY JURY QUESTION.

In a prosecution for burglary, the question with what intent defendant entered the premises of another *held* for the jury.

2. BURGLARY ~~§~~41(3)—EVIDENCE SUFFICIENT TO SUSTAIN CONVICTION.

In a prosecution for burglary, evidence *held* sufficient to sustain the conviction.

3. CRIMINAL LAW ~~§~~1159(3)—CONVICTION ON CONFLICTING EVIDENCE SUSTAINED.

On appeal from a conviction of burglary, conflicts in the evidence must be resolved against defendant.

Appeal from Superior Court, City and County of San Francisco; Frank H. Dunne, Judge.

George Wagner was convicted of burglary, and he appeals. Affirmed.

Ralph Starke, of San Francisco, for appellant.

U. S. Webb, Atty. Gen., and John H. Rioridan, Deputy Atty. Gen., for the People.

BRITTAİN, J. The appellant was convicted on an information charging burglary by entering the "house, room, apartment, tenement, shop, warehouse, store, and building" of Michael Logue, in San Francisco. The only question is regarding the sufficiency of the evidence to show burglarious intent.

[1-3] Logue, the complaining witness, operated a saloon. Back of the saloon ran a passageway, on which opened the living apartments he occupied with his wife. From the passageway also opened a washroom, from which there was a door to an alleyway. Evidently there was another door leading either from the passageway or the washroom to an inclosed yard. Shortly before 10 o'clock on the night in question the appellant, a stranger, entered the saloon and was served with liquor. About 10 o'clock the saloon was closed by Logue. He went to his living apartments across the hall, and, after closing the door from the passageway to the living apartments, he retired with his wife. The door was fitted with a Yale spring lock, which, the evidence showed, automatically locked the door when it was tightly closed. Logue testified that he had slammed the door. Shortly before midnight Logue was awakened by his wife, who said something unusual was occurring in the corridor. He arose, and on going to the door leading to the passageway found it open, and saw the appellant standing there. He slammed the door, and he testified the appellant then tried to shove the door in, and that the appellant made some exclamation, which Logue described as a "yell of disappointment." Logue immediately went into another room, the back one of the living apartments, and saw the appellant trying to get over the fence from the yard. The appellant then ran out of the alleyway. Logue telephoned to the police station, and after a few minutes accompanied an officer to Daly City, where the appellant was arrested, after having been identified by Logue. At that

time the appellant had whitewash on the upper portion of his clothing, which it was claimed was from the fence of the yard. The officer testified that when the appellant was arrested, in response to a statement of the officer that Logue claimed he had committed burglary at his residence, he said, "You have the right man—I am the man."

On behalf of the appellant it is argued that under the presumption of innocence which attends the accused, and in view of the silence of the record as to the appellant leaving the saloon after he was served with drinks, the state failed to show a burglarious intent on the part of the appellant. It is argued that he may have gone into the corridor under the influence of liquor, and on coming to his senses after the saloon was closed he was simply trying to find a way out of the corridor. The appellant relies on the rule announced in *People v. Barry*, 94 Cal. 484, 29 Pac. 1026, and *People v. Brittain*, 142 Cal. 10, 75 Pac. 314, 100 Am. St. Rep. 95. The defendant took the stand on his own behalf and testified that on the day in question he had been drinking.

The question of criminal intent is one to be determined by the jury from all the evidence. *People v. Swalm*, 80 Cal. 46, 22 Pac. 67, 13 Am. St. Rep. 96; *People v. Noon*, 1 Cal. App. 44, 81 Pac. 746. The evidence that the locked door of the living apartments was opened; that the appellant was discovered at the door, and concerning his statement to the arresting officer, was believed by the jury who heard the testimony. It was sufficient to support the verdict, and any conflict between the evidence of the appellant and that produced on behalf of the state on appeal must be resolved against the appellant. *People v. Emerson*, 130 Cal. 562, 62 Pac. 1069.

The judgment is affirmed.

We concur: LANGDON, P. J.; NOURSE, J.

(43 Cal. App. 199)

**WEST v. BOARD OF EDUCATION OF
PASADENA CITY SCHOOL DIST.
et al. (Civ. 8101.)**

(District Court of Appeal, Second District, Division 1, California. Sept. 6, 1919.)

**1. SCHOOLS AND SCHOOL DISTRICTS — 80(1)—
OFFER AND ACCEPTANCE OF CONTRACT EM-
PLOYING SCHOOL SUPERINTENDENT.**

Where the resolution of the board of education of a city appointing a superintendent of schools was sufficient in form to express contractual terms, if accepted, and the employment as offered was promptly accepted, a binding contract arose between the board and the superintendent, unless the board's action was unauthorized in some particular.

**2. SCHOOLS AND SCHOOL DISTRICTS — 79 —
APPOINTMENT UNDER CITY CHARTER OF SU-
PERINTENDENT OF SCHOOLS.**

Under Pasadena City Charter, art. 16 (as to the department of education) §§ 6, 7, the board of education was authorized to appoint a superintendent of schools, to fix his salary, and to limit his term of office to the four years specified by Pol. Code, § 1793, which the electors, in adopting the charter, and the Legislature, in ratifying it, intended should control as to the term of office.

Petition for writ of mandate by John Franklin West against the Board of Education of the Pasadena City School District, the Pasadena City High School District of Los Angeles County, and George W. Woolley and others, members of and constituting the Board of Education. Peremptory writ directed to be issued.

Woodruff & Shoemaker, of Los Angeles, for petitioner.

James H. Howard, of Pasadena, for respondents.

A. J. Hill, Co. Counsel, of Los Angeles, amicus curiæ.

JAMES, J. Mandate to compel respondents to permit petitioner to exercise the duties of the office of superintendent of schools of the Pasadena city school district and the Pasadena city high school district, and to require respondents to draw a warrant in petitioner's favor for the sum of \$375 in payment of his salary as such superintendent for the month of July, 1919.

On the 24th of June, 1919, the board of education of the city of Pasadena held a regular meeting; there being three of the five members constituting the board present. These three members unanimously adopted a resolution or motion for the employment of petitioner to be superintendent of schools for the city of Pasadena for the term of four years, beginning July 1, 1919, at a salary of \$4,500 per annum, payable monthly. On July 2d an adjourned meeting of said board was regularly held, the same three members being present, and it evidently being the apprehension that the action on the 24th of June was not expressed with sufficient formality in the resolution then adopted, the board adopted the following further resolution:

"Resolved, that the action of this board on Tuesday, the 24th day of June, 1919, in declaring that the contract of employment then existing between this board and Dr. Jeremiah M. Rhodes expired by its terms on June 30, 1919, and in appointing John Franklin West of San Diego, superintendent of the city schools of the Pasadena city school district and the Pasadena city high school district, for a term of four years, beginning the 1st day of July, 1919, and ending on June 30, 1923, be and the same is hereby ratified and approved; and

"Be it resolved, further, that in event the legality of the action of this board taken on the 24th day of June, 1919, in filling the office of superintendency of schools for the ensuing term, should be questioned upon any ground whatever, then this board will and does here now at this meeting appoint the said John Franklin West as superintendent of the Pasadena city school district and the Pasadena city high school district, for the term of four years, commencing on the 1st day of July, 1919, and ending on the 30th day of June, 1923, at a salary of four thousand five hundred dollars (\$4,500) per annum, payable monthly; and

"Be it further resolved, that the vice president and clerk of this board be and they are hereby empowered and directed to enter into a contract of employment with the said John Franklin West in the name and on the behalf of this board, under and in pursuance of these resolutions."

[1, 2] Petitioner having been notified of the action taken by the board at its meeting on the date first mentioned, under date of June 25, 1919, dispatched to the said board a telegram accepting the employment in the words following:

"Accept the appointment as city superintendent of your school, on terms and conditions stated in your telegram."

The office of superintendent of schools had theretofore been filled by Jeremiah M. Rhodes, whose term (being of four years' duration) expired on June 30, 1919. On July 7, 1919, the incoming board of education organized, an election having changed the personnel only as to one member; that one outgoing member being one of those who had participated in the election of petitioner as superintendent. The new board, voting three to two, proceeded to adopt a resolution attempting to rescind all of the action of the preceding board in the matter of the employment of petitioner as superintendent of schools. The petition shows that petitioner has been in attendance, ready and offering to perform the duties of the office of superintendent of schools, and that the board of education has refused him that right and refused to award to him any payment for his services under the alleged contract of employment. That the meeting of the outgoing board of which the resolution employing petitioner was adopted was regular, and that the number attending and voting thereat was sufficient, is not questioned, and indeed could not be. The resolution first adopted was sufficient in form to express contractual terms, if accepted by petitioner. The employment as offered was promptly accepted, and upon acceptance being made a binding contract arose, unless by reason of the law the action taken was in some particular unauthorized.

We do not decide that the action taken before the expiration of the term of the superintendent attempted to be retired was

premature. Even though it be conceded that there was no authority in the board to employ petitioner until his predecessor's term had actually expired, it does appear that the board, by the resolution adopted on the 2d of July, made a complete and second resolution wholly covering the same matter. Petitioner, as has been noted, thereafter appeared and tendered his services and offered to fill the position, so that it matters not, in our opinion, whether we say the employment was made under the resolution of June 24th or that of July 2d. The main argument of counsel is directed to the point as to whether in cities operating under freeholders' charters the general laws of the state are applicable and govern in all school matters; or whether the charter provisions affecting such questions govern exclusively. The fact is first pointed to that it is provided in section 1793, Political Code, that:

"City superintendents of public schools, elected by city boards of education, shall be elected for a term of four years. * * *"

Assuming that the general law is applicable, this express provision having been incorporated in the Code relative to the term of the superintendent of schools, petitioner contends that the board had the right to make an engagement for the four years specified. Respondents contend that the charter provisions are exclusively applicable and that those charter provisions do not authorize the board of education to make employment for such a length of time as was attempted to be done. In this connection it is urged that section 1584, Political Code (appropriate action having been taken thereunder), aids in defining the charter provision as being exclusive. It is shown by the agreed statement of facts that such action has been taken as is mentioned in section 1584. That section provides that where there has been an appropriate action in the direction required:

"Then the electors of such school district shall be deemed to have submitted to be governed in all matters relating to the management of public schools within such school district or high school district as fully and to all intents and purposes as though the electors of such school district or high school district had by their votes elected to be governed by the provisions of such charter."

The section in brief provides for the question to be submitted to the electors as to whether the charter provisions shall govern, and provides that where the electors have participated and voted at any school election held subsequent to the adoption of and under the provisions of the charter, the same effect shall follow as though the question had been specially submitted and an affirmative vote made. Petitioner contends

that if the section last mentioned purports to disassociate all general statutes from connection with school affairs of a chartered city, then it is unconstitutional, for the reason that the school system is a state system, and not a municipal affair, and is controlled by general laws unless there is an absence of legislation upon the subject—citing *Kennedy v. Miller*, 97 Cal. 429, 32 Pac. 558. Also, *Mahoney v. Board of Education*, 12 Cal. App. 293, 107 Pac. 584, and other cases which generally define the school system as being a state matter and not falling within the class of "municipal affairs."

The difficulty we have in following counsel through the various phases of this argument is that it seems to invite unnecessary labor, in that the charter provisions of the city of Pasadena relating to the school department contain nothing by which it may be said the authority of the board of education to employ a superintendent for a fixed term is prohibited. We find upon that subject, under the title of "Department of Education," article 16 of the charter, the following sections:

"Sec. 6. The board of education may, at its discretion, appoint a superintendent of schools, and prescribe the duties and fix the salary of such superintendent.

"Sec. 7. In all matters not specifically provided for in this charter the board shall be governed by the provisions of the general law relative to such matters."

It then appears that no attempt is made in the charter to limit the term of the superintendent of schools authorized to be elected by the board of education. Acting under the authority alone of the charter provision, and conceding without deciding that it has exclusive effect, we would find no difficulty at all in sustaining the contract made with petitioner for four years' employment. But furthermore, the charter being silent as to the term for which the superintendent should be elected, and its provisions only authorizing the board of education "to appoint a superintendent of schools, and prescribe the duties and fix the salary of such superintendent," it follows as a natural and, we think, necessary deduction that the electors in adopting the charter, and the Legislature in ratifying it, intended that the duration or term of office of the superintendent of schools should be controlled by the general statute, which fixes the term at four years. Looked at from any angle that the argument assumes, we think that the contract of petitioner was made with full authority and must be upheld.

Peremptory writ is ordered to be issued as prayed for; petitioner to have his costs.

We concur: CONREY, P. J.; SHAW, J.

(43 Cal. App. 304)

PEOPLE v. SARTORI. (Cr. 862.)

(District Court of Appeal, First District, Division 2, California. Sept. 17, 1919.)

1. ROBBERY \S 24(1)—EVIDENCE SUFFICIENT TO SUSTAIN CONVICTION.

Evidence held sufficient to sustain a conviction of robbery.

2. CRIMINAL LAW \S 559—CONSPIRACY MAY BE INFERRED FROM FACTS PROVED.

In a criminal case, the fact that a conspiracy existed may be inferred from facts proved, although there is direct uncontradicted testimony that no conspiracy existed.

3. ROBBERY \S 15—SUFFICIENCY OF EVIDENCE TO SUSTAIN CONVICTION.

In a prosecution for robbery, where defendant was charged as a principal on the theory that, although not present at the time of the robbery, he aided and abetted in its commission, under Pen. Code, \S 971, it was not necessary that a detailed plan of the robbery had been arranged among the different parties charged with the crime.

Appeal from Superior Court, Fresno County; M. F. McCormick, Judge.

Richard Sartori was convicted of robbery and appeals. Affirmed.

Frank Curtin, Short & Sutherland, and Carl E. Lindsay, all of Fresno, for appellant. U. S. Webb, Atty. Gen., John H. Riordan, Deputy Atty. Gen., and R. L. Chamberlain, of Sacramento, for the People.

NOURSE, J. Defendant was charged, together with his codefendants Sasselli and Gatti, with the crime of robbery by taking from the possession of one Joe Ponti a certain sum of money by force and fear. Defendants Sasselli and Gatti both entered pleas of guilty. The defendant Sartori stood trial, was convicted by the jury, and prosecutes this appeal. The sole ground for reversal urged in his behalf is that the evidence is insufficient to justify the verdict of conviction.

The undisputed facts are that this defendant first met Ponti in a saloon in Fresno one evening at about 6:30 o'clock; that Ponti had just recently arrived from Stockton; that the two had several drinks together at the bar, where Ponti displayed considerable money; that the other two defendants were in the same saloon drinking at the same bar; that defendant Sartori left Ponti for a short time and went out to the sidewalk, where he met Sasselli, to whom he said:

He "had a friend inside, from Stockton; he has \$80; saw him buy a drink, and he changed a \$20 gold piece."

It then appears that after more drinks were had Sartori suggested to Ponti that

they go out and have some tamales. As they stepped outside of the saloon, he urged Ponti to get into Sasselli's automobile, which was standing near by, saying he would follow on his bicycle. Ponti, Sasselli, and Gatti drove off in the automobile, and Sartori followed for a few blocks on his bicycle. Sasselli, driving the machine, turned into the country, and when several miles out of town he and Gatti forcibly took Ponti's money from him, put him out of the machine, and turned back to town.

On their way back Gatti gave Sasselli \$50, telling him he had taken \$75 from Ponti and that \$25, half of that given to him, was for Sartori and half for himself. When they reached town, Gatti got out of the machine and Sasselli proceeded a few blocks until he picked up Sartori, to whom he handed \$25, telling him that Gatti had taken \$75 from Ponti and had given him \$50 to be divided between Sartori and himself. Thereafter Sartori went to the saloon where he first met Ponti, and, as he entered, overheard Ponti relating his experiences to the proprietor and accusing "the man with the bicycle." Sartori stepped up, and as to what then occurred the testimony of the proprietor of the saloon shows:

"Sartori comes in, and he says to Ponti, 'I am the man with the bicycle.' And so Ponti says, 'I will go up to make my own complaint and to fight it out,' and Ponti asked me what place was the police headquarters, and I show him. And Sartori says: 'If you want to go out there, I will show you; I will go with you.' And so when it started that way, and Sartori says, 'If you put me in the complaint, I will fix you,' and Ponti says, 'Never mind,' he says, 'I am going to make my own complaint,' and so Sartori tells him again, 'I will fix you.' At the same time he hit him and he fell on the floor."

[1] It is undisputed that this defendant was not present at the time the crime was committed. To show his participation in the crime the prosecution relies upon the following circumstances: That he endeavored to make himself very agreeable to the complaining witness as soon as he learned that he had money to spend; that he told his co-defendant Sasselli that the complaining witness had \$80; that he urged the complaining witness to go out to get something to eat and then persuaded him to get into the automobile of Sasselli; that he accepted \$25 of the money taken from the complaining witness, which represented one-third of the profits of the robbery; and that, when this defendant re-entered the saloon and heard the complaining witness telling of the robbery and placing the blame on the man with

the bicycle, he immediately asserted his innocence, although still retaining his share of the spoils, and attacked the complaining witness when he learned that a criminal charge was to be laid against him. This defendant attempts to explain the receipt of the money from Sasselli by saying that Gatti owed him money, but his testimony was far from convincing, and, like the rest of his story, came from a man showing a guilty knowledge of the entire affair. After a careful examination of the entire record, it is difficult to see how the jury could have reached any other verdict than that returned.

[2] Appellant, attacking the verdict, insists that, as the prosecution failed to prove a conspiracy through the testimony of Sasselli and Gatti, the jury was not justified in drawing an inference of guilt under the circumstances which occurred. The argument is that, where direct uncontradicted evidence is introduced to show that no conspiracy existed, the jury is not warranted in drawing the inference of the existence of such conspiracy from the facts proved, citing *Maupin v. Solomon*, 183 Pac. 198. But if the rule of that decision is as stated by appellant, then it cannot be the rule in criminal cases. If it were, there could be no conviction on circumstantial evidence if the defendant or any one in his behalf took the stand and directly denied the commission of the crime.

[3] In the instant case the defendant is charged as a principal on the theory that, although not present at the time of the robbery, he did aid and abet in its commission. Pen. Code, § 971. It is not necessary for the prosecution to prove that a detailed plan of the robbery had been arranged among the three parties. No conversation may have been necessary between Sartori and Sasselli or between Sartori and Gatti. Sartori gave the information regarding Ponti's possession of the money, and urged him to get into Sasselli's automobile with Gatti on the representation that they were going to have something to eat.

All of the circumstances lead inevitably to the conclusion that the defendant participated in the fruits of the crime with guilty knowledge and criminal intent. The jury chose to follow the only inference that could be reasonably drawn from these circumstances rather than the denials made by those jointly charged with the crime.

The evidence as outlined is sufficient to support the verdict, and the judgment is affirmed.

We concur: LANGDON, P. J.; BRITTAIN, J.

(43 Cal. App. 251)

PEOPLE v. RAZO. (Cr. 864.)

(District Court of Appeal, First District, Division 2, California. Sept. 11, 1919. Rehearing Denied by Supreme Court Nov. 10, 1919.)

1. WITNESSES \Leftrightarrow 282½ — REPETITION OF CROSS-EXAMINATION PROPERLY DENIED.

Where cross-examination of complaining witness had been very complete and comprehensive, court's refusal to permit further examination, as to matters which had been covered several times in the course of the cross-examination, was proper, under Code Civ. Proc. § 2044, giving the trial court power to exercise a reasonable control over the cross-examination of a witness.

2. CRIMINAL LAW \Leftrightarrow 719(3) — ARGUMENT OF PROSECUTING ATTORNEY PROPER SUMMING UP OF EVIDENCE.

Where complaining witness had testified on cross-examination that he had not discussed case with deputy district attorney, and that he had visited the office of such attorney, but had left without discussing case, because attorney was busy, deputy district attorney's statement in argument to jury that complaining witness' testimony was that "he had not discussed the case over with me at all; he came to my room intending to talk it over with me, but I was busy, and did not talk it over with him"—held a proper summing up of testimony as against objection that the deputy district attorney was stating his own knowledge of the subject.

3. CRIMINAL LAW \Leftrightarrow 1171(3)—STATEMENT OF FACT IN ARGUMENT TO JURY HARMLESS ERROR.

Where complaining witness unequivocally stated during cross-examination that he had not discussed case with deputy district attorney, deputy district attorney's statement in argument to jury that the testimony of complaining witness was that "he had not talked the case over with me at all; he came to my room intending to talk it over with me, but I was busy and did not talk it over with him"—if improper as statement of deputy district attorney's own knowledge, was harmless.

4. CRIMINAL LAW \Leftrightarrow 323—TRUTH OF TESTIMONY WILL BE PRESUMED.

The testimony of every witness will be presumed to be truthful.

5. CRIMINAL LAW \Leftrightarrow 1206(1) — INDETERMINATE SENTENCE LAW CONSTITUTIONAL.

Indeterminate Sentence Law (Pen. Code, § 1168; St. 1917, p. 865), held constitutional as to offenses committed after its enactment.

Appeal from Superior Court, Alameda County; James G. Quinn, Judge.

Ramon Razo was convicted of robbery, and he appeals. Affirmed.

M. W. Sevier, of San Francisco, and George M. Naus, of Oakland, for appellant.
U. S. Webb, Atty. Gen., and John H. Rior-
dan, Deputy Atty. Gen., for the People.

LANGDON, P. J. This is an appeal by the defendant from a judgment of conviction of the crime of robbery. The appellant presents three points upon the appeal. We shall discuss them in the order in which they are urged. The first is that the cross-examination of the complaining witness Scott upon a vital fact was improperly and unnecessarily limited by the trial court. Scott testified that on November 14, 1918, at about 10 o'clock in the evening, he was walking along the street in Oakland when he was attacked by the defendant and another person; that the defendant knocked him down and cut him with a knife and the other person searched his pockets and took from them two coins, a five and ten cent piece. Appellant argues that, as it was necessary for the state to prove that the defendant actually took some property from Scott, therefore the question of whether Scott actually had the coins becomes decisive. He urges that the excluded questions were directed toward this matter and should have been allowed. But this matter was testified to repeatedly by Scott upon his cross-examination. He said he had a Canadian dime and a nickel in his pocket when he left his home, a few moments before the attack; that he looked at the coins before leaving home, and he knew they were there; that he had his hand in his pocket and felt such coins as he was walking on the street and up to the moment of the attack; that his pockets were good; and that the money could not have rolled out in the struggle on the sidewalk. Scott was a negro Pullman porter. It is true that he did not always answer questions as directly as might have been desired; but his examination discloses no effort to evade, but merely the difficulties which come from a lack of precision in speech and in thought, the natural consequences of lack of training. It is evident that he had difficulty in comprehending the exact meaning of many of the questions, and this in itself made it necessary for many questions to be asked a number of times. The court permitted this, and it seems to us that the cross-examination is very complete and comprehensive.

[1] Appellant contends that he should have been allowed to ask five certain questions. It is not necessary to discuss the relevancy of each of these questions here. In so far as they were relevant and proper cross-examination, their substance was covered several times in the course of the cross-examination. It appears that the direct examination of Scott covers 7 typewritten pages in the record, while the cross-examination covers over 50 pages. The trial court has the power to

exercise a reasonable control over the cross-examination of a witness (section 2044, Code Civ. Proc.), and we think that was all that was done in this case.

The second point urged by appellant is that the deputy district attorney was guilty of misconduct in his argument to the jury. The facts relating to the incident complained of are that the attorney for the defendant upon cross-examination asked the complaining witness several times if he had talked the case over with the deputy district attorney, to which he replied that he had not. In reply to further questions, Scott stated that he had gone to the office of the deputy district attorney at the close of the trial on the first day and had remained there a short time, but they had not talked about the case; that, during the three or four minutes that he remained in the office of the deputy district attorney, said deputy was talking to some one else, and he (Scott) was waiting for him to finish talking. In his argument to the jury, the deputy district attorney referred to the attempts of counsel for the defendant to impute to him improper practices in the preparation of his witnesses for the trial; he admitted that he had talked with all the witnesses in the case with whom he had had an opportunity to talk, as a regular and customary part of his duty. He continued as follows:

"I say, frankly, and very gladly, that every witness that I could get my hands on, who was going on the stand, told me definitely what his testimony was going to be, because I wanted to know what the testimony was going to be."

At this point he was interrupted by the counsel for the defendant, who objected to these remarks for the alleged reason that they contradicted the testimony of the witness Scott, who had testified that he did not talk with the deputy district attorney. The deputy district attorney then, in reply to this objection, explained his remark to the jury by saying:

"I said every witness that I could get my hands on; I could not get my hands on Mr. Scott."

Attorney for the defendant then called attention to the testimony of Mr. Scott, saying:

"And Mr. Scott's further testimony was that he was in Mr. Agnew's room, with the door closed."

To which the deputy district attorney answered:

"The testimony of Mr. Scott was that he had not talked the case over with me at all; he came to my room intending to talk it over with me, but I was busy and did not talk it over with him."

Appellant contends that this statement of the deputy district attorney, explaining why he did not talk to Scott, was outside of the

record and corroborated the witness, and was therefore improper. As the statement appears in the record, it is susceptible of being construed as a statement of the testimony of Mr. Scott, and as such it is sustained by the record, for we find upon cross-examination that Scott testified as follows:

"Q. Where did you go with him, after you went through that door? A. Out in his office. Q. Into his office. A. Yes, sir. Q. What did he talk about in there—the weather? What did he talk about? A. Talked about nothing. Q. Didn't talk about anything. How long were you in the room with him? A. About three or four minutes. Q. What did he do during the time you were in his office three or four minutes? A. He was talking to some one else."

And again:

"Q. What were you doing during the three or four minutes, or whatever time it was, that you were in Mr. Agnew's office yesterday evening? A. I was waiting for him to get through talking."

Scott also testified that he went to the office of the deputy district attorney for the purpose of discussing the case.

[2, 3] It does not seem to be an improper summing up of this testimony to say that—

"The testimony of Mr. Scott was that he had not talked the case over with me at all; he came to my room intending to talk it over with me, but I was busy and did not talk it over with him."

However, let us assume that the appellant's construction of this remark is correct and that the deputy district attorney was not referring in the latter part of the sentence to the testimony of Scott on the stand, but was stating his own knowledge of the subject. While clearly this would be misconduct upon his part, yet such misconduct, we think, under the special circumstances of this case, would not be such prejudicial error as to warrant a reversal. Appellant's argument is based upon an insistence that the fact of whether or not the witness Scott talked with the deputy district attorney was important to the defendant's case. But we have the repeated, unequivocal statement of Scott that he did not talk to him.

[4] There is a presumption that follows the testimony of every witness that such witness speaks the truth, and this witness remains uncontradicted on this point. Both Scott and the deputy district attorney admitted that they wished to talk to one another about the case. Scott testified that he went to the office of said deputy for the purpose of talking about the case, and the deputy district attorney stated in his argument to the jury that he talked with every witness in the case that he could "lay his hands on," and would have talked with Scott if he had had the opportunity. The reason why this avowed intention and desire on the part of both was

not carried out cannot have any bearing upon the matter one way or the other.

[5] The last point made by the appellant is that the judgment is erroneous because the Indeterminate Sentence Law (section 1168, Pen. Code; St. 1917, p. 665), under which it is imposed, is unconstitutional. It is necessary for us to discuss this question, because it has been passed upon in *Re Lee*, 177 Cal. 690, 171 Pac. 958, which upholds the validity of this section as to offenses committed after its enactment.

The judgment is affirmed.

We concur: NOURSE, J.; BRITAIN, J.

(43 Cal. App. 158)

FINDLEY et al. v. LINDSAY. (Civ. 2980.)

(District Court of Appeal, First District, Division 1, California. Sept. 4, 1919.)

1. PLEADING \Leftrightarrow 263 — REFUSAL OF AMENDMENT TO ANSWER NOT ABUSE OF DISCRETION.

Where an action on a note was set for trial, though the answer of defendant did not deny his default, and merely denied on information and belief that the instrument had been transferred to plaintiffs, refusal to permit an insufficient amended answer, during the progress of the trial, after defendant's vain attempt to secure postponements, was not an abuse of discretion.

2. COSTS \Leftrightarrow 260(4)—GRANTED ON FRIVOLOUS APPEAL.

Where the whole progress of the trial showed an attempt on the part of defendant to secure a delay, though there was no defense and it appeared that defendant appealed on wholly frivolous grounds, a penalty will be imposed upon the judgment being affirmed.

Appeal from Superior Court, Los Angeles County; L. R. Hewitt, Judge.

Action by M. W. Findley and others against Lycurgus Lindsay. From a judgment for plaintiffs, defendant appeals. Affirmed, with penalty for the taking and prosecution of a frivolous appeal.

A. L. Abrahams, C. W. Fricke, and W. I. Gilbert, all of Los Angeles, for appellant.

E. A. Meserve and S. E. Meserve, both of Los Angeles, for respondents.

RICHARDS, J. This is an appeal from a judgment in favor of plaintiff in an action to recover the sum of \$15,000 with interest, attorneys' fees, and costs, alleged to be due upon a promissory note of the defendant.

The only question presented upon this appeal is as to whether the trial court erred in denying the defendant's application to amend his answer at the time of the trial of the case.

That this is one of the most flagrant instances of abuse of the processes of justice for purposes of delay and of a frivolous appeal which has come within our purview the following undisputed facts will show: The plaintiffs commenced this action on May 13, 1916, by filing their complaint upon a promissory note and contract, which were set forth therein and which called for the payment to the plaintiffs of the sum of \$15,000 by the defendant as the purchase price of 1,287½ shares of the capital stock of the Independent Sewer Pipe Company and 4 shares of the capital stock of the Pacific Tile & Terra Cotta Company. On June 26, 1916, the defendant filed his answer herein, admitting all of the allegations of the complaint with respect to the purchase of the said stock and the execution of the note and contract, but denying for want of information and belief an averment in the complaint to the effect that the trustee mentioned in the contract had assigned and transferred to the plaintiffs the note in question after the maker's default according to the terms and requirements of said contract, which assignment and transfer it was the duty of the said trustee pro forma to make upon the plaintiffs' demand after such default, according to the express agreement of the defendant in said contract. As the defendant's default was not denied it would seem that this sole denial of the defendant for want of information and belief did not present a material issue. The plaintiffs, nevertheless, moved the court on July 3, 1916, to set the cause for trial. The defendant appeared in opposition to said motion by one of his attorneys of record, who announced in court that he intended to file an amended answer, setting up fraud in the obtaining of said note. The court set the cause for trial on October 25, 1916, in order to allow the defendant ample time to prepare, serve, and file said amended answer if he so desired. A few days before the said date of trial an assistant in the office of an attorney, who was not one of the attorneys of record for said defendant, made an effort to have the trial of the cause further postponed on the ground that his principal expected to be employed to try the cause on behalf of the defendant. This effort was unsuccessful. On the morning of October 25, 1916, when the cause was called for trial one of the attorneys of record for the defendant appeared to suggest that another of his attorneys of record could not be present, but had arranged with the above-mentioned attorney who was not of record to try the cause, and the latter could not do so because he was engaged in a trial in another court. The court's attention was then called to the fact that said last-named absent attorney was not an attorney of record in the case, and furthermore that no amended

answer had ever been served or filed. The attorney of record for the defendant, who was then present in court, and who had previously announced the defendant's purpose to present such an amended answer, made no statement or offer indicating that the defendant intended or desired to amend his pleading, whereupon the court set the cause peremptorily for trial for the hour of 1 o'clock p. m. of said day. At said hour the aforesaid attorney not of record for the defendant was present to ask a further postponement of the case, which request the court refused to grant. The trial then proceeded, and after a witness for the plaintiff had been sworn one of the attorneys of record appeared with an affidavit and amended answer of the defendant which he then asked leave to file. The affidavit presents no sufficient reason whatever as an excuse for the defendant's delay in presenting his amended answer, and the amended answer presents no sufficient averments of fraud in respect to the transaction in the course of which said note was executed by the defendant to constitute a defense thereto. The court, after an examination of said affidavit and answer, refused permission to the defendant to file the same, and ordered the trial to proceed. The defendant presented no evidence upon the further hearing of the case, and judgment accordingly went for the plaintiff for the recovery of the full amount due upon the note, with counsel fees and costs. The defendant appealed to the Supreme Court, the notice of appeal being filed on November 15, 1916. The appellant's opening brief was filed February 18, 1917. The respondents' brief, filed March 19, 1917, directed attention to the foregoing facts as disclosed by this record, and urged that the appeal was frivolous and taken for delay. No reply brief on behalf of the appellant has ever been filed. The cause was transferred to this court for hearing on May 19, 1919, and was set for argument on August 11, 1919. No appearance was made by appellant on said date, and the cause was submitted without argument for decision.

[1, 2] As to the merits of the case it is obvious that the trial court committed no error or abuse of discretion in refusing defendant leave to file his belated and insufficient amended answer; and it appears to us equally obvious that the whole procedure of the defendant herein from the time of his first appearance in the case down to the present moment has been marked with a deliberate design to delay the operations of justice in respect to the enforcement of his just and legal obligation, and to persist in and consummate such purpose by the taking and prosecution of a frivolous appeal.

The judgment is affirmed, with the added penalty of \$500 hereby imposed upon the ap-

pellant for the taking and prosecution of a frivolous appeal.

We concur: WASTE, P. J.; BARDIN, Judge pro tem.

(48 Cal. App. 259)

EADES v. LOS ANGELES RY. CORPORATION et al. (Civ. 8031.)

(District Court of Appeal, First District, Division 2, California. Sept. 15, 1919.)

1. COSTS \S 154—ITEMS OF DISBURSEMENT FOR TAKING DEPOSITIONS IN COST BILL.

Items for taking depositions are proper disbursements to be put into a cost bill, unless they were unnecessary, or for some special reason should not be allowed.

2. COSTS \S 154—ITEM FOR EXPENSE OF TAKING NECESSARY DEPOSITION OF PLAINTIFF.

Where the taking of the deposition of plaintiff was regular in all particulars, as provided by Code Civ. Proc. \S 2021, subd. 1, and there was no contradiction of the allegations of defendant that the deposition was necessary for the trial, the expense of taking it was a proper item on defendant's cost bill.

3. COSTS \S 154—EXPENSE OF DEPOSITION NOT CHARGEABLE AGAINST PARTY WITHOUT NOTICE OF TAKING.

Where no notice was given to plaintiff of taking of deposition of one of the three defendants, under Code Civ. Proc. \S 2031, 2032, it was not entitled to be admitted in evidence against plaintiff, and he may not be charged with it as costs.

Appeal from Superior Court, Los Angeles County; Grant Jackson, Judge.

Action by Herbert Eades, a minor, by his guardian ad litem, Walter L. Eades, against the Los Angeles Railway Corporation, a corporation, Maude Funk, and another, resulting in judgment for defendant Railway Corporation. From an order after judgment, granting plaintiff's motion to retax costs, and strike items from the Railway's cost bill, it appeals. Order modified and affirmed.

Gibson, Dunn & Crutcher and Norman S. Sterry, all of Los Angeles, for appellant.

E. B. Drake, of Los Angeles, for respondent.

LANGDON, P. J. This is an appeal from an order of the superior court, made after judgment in favor of the defendant Los Angeles Railway Corporation, the appellant here, which order granted the motion of plaintiff to retax costs and struck from the cost bill of said defendant an item of \$8.50 for the taking and transcribing of the deposition of plaintiff, and an item of \$17 for the taking and transcribing of the deposition of F. C. Funk, one of the defendants. The motion to retax costs was made upon the

grounds that the items were not taxable under the law and that the deposition of F. C. Funk was taken without the notice or knowledge of the plaintiff.

Upon the hearing of the motion the parties stipulated as to all material facts, from which stipulation it appears that the deposition of plaintiff was taken by the defendant and appellant under and by virtue of the provisions of subdivision 1 of section 2021, Code of Civil Procedure, said deposition having been taken upon stipulation of all of the parties to the said action. It also appears that the deposition of F. C. Funk was taken upon a stipulation entered into between counsel for defendant Funk and counsel for defendant Los Angeles Railway Corporation, the appellant, but that the counsel for plaintiff did not sign said stipulation and had no notice of the taking of said deposition, and plaintiff was not represented at the taking thereof. In addition to the stipulations regarding these facts, upon the hearing of said motion, the appellant filed an affidavit of its counsel to the effect that both depositions were necessary to the preparation and trial of its case. No evidence was offered by the plaintiff to contradict this affidavit, and the motion to relax costs was not made upon the ground that the depositions were not necessary.

[1, 2] It is stated to be the rule that items for taking depositions are proper disbursements to put into a cost bill, unless they are unnecessary or for some special reason should not be allowed. *Lindy v. McChesney*, 141 Cal. 351, 353, 74 Pac. 1034; Cal., etc., Co. v. Schiappa-Pietra, 151 Cal. 732, 745, 91 Pac. 593. The taking of the deposition of the plaintiff, being regular in all particulars, as provided by the Code of Civil Procedure, and there being no contradiction of the allegations in the affidavit that this deposition was necessary for the trial of the action, the expense of taking the same was a proper item upon the cost bill and should have been allowed.

[3] As to the expense of the deposition of the defendant Funk, we think the action of the trial court was proper. It is true that section 2021, Code of Civil Procedure, provides for the taking of a deposition of a party to an action. However, section 2031, Code of Civil Procedure, provides how such depositions may be taken "on serving upon the adverse party previous notice of the time and place of examination," together with a copy of an affidavit showing that the case is within the provisions of section 2021. Section 2032, Code of Civil Procedure, provides that, when a deposition is regularly taken in the manner provided therein, it may be used by either party upon the trial or other proceeding against any party giving or receiving the notice. It being admitted that no notice was given to the plaintiff of the taking of this

deposition, such deposition was not entitled to be admitted in evidence as against him. It is stated in the affidavit of the appellant that at the trial the plaintiff objected to the introduction of the deposition upon this ground. As this deposition was not regularly taken so as to make it admissible in evidence against the plaintiff, it would seem to follow that plaintiff may not be charged with it as costs.

The order appealed from is modified by allowing the item of \$8.50, the expense of taking the deposition of plaintiff, thus increasing the amount of costs allowed to appellant from \$47.70 to \$56.20. As modified, the order appealed from is affirmed, the appellant to pay its own costs.

We concur: BRITTAIN, J.; NOURSE, J.

(43 Cal. App. 279)

CARL v. McDOUGALL (Civ. 3039.)

(District Court of Appeal, First District, Division 2, California. Sept. 16, 1919.)

1. FORGERY \S 5, 27 — INTENT TO DEFRAUD ESSENTIAL TO CRIME.

In a prosecution for forgery, the intent to defraud is not only an essential element of the crime, but is essential to every indictment for the offense.

2. LIBEL AND SLANDER \S 2 — INTENT IMMATERIAL EXCEPT AS TO EXEMPLARY DAMAGES.

If defendant's words were slanderous as to plaintiff, the intention with which they were used is immaterial, except possibly on the question of exemplary damages.

3. LIBEL AND SLANDER \S 7(12) — CHARGE OF FORGERY INCLUDES ALL ELEMENTS OF OFFENSE.

Defendant's charge that plaintiff was a forger, and had forged defendant's name to a check, necessarily included all elements of the crime of forgery, including the element of intent to defraud, and charged a felony.

4. LIBEL AND SLANDER \S 124(1) — INSTRUCTION DEFINING OFFENSE IN ACTION FOR CALLING PLAINTIFF FORGER PROPER.

In an action for slander by having called defendant a forger, the court properly instructed that, to enable the jury to determine whether the language used by defendant amounted to an accusation of the crime of forgery, he would define the offense, and that Pen. Code, § 470, provided that every person who with intent to defraud signed the name of another or of a fictitious person, knowing he had no authority to do so, to a check, committed forgery.

5. LIBEL AND SLANDER \S 7(12) — CHARGE OF FORGERY SLANDEROUS.

If defendant charged plaintiff with the crime of having forged defendant's name to a check, such charge was slanderous.

6. LIBEL AND SLANDER ¶100(8)—No VARIANCE BETWEEN PLEADING AND PROOF.

In an action for slander, testimony that defendant said of plaintiff, "He forged a check on me," and, "He had a check which he forged his name to it," held not a fatal variance from plaintiff's allegation that defendant said, "Mr. Carl (plaintiff) is a forger," for, though plaintiff must prove the use of the particular slanderous words, it is sufficient if enough of the words alleged are substantially proved to constitute the sting of the charge.

Appeal from Superior Court, Los Angeles County; Curtis D. Wilbur, Judge.

Suit by Marcel Carl against D. McDougall, administrator of the estate of Theodore Wiesendanger, deceased. From judgment for plaintiff, defendant appeals. Affirmed.

F. F. Oster and Peyton H. Moore, both of Los Angeles, for appellant.

W. C. Shelton, of Los Angeles, for respondent.

BRITAIN, J. In a suit against Theodore Wiesendanger, the plaintiff, Marcel Carl, was awarded a verdict for \$300 actual and \$700 punitive damages for slander. Wiesendanger appealed from the judgment entered upon the verdict. After the death of the appellant, upon suggestion, the administrator of his estate was substituted.

The complaint was in two counts, and in it the plaintiff in substance alleged the defendant had to two different persons, then the employers of the plaintiff, on the same day but at different times, accused the plaintiff of having forged the defendant's name as the indorser of a certain check. The appellant makes six specifications of error, which may best be discussed in what appears to be their logical order. They are closely related and all refer to the allegation that the defendant said:

"Mr. Carl is a forger. He has forged my name to a check, and I have a lithographed copy of the check in my office."

[1-3] In criminal prosecutions for forgery, the intent to defraud is not only an essential element of the crime of forgery, but is an essential element to every indictment for forgery. *People v. Turner*, 113 Cal. 278, 45 Pac. 331; *People v. Smith*, 103 Cal. 563, 37 Pac. 516. In reliance upon this strict rule of criminal pleading, the appellant contends the complaint in the present case was fatally defective, in that it contained no allegation that the slanderous words were used with the intention of charging that the plaintiff had forged the indorsement intending thereby to defraud. If the words were slanderous, the intention with which they were used is immaterial, except, possibly, upon the question of exemplary damages. The rule relied

upon by the appellant binds him. The charge of forgery necessarily includes all the elements of the crime. If the defendant accused the plaintiff of forgery or said the plaintiff had forged a check, he accused the plaintiff of a felony. It is not necessary that the language used should be chosen with the technical nicety required in an indictment. *Mitchell v. Sharon* (C. C.) 51 Fed. 424, 425. Under the contention of the appellant none but those trained to observe the technicalities of criminal procedure would be able to slander their neighbors, and they would know how to limit their statements so they might do the wrong and avoid its consequences. Where one accuses another of having forged his name to a check, the language can mean nothing other than that the person accused has been guilty of a felony.

[4, 5] The appellant contends the court erred in instructing the jury that, in order to enable them to determine whether the language used by the defendant amounted to an accusation of the crime of forgery, he would define for their purposes the offense of forgery, and in further instructing them that—

"Section 470 of the Penal Code provides in effect that every person who with intent to defraud signs the name of another person or of a fictitious person, knowing that he has no authority so to do, to a check, commits a forgery."

The appellant argues that there was no allegation in the complaint that the language used was to be construed in any other manner than according to its plain and literal meaning, and that it was the duty of the trial court to construe the language. This the court did in defining forgery. He had previously properly instructed the jury that they must determine whether or not the defendant charged the plaintiff with the crime of forging his name to a check. If such a charge was made it was slanderous. *Childers v. San Jose Mercury*, 105 Cal. 284, 38 Pac. 903, 45 Am. St. Rep. 40; *Smullen v. Phillips*, 92 Cal. 408, 28 Pac. 442.

[6] The appellant contends there was a fatal variance between the words alleged and those proved. Neither of the two witnesses to whom the statement was made testified that the defendant said, "Mr. Carl is a forger," but one testified the defendant said of Carl, "He forged a check on me," and the other, that the defendant said, "He had a check which he forged his name to it." The appellant relies on those cases which hold that in a civil suit for slander the plaintiff must prove the use of the slanderous words, and that it is unavailing that the jury imputes a slanderous meaning to other words. *Fleet v. Tichenor*, 156 Cal. 343, 104 Pac. 458, 34 L. R. A. (N. S.) 323; *Haub v. Frieremuth*, 1 Cal. App. 556, 82 Pac. 571. The rule is unquestionable and was properly applied in those cases. In the *Fleet* Case the charge

was that the defendant had said the plaintiff "stole" certain jewelry. The evidence was that the defendant said the plaintiff had "taken" the jewelry. The word "taken" does not imply the commission of a crime. The statement that a man has forged a check can imply nothing else. The appellant testified he had not made the statement. The jury believed the other witnesses. The statements of the plaintiff's witnesses were within the rule that slander is established if enough of the words alleged are substantially proved as constitute the sting of the charge and contain the poison to the character. *Fleet v. Tichenor*, 158 Cal. 346, 104 Pac. 458, 34 L. R. A. (N. S.) 323; *Smith v. Hollister*, 32 Vt. 708; *Lewis v. McDaniel*, 82 Mo. 577; *Merrill v. Peaslee*, 17 N. H. 540; *Zimmerman v. McMakin*, 22 S. C. 372, 53 Am. Rep. 7.

The appellant claims the court erred in refusing to give two requested instructions and in giving another. His argument on those points is based upon the same grounds and the same rules and authorities which have been discussed. An examination of the record and all the instructions leads to the conclusion that the instructions given were fair to the defendant, complete, and in accord with the law that in such actions enough of the words alleged must be proved to contain the sting of the charge and that all the words charged need not be proved.

The judgment is affirmed.

We concur: LANGDON, P. J.; NOURSE, J.

(43 Cal. App. 229)

WHITCOMB v. GIANNINI et al.
(Civ. 2313.)

(District Court of Appeal, Second District, Division 1, California. Sept. 8, 1919.)

1. APPEAL AND ERROR ¶110—No APPEAL FROM ORDER DENYING NEW TRIAL.

An order denying motion for new trial is not appealable, and an attempted appeal therefrom should be dismissed.

2. EVIDENCE ¶78—PRESUMPTION IN FAVOR OF REGULARITY OF CORPORATE PROCEEDINGS.

Where no showing is made that a regular directors' meeting of a certain date was illegally called, assembled, or held, if notice of the meeting was required to be given each director, it must be presumed, in the absence of contrary showing, that such notice was given.

3. CORPORATIONS ¶298(3)—NOTICE TO DIRECTORS OF ADJOURNED MEETING UNNECESSARY.

Where a directors' meeting of a certain date was regularly held, and a majority of the directors were present, and action to adjourn to a later date was regularly taken, no notice to directors of the adjourned date was necessary.

4. CORPORATIONS ¶298(4) — DIRECTORS' MEETING NOT IRREGULAR BECAUSE HELD THREE HOURS LATER.

The fact that the minutes of a directors' meeting showed that the directors assembled at 1 p. m., instead of 10 a. m., as ordered by the resolution of adjournment previously made at a regular meeting, is not material on the regularity or irregularity of the meeting, as it may be presumed the directors met as soon as a quorum assembled after 10 a. m., particularly in the absence of showing that the single absent director appeared after 10 and failed to remain because of lack of a quorum.

5. CORPORATIONS ¶93—STOCKHOLDER MUST SUE WITHIN SIX MONTHS AFTER SALE TO SET ASIDE ASSESSMENT.

Where an assessment on corporate stock levied by directors was not invalid, and the stockholders had notice of their delinquencies, the irregularity that requisite notices to directors were not given of the meeting when resolution was passed postponing a previously fixed date of sale of delinquent stock was included within Civ. Code, § 847, providing a stockholder in such case must bring his action within six months after the date of sale.

6. CORPORATIONS ¶89(2) — NOTICE OF ASSESSMENT TO ONE, NOTICE TO BOTH JOINT STOCKHOLDERS.

If plaintiff was a stockholder in defendant company of whom it was bound to take notice as such, his interest in his 10 shares of stock being a joint interest with the original owner of such shares, notice to the original owner of an assessment was notice to him.

7. CORPORATIONS ¶89(2)—NOTICE TO COMPANY OF INTEREST OF ONE NOT APPEARING ON BOOKS.

A corporation was not compelled to take notice of the interest in 10 shares of stock of one who had acquired a joint interest therein with the original owner, and had merely had his name written on the original certificate with that of the owner, but no transfer made on the books of the company, so that the only notice the company was required expressly to give of the levying of an assessment on the stock was notice to the original owner.

8. CORPORATIONS ¶93—PURCHASE OF STOCK BY DIRECTOR AT SALE FOR ASSESSMENT.

A director in the company when an assessment was levied and sale of delinquent stock made held not ineligible and disqualified by any confidential relationship to the stockholder from bidding at the sale or purchasing the stock sold.

Appeal from Superior Court, Tulare County; W. B. Wallace, Judge.

Action by O. S. Whitcomb against Frank Giannini and the Tulare County Power Company, a corporation. From judgment for plaintiff, and from an order denying their motion for a new trial, defendants appeal. Appeal from order denying motion for new trial dismissed; judgment reversed.

E. I. Feemster and Middlecoff & Feemster, all of Visalia, for appellants.

Ward Chapman, of Los Angeles, and Bradley & Bradley, of Visalia, for respondent.

JAMES, J. [1] This action was brought to recover ten shares of corporate stock, or the value thereof, which plaintiff alleged had been made illegally the subject of a sale for delinquent assessment. Plaintiff had judgment, from which the defendants appeal. There was also an appeal attempted to be taken from an order denying to defendants a new trial; but, as that order was not appealable, the appeal therefrom should be dismissed.

[2-4] The contentions of the plaintiff, which were upheld by the trial court, were: First, that the meeting of the directors at which the assessment was levied was not legally called, in that the directors were not given written notice of the time and place of hearing; second, that a subsequent meeting of the directors, at which a resolution was adopted postponing the sale of stock upon which the assessment had become delinquent, was illegally held, in that the directors were not given written notice of the time and place of hearing; third, that the plaintiff as a stockholder never received a notice, nor was any sent to him, advising him of the delinquency; fourth, that defendant Giannini, who was the purchaser of the stock at the delinquency sale, being a director of the corporation, the stock of which was then being sold, was ineligible and disqualified to bid at such sale. It appeared in evidence that the 4th of August, 1914, was the day regularly set by the by-laws of defendant corporation for the holding of the regular monthly directors' meeting. There were seven directors, all of whom were present except one on the day of this regular meeting. The directors present, after the meeting was convened, adjourned the regular meeting to August 11th, at 10 a. m. The minutes of the meeting of the directors, held on the 11th day of August, showed that the meeting convened at 1 p. m., instead of 10 a. m., and that all directors again were present except one. The secretary of the corporation testified that he had given written notice by letter to this director and that he had received a telephonic communication from the director stating that he would be unable to attend the meeting. There was no evidence offered to contradict this latter showing as to the notice having been given in writing to the absent director of the meeting of August 11th. No showing was made on the part of the plaintiff that the regular meeting of August 4th was illegally called or assembled or held, and, if notice of that meeting was required to be given, it must be presumed in the absence of a contrary showing that such notice was given. *Sferlazzo v. Oliphant*, 24 Cal. App. 81, at page 86, 140 Pac. 289. The

meeting of August 4th being regularly held and a majority of the directors being present and the action to adjourn to the later date of August 11th having been regularly taken, no notice to directors of the adjourned date was necessary. See *Seal of Gold Mining Co. v. Slater*, 161 Cal. 621, 120 Pac. 15, where it is said:

"A director receiving notice of a meeting was bound to know that a quorum might adjourn, and that business might be transacted at the adjourned meeting. And this is in accordance with the general rule, which is that no notice of adjournment of a meeting regularly called need be given"—citing authorities.

Hence, not only was no notice required to be given to any director of the time and place for the holding of the adjourned directors' meeting, but the evidence without dispute shows that the only director absent on August 11th was notified in writing. The fact that the minutes of the meeting showed that the directors assembled at 1 p. m., instead of 10 a. m., as ordered by the resolution of adjournment, previously made, seems to us not to be material, for the reason that, in the absence of evidence to the contrary, it may be presumed that the directors met as soon as a quorum had assembled after the hour of 10 a. m., and especially in view, too, of the fact that no showing was made that the absent director appeared at 10 o'clock and failed to remain because of the lack of a quorum. He had previously notified the secretary that he would not appear. The directors' meeting of August 11th, at which the resolution was adopted levying the assessment against the stock of the defendant corporation, was therefore duly held and legally noticed and called. That the resolution levying the assessment was sufficient in form and substance is not disputed. In this resolution it was declared that the assessment levied thereunder should become delinquent on the 16th day of September, 1914, and that all delinquent stock on which the assessment had not been paid should be sold on the 5th day of October, 1914, at 2 o'clock p. m. On the first Tuesday in September, that being the time fixed by the by-laws for the holding of the regular monthly directors' meeting, a quorum was not present. Minority directors attempted to adjourn until September 2d. On September 2d a quorum was present and an adjournment was taken to September 17th. Five directors were present at the meeting of September 17th and an adjournment was again taken to October 3d. At the meeting of September 17th, at which there were present all but two directors, a resolution was adopted providing for the publication of a notice giving the names of those delinquent and the stock held by them, and giving notice of sale which was to take place on the 5th of October, 1914, as previously determined in the resolution levying the assessment. At the October 3d meet-

ing, at which all directors were present except one, the absent director being the director who is defendant here, Giannini, a resolution was adopted postponing the date of sale from October 5th to November 4th, and providing for a publication of notice of such extension or postponement. We have already concluded that the proceedings up to and including the levying of the assessment were regularly taken and had, and the record further shows that subsequent proceedings up to and including the date of delinquency as fixed in the resolution last referred to, were all completed as required by law. The resolution ordering the assessment contained complete direction for the publication of the necessary notice of sale for delinquencies (Civ. Code, § 337), and the publication of that notice, it is admitted, was had in accordance with the direction of the resolution.

[5] The question as to whether the meeting of October 3d was regularly called and held, that being the meeting at which the resolution was passed postponing the date of sale to November 4th, is next entitled to consideration. If all of the directors had been present at that meeting, there would have been no question as to the legality of the action taken, regardless of the matter of notice having been given to any of them. Civ. Code, § 320a. It may be assumed that the court was correct in finding, as it inferentially did, that the requisite notices were not given of the meeting of October 3d. The assessment, as has been noted, was not invalid; the stockholders had notice of their delinquencies. Hence we think that the irregularity, if such it be, was one included within the provisions of section 347, Civil Code, which provides that a stockholder must in such case bring his action within six months after the date of sale. This action was commenced by the filing of a complaint on February 21, 1916; the sale of the stock was made in November, 1914. Assuming that the plaintiff as stockholder received all the necessary notices and that, as we have already decided, the levying of the assessment was regularly done, plaintiff's action would be too late.

[6-8] There is next to be considered the question as to whether at the times material to the levying of the assessment and making of the sale plaintiff was in fact a stockholder in defendant corporation and, if so, whether he was charged with notice. It is admitted by the defendants that no special notice was given to the plaintiff of the levying of the assessment, as required by section 336, Civil Code; that is, no notice was given to him other than such notice as might be imparted by that published in the newspaper. Admittedly the giving of notice by publication alone under the section of the Code cited would not be sufficient. The ten shares of stock referred to in this controversy were originally issued to one Hall and had never

been transferred from Hall to any person upon the books of the corporation up to and including the date of sale as made under the assessment. It seems that the defendant corporation was engaged in the business of furnishing a certain form of power to its stockholders. After Hall secured his stock, he parted with some interest in land, which was affected by the stock, to this plaintiff, and the certificate of stock was taken to the office of defendant corporation and the person in charge notified of the fact that Whitcomb had become the owner of an undivided interest in the stock. There was testimony that the secretary of the corporation took the original certificate and, after the name of Hall, appearing therein, wrote the name of this plaintiff. Plaintiff testified that he was the joint owner with Hall of the stock up to the time that Hall transferred his entire interest to the plaintiff. Under the issues made by the pleadings, we must assume that this latter transfer was made after the sale for delinquent assessment. We have noted that the stock was never transferred upon the books of the corporation. It is shown that notice of the assessment was given to Hall, the record owner, and that none was given to the plaintiff. As far as can be gathered from the record the interest acquired by Whitcomb, the plaintiff, both in the property of Hall and in the stock of defendant corporation, which was useful principally in connection with that property, was in the nature of a partnership interest. Plaintiff in his testimony insisted that the interest was a joint interest, and if we are to assume that the corporation, because of the fact, as it appeared, that it had knowledge that both Whitcomb and Hall were being dealt with in connection with the power furnished to the land, is estopped from denying that plaintiff held a stockholder's interest in the corporation, then we think that it is logically to be concluded that notice to Hall was notice to Whitcomb. We are strongly inclined to the conclusion that as the stock had never been transferred on the books of the corporation the latter was not bound to recognize Whitcomb as a stockholder when it gave notice of the assessment levied. While it is true that Whitcomb stated in his testimony that he asked the secretary to see that the books were changed, he made no request at any time to have any specific number of shares of stock assigned to him, or for any new certificate to be issued to him, but went away content with the writing in of his name after Hall's on the original certificate, after stating to the secretary that he had become "jointly" interested in the stock with Hall. Section 324 of the Civil Code provides that stock may be transferred upon the books of the corporation, and provides that "until the same is so entered upon the books of the corporation as to show the names of the parties by whom

and to whom transferred, the number of the certificate, the number or designation of the shares, and the date of the transfer," such transfer, except as between the parties, should not be valid. Under the facts shown we conclude: First, that assuming the plaintiff to have been a stockholder of defendant corporation and of whom defendant corporation was bound to take notice, the interest in the stock being a joint interest, notice to Hall of the delinquent assessment was notice to him. Secondly, that it is not correct to assume the corporation was compelled to take notice of the interest in the stock of the plaintiff, but that relying upon its records, there appearing not to have been a transfer made from Hall to plaintiff, the only notice that was required to be expressly given of the levying of the assessment was the notice to Hall. The claim made and to which countenance was given by the trial judge, that Giannini, being a director at the time of the levying of the assessment and the sale made, was ineligible and disqualified from bidding at the sale or of purchasing stock sold thereat, we are not prepared to sustain. The facts shown in no way illustrate a case where the relation of the director to the stockholder was of such a confidential character as to make it a breach of faith or trust should he be permitted to purchase the stock.

In our opinion, the trial judge was in error in the making up of his conclusions as to the rights of the plaintiff.

The appeal from the order denying defendants' motion for a new trial is dismissed. The judgment is reversed.

We concur: CONREY, P. J.; SHAW, J.

(43 Cal. App. 283)

DE BOCK v. DE BOCK et al. (Civ. 1896.)

(District Court of Appeal, Third District, California. Sept. 17, 1919. Rehearing Denied by Supreme Court Nov. 14, 1919.)

1. APPEAL AND ERROR ¶757(3)—UNNECESSARY TO PRINT ALL TESTIMONY IN BRIEF.

The Legislature did not intend, by the enactment of Code Civ. Proc. § 953c, that appellant should be required to print in his brief all the testimony appearing in the record, or even all the testimony relating to the points urged by him for reversal.

2. HUSBAND AND WIFE ¶332—COMPLAINT BY WIFE STATING CAUSE OF ACTION FOR ALIENATION.

In a wife's action for alienation of her husband's affections, complaint *held* sufficient to state a cause of action.

3. ESTOPPEL ¶3(2)—JUDGMENT ¶632—ESTOPPEL OF WIFE SUING FOR ALIENATION BY PREVIOUS ALLEGATIONS WHEN SUING FOR DIVORCE.

Wife *held* not estopped, in her action for alienation of her husband's affections, from denying certain facts alleged by her in her complaint in suit for divorce against the husband, defendants' attempt being to invoke an estoppel by judgment in effect, while such an estoppel can only arise and be invoked where the subject-matter of the litigation and the parties are the same.

4. EVIDENCE ¶265(3)—PLEADING IN PRIOR SUIT REBUTTABLE AS ADMISSION AGAINST INTEREST.

In a wife's suit for alienation of her husband's affections, complaint in her prior divorce action against him can perform no other office than that of evidence of an admission on plaintiff's part that the material facts stated in her divorce complaint, which was verified, are true, not being conclusive, but rebuttable as an admission against interest.

5. HUSBAND AND WIFE ¶333(9)—SUFFICIENCY OF EVIDENCE TO SHOW ALIENATION OF HUSBAND'S AFFECTIONS.

In an action by a wife for alienation of her husband's affections against the husband's brother, his sister-in-law, and the woman alleged to have exercised the improper influence over the husband, evidence *held* insufficient to justify verdict against such woman, but sufficient to support verdict against the brother and sister-in-law.

6. HUSBAND AND WIFE ¶333(3)—EVIDENCE OF CONVERSATIONS IN SUIT FOR ALIENATION.

In an action for alienation of a husband's affections, evidence by plaintiff wife of conversations between herself and husband was admissible to indicate their feelings towards each other.

7. APPEAL AND ERROR ¶237(2)—TIMELY OBJECTION TO INADMISSIBLE EVIDENCE.

Where it is not apparent from the question itself that the response will on any theory of the case be inadmissible, an objection alone to the question will be of no avail, but the party, when the inadmissible evidence is for the first time disclosed by the answer, must move to have it stricken out, and, failing to do so, cannot predicate error on the question.

8. TRIAL ¶98—STRIKING OF INADMISSIBLE EVIDENCE.

In a wife's action for alienation of her husband's affections, testimony of a witness that the husband told her he had received two letters from a certain woman *held* effectually stricken on motion of defendants by the trial court.

9. APPEAL AND ERROR ¶1050(1)—ADMISSION OF EVIDENCE OF FACT OTHERWISE SHOWN HARMLESS.

The improper admission of evidence was harmless to appellants, where the same fact was otherwise shown on trial without objection from them.

10. TRIAL ¶45(1)—EXCLUSION OF QUESTION TO COURT INSTEAD OF WITNESS NOT SUBJECT OF REVIEW.

In a wife's action for alienation of her husband's affections, where defendants' attorney asked the court whether he might ask plaintiff a question regarding a conversation with her husband along the lines as that with a third person, the inquiry was not sufficiently precise.

11. TRIAL ¶29(3) — OBJECTION BY TRIAL COURT TO CROSS-EXAMINATION.

The action of the trial judge in objecting to a question to plaintiff on cross-examination, and in then sustaining his own objection, is not ordinarily to be commended.

12. APPEAL AND ERROR ¶930(2)—ASSUMPTION JURY FOLLOWED INSTRUCTIONS.

Where the trial court's stricture on one of the witnesses and counsel for defendants should not have been indulged in, but the jury was fully and clearly instructed to disregard everything said by the court along that line, the appellate court must assume the instruction was followed.

Appeal from Superior Court, Sacramento County; Charles O. Busick, Judge.

Action by Catherine M. De Bock for alienation of her husband's affections against August De Bock and others. From judgment for plaintiff, defendants appeal. Reversed in part; affirmed in part.

Jay L. Henry, E. S. Wachhorst, and C. E. McLaughlin, all of Sacramento, for appellants.

P. H. Johnson and Irving D. Gibson, both of Sacramento, for respondent.

PER CURIAM. We adopt the following portion of our opinion on the former hearing of this cause:

"The appeal is prosecuted by defendants, under the alternative method, from a judgment against them in the sum of \$5,000.

"It is stated in appellants' opening brief that the action was brought 'to recover damages from defendants, for enticing, inducing, and persuading plaintiff's husband to desert and abandon her,' while respondent maintains that the cause of action is 'for the alienation of the affections of Louis De Bock, husband of respondent.'

[1] "Preliminarily, respondent contends that this court is precluded from considering the points urged for reversal for the reason that appellants have failed to comply with the provision of section 953c of the Code of Civil Procedure, which provides that 'the parties must print in their briefs, or in a supplement appended thereto, such portions of the record as they desire to call to the attention of the court.' The trial of this case occupied six days, and the reporter's transcript contains 752 type-written pages. Appellants' opening brief consists of 125 printed pages, practically one-half of which are devoted to a reproduction of the

testimony which they claim is sufficient fairly and lucidly to present to this court the points upon which they rely, and we think their briefs sufficiently comply with the terms of the section to compel our consideration of the points raised on the appeal. That the Legislature did not intend, by the enactment of said section, that the appellant in a case should be required to print in his brief all the testimony appearing in the record, or even all the testimony relating to the points urged by him for a reversal, is indubitably shown by the use of the phrase, 'such portions of the record.'

"The points first urged for a reversal by the appellants concern the complaint and the effect of certain allegations of the complaint in an action for divorce instituted by the plaintiff against Louis De Bock and determined prior to the time at which the present action was commenced, and they are: (1) That the complaint fails to state a cause of action; (2) that there is a variance between the facts alleged in the complaint in the divorce action and those set forth in the complaint in this action with respect to the cause or causes culminating in the separation of and estrangement between the plaintiff and her former spouse; that the plaintiff is concluded by the facts alleged in her divorce action, and is therefore estopped from contradicting them in this action. In other words, the contention is that the plaintiff, having charged certain specified misconduct against her former husband in her divorce complaint, is conclusively bound by the averments so made, and therefore will not be permitted to say in the complaint in this action that the charge so made was not true.

"The decision of these points will require, of course, a consideration of the complaint in this action and (as to the asserted estoppel) also a consideration of the complaint in the action by the plaintiff against the said Louis De Bock for a divorce.

"The complaint herein alleges: That plaintiff and Louis De Bock intermarried at Sacramento 'on the 25th day of January, 1905, and ever since have been and now are husband and wife, and up to about the month of June or July of the year 1914, lived happily together as such husband and wife. That the conjugal affection, support, protection, care, comfort, and consortium of the plaintiff's said husband was and is a valuable property right to which plaintiff is entitled. That said Louis De Bock, on or about the first day of August, 1914, with the intent at such time to desert and abandon this plaintiff, wrongfully, willfully, and voluntarily separated from plaintiff and then and there deserted and abandoned this plaintiff,' by reason of which plaintiff is now living separate and apart from her husband. That, by reason of said alleged wrongful acts, which are reproduced, plaintiff was compelled to bring an action for divorce against her husband which resulted in an interlocutory decree of divorce being entered on September 12, 1914. That some time about the month of June, 1914, and prior to the day of the said desertion and abandonment of plaintiff by her husband, the said defendants willfully, wrongfully, wickedly, maliciously, and injuriously combined, conspired, confederated, and agreed and contrived, in-

tending thereby to injure this plaintiff and to deprive her of the affection, support,' etc., of her husband, and 'said defendants by reason of said agreement and conspiracy, wrongfully, maliciously, willfully, and wickedly behaved and conducted themselves continuously ever since said time, towards this plaintiff in an unkind, inconsiderate, unsocial, cruel, and inhuman manner, thereby gradually undermining and wholly destroying this plaintiff's happiness, peace of mind, and greatly injuring and impairing her health; said conduct * * * continually growing worse and more cruel, until by reason thereof, and in conjunction with the conduct of her husband, * * * plaintiff suffered great and grievous mental anguish and pain' and she became sick and confined to her bed. That in execution of said conspiracy said defendants wrongfully, etc., continuously until about the first day of August, 1914, 'enticed, induced, begged, persuaded and urged' her husband 'to deprive this defendant of all the things which it was the duty of said Louis De Bock to furnish this plaintiff as his wife, and to abandon and desert her and live separate and apart from her, and to refuse to live with her and to neglect her and keep her away from his said home and the home of these defendants, and for himself to remain and live with the defendants, August De Bock and his said wife, Ella De Bock, where defendant Millie Fisher was, and is, a frequent visitor.' That said Louis De Bock did, on or about August 1, 1914, 'by reason of, and on account of, and as a result of the arts, wiles, designs, blandishment, machinations and persuasion, in pursuance of said agreement and conspiracy * * * entirely desert and abandon this plaintiff, and ever since said time has continued to desert and abandon her, and has during all of said times persistently and continuously neglected and refused to furnish this plaintiff all the things which' it was his duty to furnish her. That said defendants, 'combining, conspiring, confederating, and agreeing, and willfully, wickedly,' etc., 'intending then and there to injure this plaintiff, to reduce her to penury, and deprive her of the affection, support,' etc., of her husband, about the months of June, July, and August, 1914, 'absolutely and entirely alienated, estranged, and destroyed the affection of her husband for her 'and alienated the affections of said Louis De Bock from plaintiff, and did illegally persuade, entice, and abduct said Louis De Bock from plaintiff, whereby the plaintiff has wholly lost and been deprived of the assistance, comfort,' etc., of her husband, to which plaintiff was entitled and otherwise would have had 'but for the illegal persuasion, conversation, and the said enticement, abduction and doings and actions of the said defendants.' It was alleged that plaintiff had thereby been damaged in the sum of \$15,000, and judgment was prayed for that amount.

"There was introduced in evidence the judgment roll in the case of Catherine M. De Bock v. Louis De Bock, being the action for divorce referred to in the complaint. It appears therefrom that on September 12, 1914, the complaint in said divorce action was filed in the superior court of the county of Placer, in which county the parties resided; that the answer of the defendant was filed, a trial of the action was had, and findings and an interlocutory decree of

divorce on the ground of cruelty were entered on the same day, the decree also providing for alimony to be paid the plaintiff and for a division between the parties of certain real and personal property. A final decree of divorce was entered in the action on September 28, 1915.

[2] "There was no demurrer to the complaint in this action, but even in the face of a general demurrer we would hold the foregoing allegations sufficient in the statement of a cause of action in a case of this character. The eighth paragraph in very plain and direct language charges the formation of a conspiracy by the defendants having for its object the alienation from the plaintiff of the affections of her former husband and thereby to deprive her of his protection, assistance, and consortium, that such conspiracy was actually executed or carried out by the defendants, and that by reason of the wrongful acts of the latter the plaintiff lost the love and the affection and the consortium of her said former husband. A complaint in substantially the same language was held good in *Humphrey v. Pope*, 122 Cal. 253, 54 Pac. 847. It is true that the complaint contains some matters which are wholly immaterial to and have no necessary connection with the cause of action pleaded, unless they may be regarded as explanatory by way of inducement of the cause stated; but where, as here, the complaint contains averments which do state a cause of action, it cannot be held bad even under a demurrer, albeit it does also contain matters having no connection with or in no way tending to explain the facts constituting the cause of action or how or in what manner such facts came into existence. If the matters referred to are nonessential or redundant, they could have been stricken from the complaint on motion, in which case the complaint would, as stated, still state a cause of action against the defendants for the alienation of the affections of plaintiff's husband.

[3, 4] "Nor is there any merit in the contention that the plaintiff is estopped in this action from denying certain facts alleged in her complaint in the suit for divorce against Louis De Bock. This contention arises from the fact that the plaintiff in the complaint in the divorce action charged that her then husband treated her in a cruel and inhuman manner for a period of more than one year 'next immediately preceding the commencement' of the action for divorce, particularizing therein certain occasions upon which acts of cruelty were practiced upon her by said Louis De Bock and specifically describing the nature thereof, some of which facts (it was alleged) having been committed in the month of August immediately preceding the month in which the action for divorce was instituted, whereas, in the present action, the plaintiff alleges in her complaint that she and her former husband 'up to about the month of June or July, 1914, lived happily together as husband and wife.'

"It is, of course, elementary that estoppels bind only parties and privies. An estoppel by judgment can only arise and be invoked where the subject-matter of the litigation and the parties are the same. Strangers to the suit or those not privies in law to the parties thereto are not precluded under the doctrine of estoppel from setting up rights which, as to them,

have not been adjudicated in the action. While the estoppel sought to be invoked here is said to be an estoppel arising upon and in the pleadings, yet, if this were true, we can perceive no logical reason for holding that in effect the attempt here is not to invoke an estoppel by judgment, since the findings of the court in the divorce action are in strict accord with the facts stated in the complaint therein, and certainly, if the plaintiff is upon the doctrine of estoppel foreclosed the right to deny in this action the truth of the facts alleged in her divorce complaint, a fortiori, should she be likewise handicapped by the judgment in the divorce action, which involves a definitive and conclusive adjudication of the facts as pleaded by her, so far as is concerned the cause of action so stated as against her former husband. But be that as it may, it is very clear that, since the parties to the present action were not parties to the divorce action and the subject-matter of the two actions is entirely and wholly different, the principle that an estoppel will not lie in such circumstances is equally applicable whether the claimed estoppel arises in the pleadings or by virtue of the judgment. It follows that the complaint in the divorce action can perform no other office in this action than that of evidence of an admission upon the part of the plaintiff that the material facts stated in her divorce complaint, which was verified, are true. It is not, of course, conclusive evidence of the truth of the facts so stated and may be rebutted, but it constitutes an admission against interest which may and should be considered in the determination of the issues of fact in the subsequent action. 'A verified petition filed in one case by a party is competent evidence against such party on the trial of another case as a statement or admission, but is not conclusive and carries nothing of estoppel.' *Solomon R. Co. v. Jones*, 30 Kan. 601, 2 Pac. 657. See, also, *Parsons v. Copeland*, 33 Me. 370, 54 Am. Dec. 628; *Murphy v. Hindman*, 58 Kan. 184, 48 Pac. 850; *Warfield v. Lindell*, 30 Mo. 272, 77 Am. Dec. 614; *Clemens v. Clemens*, 28 Wis. 637, 9 Am. Rep. 520; 16 Cyc. 1060; *Freeman on Judgments*, § 417a; *Black Judgm.* § 608; *Dahlman v. Forster*, 55 Wis. 382, 13 N. W. 264.

"The remaining and by far the more important problems submitted for solution here involve the question whether the verdict derives sufficient support from the evidence and the further question whether certain rulings upon the evidence were erroneous and, if erroneous, whether prejudicial in their effect upon the substantial rights of the defendants.

"Although, as seen, the briefs contain portions of the testimony, the writer has performed the decidedly operose task of reading all the testimony, which comprises approximately seven hundred pages of typewritten matter. This burden was assumed because of the claim that the evidence is wholly insufficient to support the verdict, and that a number of errors in the admission and exclusion of certain evidence was committed at the trial, and because, if they were errors, we are required to determine whether or not a miscarriage of justice has followed from those errors (article 6, § 4½, Const.)—a question which can be determined in this case only after an examination of the evidence.

"It is, of course, entirely out of the question to essay a reproduction herein, even in substance, of all the testimony which was received and presented to the jury. All that can be done or which, in our opinion, it is necessary to do, is to state in a concise form all of what may be termed the controlling facts; that is, all those facts which, in any view or under any possible interpretation, may be said to afford or tend to afford support to the cause of action stated in the complaint. This we will now proceed to do.

"The defendant August De Bock, spoken of as 'Gus,' is a brother of Louis De Bock, and defendant Clara E. De Bock, referred to in the record as 'Ella,' is the wife of August. Defendant Millie Fisher for many years had been an intimate friend of her codefendants. She first met Louis De Bock and the plaintiff in 1912, when she visited their house in company with Ella De Bock. Louis De Bock was an engineer in the employ of the Southern Pacific Company.

"There was testimony tending to show that plaintiff and her husband lived happily together for a period of over nine years, from their marriage in 1905 until the spring of 1914. They lived mostly at Roseville and Blue Canyon, in Placer county. During the period above mentioned Louis De Bock treated his wife in a kind and affectionate manner. He would kiss both her and her mother, who lived with her part of the time, when he left the house to go on his run. Plaintiff testified that in about March, 1914, her husband became cool and indifferent towards her; that in June, 1914, he went to Colfax to work, leaving her at Blue Canyon; and that about the first of August he deserted her. She also said that defendants had always been friendly towards her and had visited her frequently until in the summer of 1914, when they ceased visiting her and became very indifferent and cool toward her. Some time in the month of August, 1914, plaintiff and her mother visited Ella De Bock and Millie Fisher at the house of said Ella in Blue Canyon and had a conversation with them. Plaintiff spoke of a letter written by Ella De Bock and asked why she had written it. Defendant Ella said that she had written, saying that plaintiff and her husband were having trouble. Plaintiff testified: 'She started in about my husband, and she said that I was a fool to put up with him the way he was carrying on, and that he was low and dissipated, and she was sure he was running around with fast women, and she said that I was a superior woman to him; she said: "The only thing left for you to do is to get a divorce; if I were you I would go away off to Los Angeles, where I would never come in contact with him again. You could take him to the desert of Sahara, and he would never be any different."' Asked by plaintiff if she was sure her husband was running around with fast women, defendant Ella said that 'she didn't know it for a fact, but was sure of it. * * * She said: "I would take my maiden name back."' Plaintiff testified that defendant Fisher spoke up and said that she admired Ella for the way that she took the thing; that when she first met my husband she thought he was a pretty good looking fellow; but she said, "Now he is low and dissipated, degraded looking," and she said: "Kate, you are a fool to put up with anybody

like that; there is too many men in the world." And she says: "I could get one any time, but no man for me. I advise you to get a divorce." Plaintiff said that in July, 1914, at the house of Ella De Bock, in Roseville, she had a conversation with her husband in which she asked him: 'What is the matter with you, Lou, anyway? Why are you treating me this way?' to which he replied, 'Kate, the only way for you and I to get along is for me to quit my job, and for us to go off where my folks will never know where we are.' Plaintiff said: 'Why do you talk that way? * * * My folks aren't trying to separate us.' At about the same time, at Roseville, plaintiff's husband told her he was not going to live with her any more, and said, 'If you don't think you have got grounds enough to get a divorce, I will get a woman and let you catch me with her,' and plaintiff said he told her 'he had been running around with fast women, and all that sort of thing; he wouldn't live with me any longer.' She said that she had tried to get him to come back to her, even after she had filed her complaint for divorce, but that he said: 'It has gone this far, let it go through.' Plaintiff said that when she would go to the train to see her husband, if Gus and Ella De Bock were there he would hardly speak to her, but that when she would go the next day, if he was alone, he would get off the engine and kiss her and be himself again.

"Mrs. Rose Gray testified that very often she and Ella De Bock discussed the plaintiff, and that on one occasion said Ella stated that 'the only way Lou could get rid of her was to take her meal ticket away from her.' It appeared that plaintiff had a painting which she had taken to Sacramento to have valued, and Ella said to the witness that 'she didn't care if she got a hundred thousand dollars for the picture, just so she got out of the family, and left the De Bocks alone; that Gus said he would give her five dollars if she would take her maiden name back'; that plaintiff's influence was so strong over her husband 'that they would have to move away until this thing was put through.' At one time, speaking of the Caminetti case, Ella said to witness 'that she didn't blame Drew Caminetti at all, if he was in love with the girl, and that his own father upheld him, and that if she were in Lou's shoes, she would do the same.'

"Louis De Bock first met defendant Fisher in 1912, when she, with Ella De Bock, visited the home of himself and wife at Blue Canyon and remained there about eight or nine days. They made them another visit of two or three days' length in 1913. In the same year, Ella De Bock had a cottage at Truckee, where Miss Fisher was her guest. Louis De Bock visited them every Saturday night for about two months. He testified that in 1914 he saw Miss Fisher one evening in Oakland at his sister's house, and later the same year he met her again in Oakland.

"During the month of July, 1914, Mrs. Ella De Bock wrote to Mrs. Rose Gray, who lived at Blue Canyon, requesting her to secure a house for her at the canyon during the summer months and not to let plaintiff know of it. Mrs. Gray secured a house, and Mrs. Ella De Bock and Miss Fisher occupied it from the middle or latter part of July. Miss Fisher testified she had always been friendly with plaintiff and had visited at her house until the summer of 1914,

but that at that time 'we were requested by Mrs. Gus De Bock to stay away from there, not mix in our family affairs. At about this time, Ella De Bock and Miss Fisher kept their clothes on most of one night without retiring in order to be sure of meeting the respondent's husband as he passed through on his run at 4 o'clock in the morning. He dismounted from the engine and hugged and kissed both of them. On one occasion Clara E. De Bock met Louis De Bock at a train and 'patted him on the face in an affectionate way.' From June 15 to July 5, 1914, Louis De Bock roomed at the house of Mrs. Jessie M. Wales, at Colfax. Louis was then the fireman on the locomotive engine of which Mrs. Wales' husband was the engineer. While stopping at the Wales', Louis received one or more letters from the defendant Fisher, signed 'Millie,' and he spoke of her on those occasions as 'My Mill,' and called her his 'pal' and friend. On one occasion Louis showed Mrs. Wales some samples which he said were samples of Millie's dresses and that she (Millie) had sent them to him.

"In August, 1914, defendant Gus De Bock went to plaintiff's house to get Louis De Bock's hunting clothes. She said he told her that four men, including himself and her husband, were going on a hunting trip; that no women were going along. The three defendants went by train to Reno and were there met by Louis De Bock. From Reno the four of them, with a man named Judd, started in an automobile belonging to Gus De Bock and drove to Sacramento. The party stayed two days in Sacramento, Louis De Bock stopping at a hotel and the defendants going to the home of the mother of Mrs. Ella De Bock. The defendants and Louis De Bock then went in the automobile to Nelson, Chico, Oroville, and Lincoln, remaining one night in each place. They had a camping outfit with them, but the testimony was that they did not camp out at any time. The auto trip consumed about a week.

"We have now presented herein the salient facts brought out by the testimony. There are many other facts in the record of the same general character of those embraced in the foregoing statement to which we have not considered it necessary to make specific reference herein for the purpose for which the evidence is to be considered here.

"It must, of course, be conceded, in view of the verdict, that, notwithstanding that the plaintiff in her divorce complaint under oath declared that 'for more than one year next immediately preceding the commencement of the foregoing action, defendant has treated plaintiff in a cruel and inhuman manner,' etc., specifying times and places when and where such acts of cruelty were committed, she and her former husband, down to a few weeks prior to the commencement of said divorce suit, lived amicably and happily together, never prior thereto having had anything more than those inconsequential misunderstandings which are common among married people and which are mere temporary outbursts, generally not followed by serious results. These further facts are, from the verdict, to be conceded as having been established: That from the date of the intermarriage of Louis De Bock and the plaintiff, in the year 1905, down to about a year prior to the date of their separation by divorce, the defendants Gus and Clara E. De Bock were on uniformly friend-

ly terms with the plaintiff; that at about the time indicated they turned against the plaintiff, the defendant Gus De Bock having developed a feeling of intense hatred for her; that both Gus and Clara E. De Bock were at the least agreeable to if not anxious for a permanent separation of the plaintiff and Louis De Bock; that Gus and Clara De Bock, as well as Louis De Bock, were very much attached to Millie Fisher and that the latter reciprocated that sentiment as to all those three persons; that both Gus and Louis De Bock almost invariably, upon returning from their runs (Gus being also a locomotive engineer in the employ of the S. P. Co.), greeted both Clara E. De Bock and Millie Fisher, upon meeting them on those occasions, in a very affectionate manner, often kissing the women; that Gus De Bock, Clara E. De Bock, Millie Fisher, and Louis De Bock, between themselves arranged the outing in the automobile, mentioned above, and that (it may reasonably be inferred) it was the purpose of all of them to make the plaintiff believe that the party constituting the 'outing party' was to consist entirely of men—that no females were to be members thereof. It is further to be conceded that it is fairly and reasonably inferable from the evidence that Gus and Clara E. De Bock had discussed with Louis De Bock the proposition of a permanent legal separation between himself and the plaintiff. In a word, it is the duty of this court to assume that every word of the evidence as to the acts and conduct of the defendants in connection with the plaintiff and Louis De Bock is absolute verity," and so viewing the record, what shall we conclude as to the sufficiency of the evidence to support the verdict?

"Unquestionably, the theory upon which the complaint proceeds is that there existed between Louis De Bock and Millie Fisher a mutual sentiment of love and affection; that Louis, having transferred his affections from the plaintiff to Miss Fisher, desired to be freed from the then insuperable legal obstacle in the way of making that young woman his wife; that Gus and Clara De Bock, being greatly attached to Miss Fisher and having conceived a deep feeling of animosity against the plaintiff, joined Miss Fisher (and perhaps Louis De Bock) in a scheme the consummation of which would be the divorcement of the plaintiff and Louis and the subsequent intermarriage in due legal time of the latter and Miss Fisher. At the time of the trial of this case—over two years after the plaintiff was divorced from her former husband—Louis De Bock and Millie Fisher had not intermarried. There is no direct evidence that they ever intended to intermarry or that they were more than good friends. There is no evidence that they ever maintained improper relations with each other, unless it is to be declared that the fact that he, as did Gus De Bock, in the presence of his wife, often kissed her when he met her affords an inference of meretricious relations between them, a proposition abhorrent to decent and right thinking. But let it be assumed that Louis De Bock was 'in love' with Millie Fisher, that she loved him, and that as a consequence Louis lost all love and affection for his wife; yet the truth remains that there is no direct evidence that that condition was not brought about wholly and solely through the conduct and acts of Louis himself. In other words, if it be true that there was generated

and developed in the hearts of Louis De Bock and Miss Fisher a mutual sentiment of love and affection sufficient to overcome and destroy the love and affection which Louis once had for the plaintiff, the evidence, while perhaps having a tendency to do so, does not clearly show but that Louis himself was the wooer and not the wooed, and that he himself took the initiative in bringing about that state of feeling or sentiment between them. In short, the record discloses very slight evidence, the effect of which is to negative the proposition that Louis De Bock's whole conduct towards Millie Fisher was his own voluntary act, uninfluenced by any active interference on her part. *Buchanan v. Foster*, 23 App. Div. 542, 48 N. Y. Supp. 732, 735."

[5] Upon further consideration we have reached the conclusion that not only is the evidence against Millie Fisher very slight, but that it is not legally sufficient to justify a verdict against her.

"The evidence is obviously stronger against the De Bock defendants than it is against Miss Fisher. But the evidence against all the defendants is entirely of circumstances. There is no direct evidence that the conduct and acts of any of the defendants constituted the cause of the abandonment by Louis De Bock of his wife or his loss of affection for her." But, considering all the circumstances disclosed by the record, we think it cannot be said that the verdict as to the De Bocks is unwarranted.

In cases like this, depending for their support entirely upon circumstantial evidence, the task of the reviewing court is more difficult than in those instances wherein the verdict rests, in part at least, upon the direct testimony of witnesses. This circumstance furnishes an additional reason why we have given this record such deliberate consideration, devoting especially close attention to the questions whether the verdict is supported, and whether any prejudicial error was committed by the trial court in its rulings upon the admissibility of evidence.

As to the sufficiency of the showing to support a rational inference in favor of plaintiff we have already declared our judgment. It remains to notice the other specifications of alleged error, and of these only five are regarded of sufficient gravity to require specific attention.

[6, 7] 1. The record shows the following proceedings while the plaintiff was on the stand:

"Mr. Johnson: Q. In July, 1914, when you were visiting Ella De Bock at Roseville, did you have a conversation with your husband at that time? A. Yes. Q. Well, what was it? A. Well, I asked him what was the matter with him, and he told me—we had, we took a walk—he had not been treating me right for quite a while, and we took a walk and Ella De Bock, she went out some place, and him and I took a walk, and I asked him: 'What is the matter with you, Lou anyway? Why are you treating me this way?' And he said, 'Kate, the only

way for me to get along"— Mr. Wachhorst (interrupting): 'We object to that as irrelevant, incompetent, and immaterial.' The Court: 'It will be admitted for the purpose of showing the relations existing between the witness and her husband; not for the purpose of binding the defendants, except as it would show the relations. Go on.' A. Well, we took a walk, and I asked him what was the matter with him that he was treating me the way he was, and he said: 'Kate, the only way for you and I to get along is for me to quit my job, and for us to go off where my folks will never know where we are—never find out where we are.' I said: 'Why do you talk that way? My folks aren't trying to make trouble with me.' I asked it of him, and I said, 'You do not want to quit your position,' and I said to him, 'If you feel that way, why don't you quit?' and he said: 'No, I will take a lay-off.' And I said, 'My folks aren't trying to separate us.' He said: 'That is just the way it stands.'"

The point of the objection is that—

"The defendants could not be prejudiced by any declaration, act or omission of plaintiff or her husband not made in their presence." Code Civ. Proc. § 1848; *Humphrey v. Pope*, 1 Cal. App. 376, 82 Pac. 223; *Bashore v. Parker*, 146 Cal. 529, 80 Pac. 707.

It is quite obvious, however, that the only portion of the answer that could possibly prejudice the defendants was the statement in reference to their going away "where my folks will never know where we are." But a sufficient answer to appellants' criticism of this is that no motion was made to strike it out. The question itself was concededly proper, as evidence of conversations between the husband and wife was admissible to indicate their feelings towards each other. Hence, any objection to the question would have been properly overruled. But, if it may be said that the objection of appellants made in the midst of the answer can be considered as a motion to strike out, then it is quite apparent that the motion was properly denied, since she had up to that time said nothing whatever to connect appellants in the slightest degree with any trouble between herself and her husband. The proper practice in such cases is well settled, and it is sufficient to refer to the decision of the Supreme Court in the case of *People v. Lawrence*, 143 Cal. 148, 70 Pac. 893, 68 L. R. A. 193. Therein it is said:

"Under such circumstances, where it is not apparent from the question itself that the response thereto will, upon any theory of the case, be inadmissible, an objection alone to the question will be of no avail, but the party must, when the inadmissible evidence is for the first time disclosed by the answer, move to have it stricken out. This is the proper and only remedy, and the appellant here, having failed to avail himself of such a motion, is not in a position to predicate error merely upon a question which, upon its face, did not show that the testimony to be given in response to it would necessarily be inadmissible."

Moreover, the court in its ruling limited the consideration of the evidence to the single purpose of indicating the relation of the parties, and we must presume on appeal that it was considered by the jury only for that purpose.

[8, 9] 2. Complaint is made of the testimony of a Mrs. Wales that Louis De Bock told her either in June or July, 1914, that he had received two letters from the defendant Fisher. But the court struck out this evidence in the following language:

"As to the letters which Lou De Bock told her he received from Millie Fisher, why the motion will be granted. It is hearsay, anything that is told her, and her only information is what he told her—is hearsay."

Furthermore:

"The court instructs the jury that as the court has granted the motion to strike out that portion of the witness' testimony wherein she stated what Louis De Bock had told her concerning letters, and what he told her concerning whom the letter was from; but as to the letters which she saw herself and read, and the testimony will be one letter; that stands, and is not stricken out."

Appellants contend that there is some uncertainty as to this ruling. But it is clear that everything that was said by Louis De Bock was stricken out. There was nothing left of any importance in the answer to the question, to which an objection had been made. The one letter to which the court refers was undoubtedly the one concerning which she testified without objection when she was asked the question: 'Did Lou De Bock ever give you any letters to mail to Millie?' and she answered, "One." Furthermore, "What did you do with it?" and she answered, "I burned it." But, if we concede that the court did not fully strike out the testimony to which an objection was made, it is quite apparent that it resulted in no prejudice to appellants, since the same fact was shown without objection. *Fernandez v. Watt*, 26 Cal. App. 86, 146 Pac. 47; 3 *Corpus Juris*, 815.

3. The situation is similar in reference to the ruling of the court as to a conversation between plaintiff and one Bob Wales as to said correspondence. If error was committed, it was clearly without prejudice for the reason already stated.

Besides, the contents of the letters were not shown, and it cannot be assumed that there was anything therein of a compromising or improper character, or that the jury was influenced against any of the defendants by the mere circumstance that Lou De Bock had corresponded with Miss Fisher.

[10] 4. It is urged that the court erred in refusing a request of appellants to cross-examine the plaintiff in reference to a conversation with her husband. The request itself was somewhat indefinite, being in the following language:

"Well, now, your honor, in regard to Ben Smith, may I ask the question regarding a conversation along the same lines with her husband?"

The reference to "Ben Smith" may be understood when we recall that appellants had unsuccessfully attempted to question the witness about a conversation with said Ben Smith. If appellants desired to interrogate plaintiff concerning a conversation with her husband, they should have put the inquiry in more precise terms. It does, indeed, appear that the court did not so understand the question. Again, they should have asked the question of the witness directly to make it the proper subject of review. Moreover, the question does not purport to be in reference to any quarrel, disagreement, or dissension between her and her husband. If such was the purpose of the question, it should have been disclosed to the court. In *County of Sonoma v. Hall*, 129 Cal. 659, 62 Pac. 213, objections were sustained to certain questions upon cross-examination. It was contended on appeal that the questions should have been allowed for a certain purpose, not evident on the trial; but the Supreme Court said:

"If such was the purpose of the questions, a direct question should have been asked in such manner as to show the aim of counsel."

Again, assuming that counsel desired to ask the witness concerning a controversy about her having been in a hospital at Sacramento, it may be said that the husband testified fully as to the conversation, and it thus appears that the conversation did not amount to a quarrel and the fact that they lived together for six years thereafter is quite satisfactory evidence that said conversation did not cause their separation.

[11] 5. Plaintiff was asked on cross-examination concerning a "disagreeable conversation" with her husband about one Schultz. The trial judge made an objection to the question and then sustained his own objection. Such procedure is not to be commended except in unusual cases. Counsel for respondent seem to have been amply able to fully protect the interests of their client and they should have been permitted to make whatever objection they deemed advisable. But what has been said in reference to the preceding matter will apply to this question which related to an occasion of six years prior to the separation of the parties. And whatever discord was thereby created was clearly condoned and forgotten in the subsequent six years of felicitous marital relation.

[12] Some complaint is made of certain criticism made by the trial judge of one of the witnesses and of the counsel for appellant. It may be admitted that the stricture should not have been indulged in; but the jury was fully and clearly instructed to disregard

everything said by the court along that line, and we must assume that the instruction was followed.

The judgment as to Millie Fisher is reversed, and as to the other defendants it is affirmed.

HART, J. (concurring). As the writer of the former opinion filed in this cause, and in view of the fact that we have reached a different conclusion from that arrived at on the former consideration of the case, I deem it proper to explain that in the original consideration I was misled by the lack of clearness of the record as to the action of the court with respect to certain evidence to which objections were, in my opinion, well taken, and which I conceived to be, in view of the slightness of the proof against the defendants, sufficiently prejudicial to require a reversal of the judgment as to all the defendants. Upon a reconsideration of the rulings upon which the reversal by the former opinion was ordered, however, I find, as the present opinion shows, that the court struck out all the damaging portions of certain testimony to which objection was made, and that, as to other testimony, which I held to be erroneous and prejudicial, no motion was made to strike it out after it had been given, although there was an objection made to it after it got into the record. As the main opinion shows, in such circumstances—that is, where a proper question elicits from a witness improper testimony—the remedy is by a motion to strike out such testimony, a mere objection to it not being sufficient to preserve the right of the objecting party to have the questions so raised reviewed. Other rulings as to other testimony which appeared to my mind to be prejudicially erroneous are disposed of satisfactorily to me in the present opinion of the court.

I desire further to add that, after a fuller consideration of the case, I have become convinced that the judgment should not stand against the defendant Fisher. While it appears that the three defendants were close friends and companions, and that Louis De Bock was also very friendly with Miss Fisher, it was not made to appear that the latter did or said anything calculated to cause an estrangement between the plaintiff and her husband, or that she had or entertained any feeling of animosity or unkindness toward the plaintiff. There is no evidence tending to show that Miss Fisher ever attempted to persuade Louis to desert his wife or ever said anything to Louis or any other person in the least derogatory of the personal character of the plaintiff. There is, in short, nothing in the evidence tending in the slightest degree to connect Miss Fisher with a conspiracy to which the defendants De Bock might have been parties, the object of which was to cause a separation and divorce between the plaintiff and Louis De Bock. The

fact that Miss Fisher was on intimate terms of friendship with her codefendants and Louis De Bock is without special significance in the absence of proof that she had committed acts or uttered words calculated to influence Louis against the plaintiff, and which were designed by her to cause the alienation from plaintiff of Louis' love and affection. There are, it is true, some circumstances from which the conclusion might justly follow that Louis De Bock and Miss Fisher were "in love with each other"; but, conceding that to have been the case, there is no evidence showing or tending to show that Miss Fisher was responsible for that state of the affairs between them. In other words, putting it in the language of the main opinion, it was not made to appear but that Louis himself "was the wooer and not the wooed," and that but for what might have been, so far as the record discloses, his undue attentions to her, wholly initiated and persistently prosecuted by him, she would not have given him any serious thought as an unholy suitor for her affections. These observations are, of course, based upon the assumption that a reciprocal sentiment of love had developed between Louis and Miss Fisher, a fact as to which the evidence is by no means clear and convincing, since, after all, the evidence as to the relations between Louis and Miss Fisher and the sentiments they entertained for and toward each other is justly capable of the interpretation that their relations at all times were only those which commonly exist and are entertained between mere friends or between persons entertaining no thought of each other beyond that which is motivated by a mere ordinary sentiment of friendship.

But it is not necessary to discuss this matter further. I am satisfied, from a thorough examination of the record, that no case was made against Miss Fisher, and for the reasons stated in the main opinion I concur in the reversal of the judgment as to the defendant Fisher, and in its affirmance as to the defendants De Bock.

(43 Cal. App. 218)

HEGEL v. HANNAS et al. (Civ. 8059.)

(District Court of Appeal, Second District, Division 1, California. Sept. 8, 1919. Rehearing Denied by Supreme Court Nov. 6, 1919.)

1. CONTRACTS \Leftrightarrow 265—PROVISIONS OF STATUTE AS TO RESTORATION OF RIGHTS CONSTRUED TOGETHER.

Civ. Code, §§ 1691, 3407, and 3408, relating to restoration of status quo on rescission, must be construed together, for they are not mere statutory laws, but are declarations of well-understood principles of equity.

2. CONTRACTS \Leftrightarrow 265—RELIEF FOR FRAUD BY CANCELLATION.

If equity can be done between the parties, the courts will grant relief to the defrauded party, by way of cancellation of a contract, even though the parties cannot be placed exactly in statu quo.

3. EXCHANGE OF PROPERTY \Leftrightarrow 5 — RESCISSION OF EXCHANGE OF LAND FOR FRAUD.

Where defendants were guilty of fraud in effecting an exchange of land, plaintiff may obtain rescission of the contract, even though she had, before discovery of the fraud, entered into a cropping contract; judgment that defendant shall receive the share of the crops which plaintiff would otherwise have received being a sufficient provision for restoration.

Appeal from Superior Court, Los Angeles County; Frank G. Finlayson, Judge.

Action by Kate Hegel against Grace B. Hannas and another. From a judgment for plaintiff and an order denying their motion for an order vacating the judgment, etc., defendants appeal. Judgment and order affirmed.

B. T. Quinn, of Los Angeles, for appellants.

Charles J. Kelly and D. A. Stuart, both of Los Angeles, for respondent.

CONREY, P. J. The defendants appeal from the judgment and from an order denying their motion for an order vacating the judgment and for an order to amend and correct the conclusions of law and to enter a judgment for the defendants instead of the judgment rendered in favor of the plaintiff.

Both appeals raise the same question. The action was brought to rescind an exchange of real property between the plaintiff and the defendants. Upon evidence the sufficiency of which is not disputed, the court found that the transaction was tainted by fraud on the part of the defendants, and that the plaintiff is entitled to rescind. Finding 11 reads as follows:

"That after the plaintiff obtained possession of the land described in Exhibit C, and before she knew that the representations made to her by said Heber, which are hereinbefore found to be untrue, were in fact untrue, she made a cropping contract of said land for cropping purposes for the period of one year from the 11th day of January, 1918, to and with one Manuel Dueso, and by the terms of this cropping contract said Manuel Dueso has the right to go upon said land for the purpose of raising crops thereon until January 11, 1919. That under the terms of said cropping contract said Manuel Dueso has raised a crop of barley hay, and has now growing on said land a crop of beans. That one of the conditions of said cropping contract is that the plaintiff is to receive one-fourth of each of these crops, but has not yet received any part of either of them, but one-fourth of said hay crop is on said land ready for delivery by said Manuel Dueso. That said land has no buildings

or improvements thereon, and is only adapted to agricultural purposes, such as provided for in said cropping contract. That said cropping contract was an ordinary and proper use thereof. That otherwise than as provided by said cropping contract the plaintiff is able to surrender full possession of said land to the defendants. That the defendants are entitled to the one-fourth part of said crops that would have gone to the plaintiff under said cropping contract. That the making of said cropping contract, and the keeping of the land in cultivation thereunder, was beneficial to said land, otherwise it would be in an uncultivated condition and weeds would have grown thereon and reduced the value of said land. Said cropping contract has increased the value of said land, and therefore the defendants are not entitled to any other compensation on account of the right outstanding in said Manuel Dueso to go upon and use said land up to January 11, 1919, than said one-fourth of said crop."

The court ordered that the property conveyed by the plaintiff to the defendants be reconveyed to the plaintiff. It ordered that upon that reconveyance the plaintiff deliver to the defendants a reconveyance of the property conveyed by the defendants to the plaintiff, and that the plaintiff also deliver to the defendants an assignment in writing conveying to the defendants all her rights and interest in and under the Dueso lease, and also to all crops raised on said land under said lease.

[1-3] Section 1691 of the Civil Code provides that the party rescinding a transaction "must restore to the other party everything of value which he has received from him under the contract; or must offer to restore the same, upon condition that such party shall do likewise, unless the latter is unable or positively refuses to do so." Sections 3407 and 3408 of the Civil Code are as follows:

"Sec. 3407. Rescission cannot be adjudged for mere mistake, unless the party against whom it is adjudged can be restored to substantially the same position as if the contract had not been made.

"Sec. 3408. On adjudging the rescission of a contract, the court may require the party to whom such relief is granted to make any compensation to the other which justice may require."

Appellants contend for a strict application of the foregoing provisions of section 1691, and claim that the subsequent provisions above quoted cannot be applied until it is first shown that the plaintiff has fully and absolutely complied with section 1691. We do not agree with this contention. The three sections must be construed together. They are not mere statutory law, but are declaratory of well-understood principles of equity. "It is not an invariable rule that the rescission of a contract obtained by fraud will be denied merely upon the ground that the parties cannot be placed in statu quo. If equity

can still be done between the parties, courts will grant relief to the defrauded party." *Green v. Duvergey*, 146 Cal. 379, 389, 80 Pac. 234, 238. It is our opinion that the provisions as made in the decree in this case are sufficient to restore the defendants to substantially the same position in which they would have been if the rescinded conveyances had not been made. The Dueso lease was made for such a short time and upon such terms that the existence of such lease does not prevent the plaintiff and the court acting in this matter from doing substantial justice to the defendants, while at the same time the plaintiff's undoubted right to a rescission is enforced.

The judgment and order are affirmed.

We concur: SHAW, J.; JAMES, J.

(43 Cal. App. 241)

SAN JOAQUIN LIGHT & POWER CO. v. BARLOW. (Civ. 2294.)

(District Court of Appeal, Second District, Division 1, California. Sept. 8, 1919. Rehearing Denied Sept. 30, 1919.)

1. ASSUMPSIT, ACTION OF \S 23—CONTRACT PRICE ADMISSIBLE UNDER COMMON COUNT TO PROVE VALUE.

Though letters from plaintiff, power company, to defendant, consumer, proved a contract price for current furnished, by virtue of such fact they were also admissible under a common count to prove that the rate charged was reasonable.

2. APPEAL AND ERROR \S 277—RULING ON AND EXCEPTION TO EXCLUSION OF EVIDENCE.

In an action by a power company against a customer to recover for current furnished, conduct of the customer's attorney in refraining from cross-examination of the power company's witness as to the reasonableness of its rate, the court having announced that the only issue was whether the power company had furnished the amount for which it was charged, held equivalent to formal ruling not permitting any further cross-examination, and exception thereto.

3. WITNESSES \S 268(1) — CURTAILMENT OF CROSS-EXAMINATION.

In a power company's action against its customer to recover for current furnished, the trial court erred in cutting off, substantially at its beginning, the cross-examination of the company's clerk by the customer on the subject of the reasonable value of the electricity furnished, where the action was upon a common count and not on express contract, although letters in evidence proved a contract price; he being the only witness on the subject produced by the company, and his evidence having an important bearing on the fact.

4. APPEAL AND ERROR — 110 — No APPEAL FROM ORDERS DENYING NEW TRIAL.

Code Civ. Proc. § 963, as amended (St. 1917, p. 624), takes away the right to appeal from orders denying motions for new trial.

Appeal from Superior Court, Los Angeles County; Fred H. Taft, Judge.

Action by the San Joaquin Light & Power Company, a corporation, against C. H. Barlow. From judgment for plaintiff, defendant appeals. Reversed.

Frank P. Doherty, of Los Angeles, for appellant.

Stuart M. Salisbury, of Los Angeles, and Borton & Thelle, of Bakersfield, for respondent.

CONREY, P. J. In this action the plaintiff seeks to recover the sum of \$655.20 upon a common count for the alleged reasonable value of electric current delivered by plaintiff to the defendant. From a judgment awarding the demanded sum of money the defendant appeals.

The plaintiff introduced in evidence certain correspondence between the parties, constituting a contract which authorized the plaintiff to deliver electricity and to charge therefor at a stated rate. The evidence further shows that a stated quantity of electric current was delivered, and that the amount due therefor, when computed in the manner and at the rate named in the contract, is the sum demanded in this action. Simpson, a clerk whose duty it was to compute charges from meter readings brought into plaintiff's office, testified for the plaintiff, and stated that the several charges made were reasonable charges for the service rendered.

The errors claimed and relied upon, as we glean them from the briefs of appellant's counsel, are as follows: (1) That the letters were not admissible to prove a contract price, because the plaintiff's complaint counts upon reasonable value and not upon a contract price; (2) that the court erred in preventing cross-examination of Simpson for the purpose of testing his qualifications as a witness on the question of reasonable value, and for the purpose of showing that the charge was not reasonable.

[1] 1. Although the letters received in evidence proved a contract price, they by virtue of that fact were also evidence tending to prove that the rate charged was reasonable. "A promise to pay a specific sum is some evidence of value." *Steward v. Hinkel*, 72 Cal. 187, 191, 13 Pac. 494, 495. "Where an express contract has been fully performed by plaintiff and nothing remains to be done under the contract but the payment of money by defendant, and plaintiff sues on indebitatus assumpsit instead of on an express contract, the contract is admissible as evidence

of the amount due, and it is the best evidence of such amount, and prima facie establishes it." 5 Corp. Jur. 1409.

2. On cross-examination of Simpson, after some questions had been asked and answered, relating to the conditions under which the service was to be rendered, and for the stated purpose of reaching the question of what was a reasonable rate, counsel for plaintiff objected that defendant could not go into these matters, on the ground that defendant, by entering into the contract, was estopped to question the reasonableness of the rate. After discussion, the court announced that—

"The only issue here is of them furnishing the amount for which they are charging."

Mr. Doherty: "You mean no further testimony allowed on the proposition of whether or not the rate fixed by them was a reasonable rate under the issue of their pleadings?"

The Court: "I don't see that there is any open question there."

On the ruling thus made, defendant's counsel refrained from further cross-examination on the reasonableness of the rate. To the statement made by the court, and without any direct exception, counsel responded, "Well, on the ruling of the court, then, I will not ask any further questions on cross-examination as to the reasonableness of the rate."¹

[2] Although no question was formally propounded, with a ruling thereon from which under the statute an exception would be implied, the record made, as above stated, was equivalent to such formal ruling and exception. *Pastene v. Pardini*, 135 Cal. 431, 67 Pac. 681.

[3] The court erred in thus cutting off, substantially at its beginning, the cross-examination of Simpson on the subject of reasonable value of the electricity furnished to defendant. The effect of the ruling was to leave his testimony, as given on direct examination, unaffected by any additional statements by which it might have been modified on the cross-examination. No other witness on the subject was produced by plaintiff, and this evidence had such an important bearing on the fact at issue that the defendant was seriously prejudiced by the court's refusal to allow the cross-examination to proceed as indicated.

[4] As the court's order denying defendant's motion for a new trial was made after the right of appeal from such orders had been taken away by amendment of the statute (Code Civ. Proc. § 963; St. 1917, p. 624), the appeal from that order is dismissed.

The judgment is reversed.

We concur: SHAW, J.; JAMES, J.

For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

¹ This sentence added by amendment on denial of rehearing.

(43 Cal. App. 149)

BISHOP v. BARNDT et al. (Civ. 2982.)

(District Court of Appeal, First District, Division 1, California. Sept. 4, 1919.)

1. VENDOR AND PURCHASER ⇨95(2), 101 — RESTORATION OF VENDOR'S RIGHT AFTER SUSPENSION BY WAIVER.

Where time is made of the essence of a contract for the payment of money, as a land sale contract, and the covenant has been waived by acceptance of installments overdue, with knowledge of the facts, such conduct will be regarded as creating only a temporary suspension of the right of forfeiture, which may be restored by giving specific notice of intention to enforce it.

2. ESTOPPEL ⇨72—ESTOPPEL TO DENY VALIDITY OF ASSIGNMENT TO AGENT.

Where an assignment was signed in blank with the knowledge of the real party in interest, who in turn delivered to his agent, whose name was written into the assignment with the knowledge and consent of the real party in interest, the latter is estopped to deny that the assignment as delivered to his agent was valid, duly executed, and binding on him, and one not a party to the assignment cannot complain.

3. VENDOR AND PURCHASER ⇨207—No PRIVILEGE BETWEEN VENDOR AND THIRD PERSON WITHOUT ASSIGNMENT OF CONTRACT.

The assignee of a contract to convey by contracting to sell to a third person could not create a privity of contract or estate between her and the vendor without assigning his interest in whole or in part under the original contract, and without such assignment and notice of it the vendor was entitled to stand upon the contract with the vendee regardless of any subcontract the latter might make.

4. QUIETING TITLE ⇨7(1) — VENDOR AND PURCHASER ⇨214(1) — THIRD PERSON WITHOUT RIGHTS BECAUSE NOT ASSIGNEE OF CONTRACT.

Where, by contract with the assignee of a contract to convey, a third person assumed no obligations towards the vendor so as to bring herself into privity with the vendor, she acquired no rights under her contract, which did not operate as an assignment, and, having no rights, there was nothing for her to forfeit to the vendor, who was entitled, however, to have removed, in an action to quiet title, her claim operating as a cloud on title.

5. VENDOR AND PURCHASER ⇨101—REVIVAL OF RIGHT OF FORFEITURE BY VENDOR'S NOTICE.

Notice, served by the vendor of land by contract to convey on the real party in interest, several installments being in default, to the effect that the vendor would insist on the forfeiture clause unless payment was made promptly, held sufficient to revive all the vendor's rights under the contract, entitling her subsequently to stand strictly on its terms, and to have decree of forfeiture against the buyer and various assignees on their failure to pay within a reasonable time.

6. SPECIFIC PERFORMANCE ⇨114(2)—NECESSARY TO PLEAD AND PROVE CONTRACT JUST AND CONSIDERATION ADEQUATE.

A decree for specific performance of a contract to sell and convey land cannot be supported under Civ. Code, § 3391, in the absence of allegation and finding the contract was just and reasonable, and the consideration adequate.

Appeal from Superior Court, Orange County; W. H. Thomas, Judge.

Action by Ada M. Bishop against Elizabeth J. Barndt and others. From judgment for defendants, plaintiff appeals. Reversed.

Hartley Shaw, of Los Angeles, for appellant.

G. P. Adams and John C. Stick, both of Los Angeles, for respondents.

WASTE, P. J. This, in form an action to quiet title, is, in effect, one to declare a forfeiture of the rights of all the defendants in and to the real property in question. The facts of the case appear from the findings, fully supported by the testimony.

By an agreement of sale, made on February 6, 1913, the plaintiff agreed to sell, and the defendant Elizabeth J. Barndt agreed to buy, the land in question for the sum of \$1,300, payable \$100 upon the execution of the agreement, \$400 on March 1, 1914, \$400 on March 1, 1915, and \$400 on March 1, 1916, with interest at the rate of 7 per cent. per annum, payable semiannually; the buyer to pay all taxes after March 1, 1913. This contract, almost immediately after its execution, was assigned and transferred to defendant Stick, and, together with said assignment on the back thereof, was recorded in the office of the county recorder of Orange county, but not until May 29, 1915, just before this action was commenced. Time is the essence of the contract.

On August 14, 1913, defendant Stick sold the property under another contract to defendant Beulah B. Coward for the sum of \$2,400, on account of which defendant Coward had paid the sum of \$1,863.81 before trial of the action.

The initial payment of \$100, due under plaintiff's contract, was paid at the time of the execution of the agreement. The \$400 installment on account of principal, due March 1, 1914, and the various payments on account of interest, falling due prior to February 6, 1915, were paid by defendant Stick. None of these payments were made when due, but at various dates thereafter, and each was received and accepted by the plaintiff without any objection on her part. At the time the suit was commenced—July 23, 1915—the payment of interest due on February 6, 1915, and the \$400 installment on account of principal, due March 1, 1915, had

not been paid to plaintiff. Plaintiff had also paid certain taxes, assessed against the property, which had not been repaid.

Prior to the bringing of the action, no notice of any delinquency of any payment, or demand for the payment of the same, was made, or served, upon defendants Stick and Coward. Plaintiff never gave to the said defendants, or either of them, any notice that she would, or did, insist upon the provisions of the agreement between herself and Barndt, as to time being the essence of the agreement, or that she would declare a forfeiture of her contract with defendant Barndt, although she became aware of the existence of the agreement between defendants Stick and Coward in June, 1915, about one month before bringing this action.

The court found that defendants Stick and Coward were ready, willing, and able to pay to the plaintiff all money due under the contract between herself and the defendant Barndt. Those defendants, in open court, in keeping with this finding, offered to pay the amount, together with all taxes paid by plaintiff, and costs of suit, upon the condition that plaintiff convey the title to the premises to either of them, and deliver to the grantee a certificate of title, as provided in the original contract. Defendant Stick, by stipulation filed in the action, consented to the transfer being made directly to the defendant Beulah Coward. Plaintiff declined to accept the tender and convey the property. Counsel for the respective parties, by stipulation, then agreed that the amount due upon principal and interest, under the contract between plaintiff and defendant Barndt, provided the same was then in force, amounted at that time to \$901.87; that the taxes paid by plaintiff on said premises, including interest, amounted to \$13.20; and that plaintiff's costs amounted to \$19.95—making the total of principal, interest, taxes, and costs the sum of \$935.02. The defendants Stick and Coward then made tender of that amount in open court to the plaintiff, and the tender was refused. In lieu of the payment of the money into court, pending the final determination of the action, it was stipulated that the amount be deposited with a trustee, to hold the same, with proper instructions as to its disposition.

As its conclusion of law from the foregoing facts, the court found that plaintiff was entitled to recover of and from the defendants John C. Stick and Beulah Coward the above amount, upon her executing and delivering a proper deed and certificate of title, and, also, that the defendants in the action were entitled to a judgment and decree that plaintiff execute such conveyance to defendant Coward, and furnish proper certificate of title. Judgment and decree was entered in accordance with the findings. It was further decreed that, in the event said plain-

tiff refused to make such deed of conveyance and furnish such certificate of title within 40 days from the date of the judgment, the clerk of the court make, execute, and deliver to the defendant Coward such conveyance for and on behalf of plaintiff, and obtain and turn over the certificate of title, as directed. Plaintiff has appealed.

The judgment and decree of the lower court, if it is to be upheld, must rest upon the legal effect of its findings that all of the payments on the contract between plaintiff and defendant Beulah Coward, other than the initial payment of \$100, were made at various dates after the same became due, according to the terms of the contract, and were received and accepted by plaintiff without objection upon her part. From this conduct on the part of plaintiff, the trial court apparently reached the conclusion that plaintiff had waived the default, and failure to comply strictly and punctually with the conditions of the agreement to such an extent that plaintiff had induced the purchaser and assigns, in reliance thereon, to alter their course as to strict and punctual compliance with the contract. There is no finding to this effect.

In addition to the facts, outlined above, as found by the trial court, it appears from the evidence that Gail E. Moon, who was made a defendant, and answered generally, denying the allegations of the complaint, was the real vendee in interest in the contract between plaintiff and defendant Barndt. On May 18, 1915, and before she knew of the claim of defendant Coward to an interest in the property in litigation, plaintiff directed her attorney to send a letter to Moon. In this communication, after calling attention, by apt reference, to the contract between plaintiff and Mrs. Barndt, counsel said:

"I understand that you are the present owner of this contract, and this is to notify you that the sum of \$400 due under the terms of said contract March 1, 1915, has not been paid, and that the interest has not been paid beyond August 6, 1914.

"You are hereby notified that, unless the sums due under this contract are paid within 15 days from date hereof, Mrs. Bishop will exercise the rights conferred upon her by the contract, which recites that time is the essence thereof, and will declare all your rights under said contract to be forfeited, and will not recognize herself as being under any further obligation to perform said contract."

No attention was paid by defendants to this notice, and the amounts due were not tendered or paid to plaintiff. After waiting two months plaintiff commenced her action to quiet title.

Upon the foregoing admitted facts, the first question that arises is as to what were the rights of the respective parties on May 18, 1915, the date of plaintiff's letter to de-

fendant Moon. On that date the defendants were more than three months in default in respect to the semiannual installment of interest due under the contract, for the six preceding months, and nearly three months in default as to the payment of the installment on principal due March 1, 1915. According to the strict letter of the agreement, making time the essence thereof, the vendees under the contract were then subject to the penalty of having their contracts canceled and of a forfeiture of the payments which they had theretofore made, unless, as contended by defendants, the plaintiff, by receiving without objection the several payments which the defendants had tardily made, can be held, by her action in so doing, to have waived her right to insist upon the strict letter of the contract. Defendants claim that plaintiff is no longer entitled to take advantage of their past delinquencies, so as to either declare the contract canceled because of them, or to claim a forfeiture of such payments as she had theretofore received without objection, when they were not made on the dates fixed by the contract. In urging this contention they rely, among many others, upon *Pearson v. Brown*, 27 Cal. App. 125, 129, 148 Pac. 956; *Boone v. Templeman*, 158 Cal. 290, 295, 110 Pac. 947, 139 Am. St. Rep. 126; *Stevinson v. Joy*, 164 Cal. 279, 285, 128 Pac. 751; *Sausalito Bay Land Co. v. Sausalito Improvement Co.*, 166 Cal. 302, 307, 136 Pac. 57.

[1] These cases support respondent's contention, as being the correct rule under proper circumstances. Our attention has not been called, however, to any cases holding that the vendor may not by proper steps revive such right of forfeiture after default. On the contrary, it is the law that where time is made the essence of the contract for the payment of money, and this covenant has been waived by acceptance of the installments after they were due, and, with knowledge of the facts, such conduct will be regarded as creating only a temporary suspension of the right of forfeiture, which may be restored by giving a definite and specific notice of an intention to enforce it. *Stevinson v. Joy*, supra; *Boone v. Templeman*, supra. As was said in the latter case:

"The simple act of receiving a payment after the date when the payee was bound to accept it, without more, is no excuse for laches as to future payments. The effect of the acceptance is exhausted upon the payment made, and, as to those following, the provisions of the contract are left to operate with unimpaired force."

This court, in *Pearson v. Brown*, supra, took note of this power, resting in a vendor to revive and restore the right to a forfeiture under contracts wherein time is made the essence thereof. In speaking of the notice given in that case the court said:

"The utmost effect, under the foregoing rule [relating to waiver by accepting past due payments], which would be given to it, would be that of a notification to the vendees that the vendor intended thereafter to insist upon a strict compliance upon the terms of the contract; and, that, unless within a reasonable time the vendees paid up their deficiencies, and thereafter made their payments strictly in accordance with the time conditions of their contract, the forfeiture clause would be enforced."

[2] Appellant contends that she has complied with all the requirements of the rules laid down by the cases we have cited, in that ample notice of default and forfeiture was in fact given. She relies upon the notice contained in the letter of May 18th, sent by her attorney to the defendant Moon. This letter, as will be noted, was sent after the assignment from Barndt to Stick, and the execution of the separate contract between Stick and Miss Coward, and before plaintiff had knowledge of the latter's claim to an interest in the property. Appellant's first contention in this regard is that Moon was still the owner and holder of all the rights under the original contract, and that service of the notice upon him was sufficient within the application of the established rule. In making this contention she relies, first, upon the fact that the assignment by Mrs. Barndt was executed and delivered in blank, the name of John C. Stick, as assignee, having been inserted thereafter, and, for the law to sustain the proposition, cites *Arguello v. Bours*, 67 Cal. 447, 8 Pac. 49. In that case it was held that a deed, in which the name of the grantee was left blank by the grantor at the time of its execution and afterwards inserted without his authority, did not convey any interest, nor become sufficient to pass title because the grantee entered into possession and paid the purchase price. We have no such state of facts in the present case. Mrs. Barndt signed the assignment in blank, with the knowledge of the defendant Moon, the real party in interest, and he, in turn, delivered the contract to defendant Stick, who appears to have at all times conducted the entire transaction for and on his behalf. Thereafter, the name of Stick was written into the assignment with Moon's knowledge and consent, and apparently for the purpose of carrying out some arrangement between the two. Moon was estopped to deny that the assignment, as delivered to Stick, was valid, duly executed, and binding upon him (*Dolbeer v. Livingston*, 100 Cal. 617, 621, 35 Pac. 328), and appellant, who was not a party to the assignment, cannot complain.

Appellant's second point in support of her contention that the notice given to Moon was amply sufficient to revive her right of forfeiture is that, notwithstanding the assignment by the latter to Stick, Moon was

in reality the owner of all the rights conferred by the contract. This suggestion is entitled to more serious consideration. The testimony bearing on this subject is neither full nor elucidating, and some of it is hearsay. But the only inference which can safely be drawn from the evidence is that appellant is correct in her contention. There is absolutely no showing to the contrary. Notwithstanding that the trial court found that defendants Barndt and Moon had no right or interest in the real property, we are fully satisfied from the statements made by Stick to plaintiff and the admissions contained in his letters to her and from the testimony of Moon that Stick and Moon were one in interest in the contract. Moon testified that Stick acted as his representative in dealing with Miss Coward.

[3, 4] Appellant's contract bound her, on receiving the payments at the time and manner therein mentioned, to deliver a certificate of title showing the property free from incumbrances, and execute and deliver to the buyer or her assigns a good and sufficient deed thereof. She contends, however, that defendant Coward was not an assignee of the contract, and in no way party thereto; that there was no privity between plaintiff and her; and that Miss Coward was not entitled to the notice to perform, and is not now in position to enforce the contract. Appellant is correct in this contention. While defendant Stick had an ostensible equitable interest in the land acquired by the assignment of the Barndt contract, which he had the right to contract to convey to Miss Coward (*Rogers Dev. Co. v. Southern California, etc., Inv. Co.*, 159 Cal. 735, 739, 115 Pac. 934, 35 L. R. A. [N. S.] 543), she was a stranger to the plaintiff. Her agreement with Stick was a separate and independent contract, without any reference to the contract between plaintiff and Barndt, and plaintiff was not required to take any notice of it. Stick, by contracting to sell to Miss Coward, could not create a privity of contract or estate between her and plaintiff without assigning his interest, in whole or in part, under the original contract. Plaintiff, without such assignment, and notice of it, was entitled to stand upon her contract with her vendee regardless of any sub-contract the latter might make. The contract between defendant Stick and Miss Coward did not operate as an assignment of the contract between plaintiff and Barndt. Miss Coward assumed no obligations under that agreement towards plaintiff so as to bring herself into privity with her. This being so, she acquired no rights under the contract,

and, having no rights, consequently there was nothing to forfeit. Her claim, however, operated as a cloud upon the title of plaintiff which she was entitled to have removed in this form of action. *Stratton v. Cal. Land, etc., Co.*, 86 Cal. 353, 360, 24 Pac. 1065.

[5] The notice served by plaintiff on defendant Moon was, in our opinion, under the disclosed facts of this case, sufficient to revive and restore all plaintiff's rights under her contract, and she is now entitled to stand upon its terms. When she gave the defaulting vendees a reasonable time within which to pay the money due thereunder, they should have met the requirements of the notice. When they did not they forfeited all rights under the contract. Plaintiff is doing no more than to insist that under the terms of the contract defendants have no further rights thereunder, but have forfeited all such. Her action to quiet title amounted to no more than the calling of the defaulting vendees into court to show why it should not be decreed that, under the terms of the contract, all their rights thereunder were at an end. In the absence of some sufficient equitable showing to excuse their failure to comply with the terms of the contract, which defendants failed to make, the plaintiff was entitled to such decree. *Oursler v. Thatcher*, 152 Cal. 739, 745, 93 Pac. 1007. Defendants were not entitled to the finding made by the trial court that the contract between plaintiff and Mrs. Barndt was still in force and effect. It is a finding against fact. The finding that the contract made between defendants Stick and Miss Coward was still in force and effect is a finding on an immaterial issue.

[6] Specific performance in this case was decreed upon the answer of defendant Coward. Even though she were in position to seek such relief, her answer does not state sufficient facts, for it is not alleged therein that the consideration to be paid plaintiff for the land is adequate, or that the Barndt contract is just and reasonable. *White v. Sage*, 149 Cal. 613, 614, 87 Pac. 193. No evidence was received upon this subject, and there is no finding in regard to it. A decree for specific performance cannot be supported in the absence of allegation and finding that the contract was just and reasonable, and the consideration adequate. *Civ. Code*, § 3391; *Gibbons v. Yosemite Lumber Co.*, 172 Cal. 714, 716, 158 Pac. 196.

The judgment is reversed.

We concur: RICHARDS, J.; KERRIGAN, J.

(74 Okl. 313)

SOUTHERN SURETY CO v. SMITH.
(No. 7898.)(Supreme Court of Oklahoma. June 6, 1917.
Order Granting Rehearing Set Aside and
Appeal Dismissed Nov. 25, 1919.)*(Syllabus by the Court.)***APPEAL AND ERROR** ⇨511(2)—**CASE-MADE—**
JURISDICTION—DISMISSAL.

Where it does not affirmatively appear from the record that the purported case-made was served within the time fixed by the trial court, or within an extension of the time allowed, such case-made is a nullity, and confers no jurisdiction upon this court, and the appeal will be dismissed.

Commissioners' Opinion, Division No. 1.
Error from District Court, Pawnee County;
Conn Linn, Judge.

Action by George H. Smith, guardian of James Peters, a minor, against the Southern Surety Company. Judgment for plaintiff, motion for new trial overruled, and defendant brings error. Appeal dismissed.

William T. Hutchings, of Muskogee, for plaintiff in error. Clark & Armstrong, of Pawnee, for defendant in error.

COLLIER, C. This is an action brought by the defendant in error against plaintiff in error to recover upon a bond executed as surety for a guardian. There was judgment for defendant in error in the sum of \$1,600, and interest, to which plaintiff in error duly excepted. Motion for new trial was timely filed, overruled, said action of the court duly excepted to, and error brought to this court.

Motion is made to dismiss the appeal upon the ground that it does not affirmatively appear from the record that the case-made was served within the time fixed for service thereof, and upon other grounds which we deem unnecessary to consider. A careful examination of the record does not disclose that the case-made was served upon the defendant in error within the time allowed by the court or was served at any time. The letter of the attorney for defendant in error to attorney for plaintiff in error, relied upon by plaintiff in error as proof of the time of service of said case-made, is too indefinite to constitute proof of service of the case-made. Besides, said letter was not written until after the expiration of time fixed for service of the case-made, at a time that the trial court could not have legally extended the time for serving a case-made, the time fixed therefor having expired. The case-made is a nullity, and confers no jurisdiction upon this court, and is not certified as a transcript.

"A purported case-made which is not served within the statutory time after the judgment ap-

pealed from is entered, or with an extension of time duly allowed, is a nullity, and cannot be considered by the Supreme Court." *Navarre v. Finerty*, 154 Pac. 1143; *Powell v. First State Bank of Clinton*, 155 Pac. 500.

"An order or orders, purporting to grant an extension of time in which to serve case-made for appeal to the Supreme Court, made after the expiration of the time or times formerly allowed, is and are nullities, and appeal based upon service of case-made thereunder will be dismissed." *Morgan v. Board of Commissioners of Logan County*, 159 Pac. 514.

It follows that the appeal must be dismissed.

PER CURIAM. Adopted in whole.

(76 Okl. 231)

INTERURBAN CONST. CO. et al. v. CENTRAL STATE BANK OF KIEFER
et al. (No. 8841.)

(Supreme Court of Oklahoma. June 24, 1919.)

*(Syllabus by the Court.)***1. RAILROADS** ⇨171(10)—**LIENS FOR LABOR AND MATERIALS BARRED BY LIMITATIONS.**

In a suit by a mortgagee for its debt and to foreclose the mortgage given to secure the same, upon the property of a street railway company, the mortgagor, wherein a receiver was asked for and was appointed by order of the district court directed to take charge of all the property, goods, moneys, and effects of said defendant and preserve the same until further order of the court or the judge thereof, and thereafter other mortgagees were allowed to intervene and filed their actions for debts and a foreclosure of their mortgages upon the property of the defendant, then in the hands of the receiver, and more than one year thereafter claimants were allowed to intervene and file their action upon claims for labor and material furnished under the provisions of and to establish their respective liens under the provisions of Rev. Laws 1910, §§ 3868-3871, and where it is conceded that no suit was commenced on such claims within one year after the same accrued, nor was any intervening petition filed in the action brought by the mortgage, on behalf of such claimants, within one year after such claims accrued, and that no notice was given by any of such claimants as required by section 3871, *held*, that the claims of such claimants to liens and the right to have the same enforced against the property of the defendant in the hands of the receiver and declared by the court to be prior to the liens of the mortgagees and ordered to be first paid by the receiver were barred by the terms of the statutes, *supra*.

2. CORPORATIONS ⇨559(6)—**RAILROADS** ⇨177(10)—**CLAIMS OF LABORERS AND MATERIALMEN BARRED BY FAILURE TO INTERVENE IN FORECLOSURE WITHIN ONE YEAR FROM ACCRUAL.**

In a suit to foreclose a mortgage, and for the administration of the assets of the mort-

gagor, an insolvent corporation, a receiver for all its property was appointed and a reference made to a referee, but it was only by the decree subsequently made that the court showed its ulterior intent to make an equitable distribution of the funds, among all the creditors and provided for notice to them to file their claims. *Held:* (a) That, until a decree appointing such referee, creditors were entitled to sue at law, and by judgment acquire priority in an equitable distribution of the property including that covered by the mortgage. (b) But where creditors base the right to have their claims adjudged to be liens prior to the liens of the mortgagees, under Rev. Laws 1910, §§ 3868-3871, their failure to bring suit within one year from the accrual of such claims and to give the notice to the defendant provided for in the statute and failed to intervene in the suit brought by the mortgagees to foreclose their lien upon the property of the defendant corporation within one year from the accrual of their claims, such right to a preference lien over that of the mortgagees provided in the statutes will be barred by the running of the limitation named in the statute.

3. RAILROADS — 197—PRIORITY OF LIENS OVER MORTGAGE—NET INCOME IN HANDS OF RECEIVER—PROCEEDS OF SALE.

Where a court of equity at the suit of creditors acquires jurisdiction to establish priorities of liens upon and order a distribution of the proceeds arising from the sale of the property of an insolvent railway corporation, and certain creditors claim priority of payment of their claims to those of the mortgagees, because the claims of the former were for material and labor furnished for the betterment of the mortgaged property within six months next before such property was placed in the hands of a receiver, who operated the railroad for about three years, at the expiration of which period he sold the same by order of the court, *Held:* (a) Equity will decree a prior lien in favor of such claimants to that of the mortgage lien which was prior in point of time upon the net surplus income only, arising from the operation of the railroad by the receiver and not upon the proceeds of the sale of the mortgaged property. (b) Where there was no diversion by the receiver of the income derived from the operation of the railroad to betterments of the property, and the entire amount of such income was expended by him in the payment of operating expenses and taxed, and that after such payment there was no net income, but a deficit existed and was paid from the proceeds of the sale of the mortgaged property, it is further *held*, that there being no net income in the hands of the receiver, derived from the operation of the railroad, the claimants were not entitled to an equitable lien upon moneys in the hands of the receiver derived from the sale of the mortgaged property.

(Additional Syllabus by Editorial Staff.)

4. LIENS — 8—STATUTE MEASURE OF RIGHT.

The rule of construction of lien statutes which create a right and provide a remedy is that the requirements of the statutes and conditions prescribed therein are the measure of the right, and the court cannot declare purpose-

less and useless that which the Legislature has made a condition of the lien.

Error from District Court, Tulsa County.

Action by the First National Bank of Tulsa, Okl., against the Oklahoma Union Traction Company, to foreclose a note and mortgage, in which a temporary receiver was appointed to take charge of defendant's property, and in which the Colonial Trust Company and the Central State Bank of Kiefer were allowed to file petitions in intervention against the defendant praying for foreclosure of mortgages against it, and in which the Interurban Construction Company and A. A. Small and G. B. Small filed their petitions in intervention against the defendant, to enforce mechanics' liens. Cause referred to a referee, whose report finding that claimants were not entitled to liens on defendant's property was confirmed by the court, claimants' motions for new trial overruled, and claimants bring error. Affirmed.

Geo. T. Brown, of Tulsa, for plaintiffs in error.

Biddison & Campbell, of Tulsa, for defendants in error.

JOHNSON, J. On September 21, 1910, the Oklahoma Union Traction Company gave a note and mortgage on its property to the First National Bank of Tulsa, Okl., for \$6,918.

On December 9, 1911, the First National Bank commenced this action in the district court of Tulsa county against the Oklahoma Union Traction Company to recover the amount due on this note and to foreclose its mortgage. The bank asked for the appointment of a receiver, and the court ordered:

"That Percival E. Magee, of the county of Tulsa, and the state of Oklahoma, be appointed temporary receiver in said cause; that the amount of his bond as receiver be fixed at the sum of \$5,000; and that, upon his qualification, such receiver take charge of all the property, goods, moneys, and effects of said defendant and preserve the same until the further order of the court or the judge thereof."

This was the only order made appointing a receiver. The receiver did take charge of all the property of the Oklahoma Union Traction Company.

On December 12, 1911, the Colonial Trust Company was permitted by the court to file its petition of intervention asking judgment against the Oklahoma Union Traction Company for \$31,931, and also praying for the foreclosure of its mortgage against the property of the mortgagor.

On April 27, 1914, the Central State Bank of Kiefer, defendant in error, filed its petition of intervention in said suit asking a judgment against the Oklahoma Union Trac-

tion Company for \$6,025, and for the foreclosure of its mortgage against the property of the Oklahoma Union Traction Company.

On June 1, 1914, the plaintiffs in error filed their petition of intervention in said cause asking judgment of \$11,484, and alleging that in the year 1911 they furnished labor and material to the Oklahoma Union Traction Company to the amount of \$11,484, alleging that this was due on June 1, 1911, and that they were entitled to a lien on the property of the Oklahoma Union Traction Company for that amount, and also asking that all other parties be barred from any right or interest in the property of the company.

Plaintiff in error A. A. Small in his petition of intervention asserts a claim of \$1,896 on account of work and labor performed by him for the street railway company during the months of September, October, November, and December, 1911, in the equipment and operation of said railway company. The plaintiff in error G. B. Small in his petition of intervention asserts a claim in the sum of \$700 for work and labor performed by him for said railway company during the months of April, May, June, July, August, September, October, and November, 1911, in the equipment and to facilitate the operation of said street railway. There is no dispute as to the amounts of these various claims, as will appear from the report of the referee.

The cause was afterwards referred to W. T. Tucker, referee, to try said cause and make a report to the court. He made his report on April 21, 1916, finding that the plaintiffs in error were not entitled to a lien on the property of the Oklahoma Union Traction Company.

Exceptions were duly saved to this report and presented to the referee and to the court in proper motions; but the report of the referee was, over the objections and exceptions of these plaintiffs in error, approved and confirmed by the court. Motions for new trial were overruled, and the judgment complained of herein was rendered, in pursuance of said report under date of June 30, 1916. Superseas bonds were given by these plaintiffs in error, and this appeal taken and lodged herein.

The plaintiffs assign error: (1) The trial court and referee erred in overruling the motions for new trial. (2) Trial court erred in approving, adopting, and confirming report of the referee. (3) The referee and trial court erred in overruling exceptions and objections of the plaintiffs to the report, findings, recommendations, and conclusions of the referee. (4) Trial court erred in rendering judgment against the Oklahoma Union Traction Company and in favor of the defendant Colonial Trust Company, and the Central State Bank of Klefer. (5) The court erred in ordering the receiver to satisfy the judgments in favor of the Central State Bank and Colonial Trust

Company out of the funds in the hands of said receiver derived from the sale of the property of the traction company, to the exclusion of the claims of the plaintiffs. (6) The court erred in approving findings of fact Nos. 8, 9, 13, 18, 19, and 31, and conclusions of law Nos. 1 to 16 of the referee. (7) Referee and court erred in refusing to render judgment in favor of the plaintiffs that they participate in the distribution and receive the payment of their said respective claims out of the funds in the hands of the receiver, arising from the sale of the property of the traction company. (8) The referee and court erred in finding and adjudging that there had been no diversion of the current earnings while in the hands of the receiver. (9) Referee and the court erred in not finding and adjudging that the claims and liens of plaintiffs against the property of the traction company and the proceeds derived from the sale thereof to be prior and superior under the statutes and laws of the state of Oklahoma to the lien and claim of the mortgage bondholders, the Central State Bank of Klefer, and the Colonial Trust Company. (10) That the findings of the referee and the approval thereof by the court and the judgment of the court based thereon are not sustained by the evidence and contrary to the evidence. (11) The judgment of the trial court and conclusions of law of the referee are contrary to law.

The plaintiffs in error discuss the foregoing assignments of error under three propositions:

First. Because the claims of the plaintiffs in error are entitled to priority of payment to the mortgage lienors, from the funds in the hands of the receiver from the sale of the mortgaged property under the provisions of sections 3868 to 3871 of the Rev. Laws of Oklahoma 1910.

Second. Because the claims of the plaintiffs in error are entitled to priority of payment to the mortgage lienors, from the funds in the hands of the receiver as equitable liens arising by reason of plaintiffs in error having furnished labor, materials, and supplies necessary to the maintenance, operation and improvement of the railroad, a reasonable length of time, to wit, within six months prior to the receivership.

Third. Because the claims of the plaintiffs in error are entitled to priority of payment to the mortgage lienors, from the funds in the hands of the receiver from the sale of the mortgaged property, since said claims having accrued within six months prior to the appointment of a receiver, and since the income of said property during the receivership was expended for betterments and improvements of the property covered by the mortgage under which mortgage lienors hold.

The sections of the statutes referred to are as follows:

"Sec. 3868. Every mechanic, builder, artisan, workman, laborer or other person, who shall do or perform any work or labor upon, or furnish any materials, machinery, fixtures or other thing towards the equipment, or to facilitate the

operation of any railroad, shall have a lien therefor upon the road-bed, buildings, equipments, income, franchise, and other appurtenances of said railroad, superior and paramount, whether prior in time or not, to that of all persons interested in said railroad as managers, lessees, mortgagees trustees, beneficiaries under trust or owners.

"Sec. 3869. The lien mentioned in the preceding section shall not be effectual unless suit shall be brought upon the claim within one year after it accrued.

"Sec. 3870. The said lien shall be mentioned in the judgment rendered for the claimant in an ordinary suit for the claim, and may be enforced by ordinary levy and sale under final or other process of law of equity.

"Sec. 3871. A notice of ten days shall be given to the railroad of the existence of a claim or the intended lien which is contemplated under this article."

[1-3] It is conceded by the plaintiffs in error that no suit was filed by them to enforce their claims and liens against said Oklahoma Union Traction Company, other than their participation in this receivership action. It is also admitted that the several petitions of intervention of the plaintiffs in error were not filed within one year after the several claims accrued. It is contended, however, that inasmuch as the court, by its officer, had taken charge of all of the properties and franchises of said street railroad within the one year period (in fact, within six months of the creation of the indebtedness for which the claims of plaintiffs in error are asserted) the suit and notice mentioned by sections 3869 to 3871, supra, were unnecessary. In other words, that section 3869 of the act being in the nature of a statute of limitation is stayed during the period of receivership, and that, since the court had taken possession of all the property and franchises of said railroad, the plaintiffs in error could not bring the suit mentioned in section 3869, supra. So that all that was necessary, in order that plaintiffs in error have the benefit of section 3868 of the statute, was for them to intervene herein before the final determination of this cause. That if they could not bring a separate independent action, then why serve the notice? That the law does not require the doing of a vain act. That section 3868 gives the lien, fixes the right, and the following sections of the act simply go to the remedy. Under the contentions of the plaintiffs, one thing is clear; that is, had not the receiver been appointed, the plaintiffs in this case would not have been entitled to a lien under the sections of the statutes quoted supra, because no suit was commenced by any of them within one year from the accrual of their claims, and such default would have been a complete bar to the assertion of such a lien. But it is asserted that the appointment of a receiver in this suit within a year operated to suspend the running of the statute. So the question thus presented is:

Did the appointment of a receiver toll the statute? On this question, we find that in *High on Receivers* (4th Ed.) § 184, it is said:

"The appointment of a receiver over the estate or property does not alter or affect the rights of the parties as regards the operation of the statute of limitations."

In 25 Oyc. 1282, it is said:

"As a general rule, the mere appointment of a receiver does not in any way affect the running of the statute of limitations. But where the receiver is appointed to take charge of an estate for the purpose of administering it, as for instance the settlement of affairs of a partnership and the payment of firm debts, the statute being substantially for the benefit of all the creditors, in analogy to an ordinary creditor's bill, the running of the statute of limitations is suspended in equity against the claims by firm creditors for the payment of partnership debts out of the assets in the receiver's hands."

In support thereof the following cases were cited: *Cain v. Seaboard Air Line*, 138 Ga. 96, 74 S. E. 764; *Taylor v. Vossburg Mineral Springs*, 128 La. 364, 54 South. 907; *Williams v. Taylor*, 99 Md. 306, 57 Atl. 641.

The authorities quoted announce the general rule as above stated. In this case, the action was commenced in the district court of Tulsa county, by the First National Bank of Tulsa, for the foreclosure of its mortgage upon the property of the Oklahoma Union Traction Company, and in its petition alleged the insolvency of the defendants, and asked for the appointment of a receiver. A receiver was appointed, took charge of the street railway, and operated the same for about three years, after which time he sold the same by order of the court, and, in the meantime, the defendants Central State Bank of Kiefer and Colonial Trust Company intervened and filed actions respectively for foreclosure of mortgages upon the property of the defendant, then in the hands of the receiver. More than two years thereafter, the plaintiffs respectively presented their claims, claiming prior lien upon the property of the defendant by reason of the provisions of the statute quoted supra; and (2) since such claims having accrued within six months prior to the appointment of a receiver, that the same were a lien in equity upon the income of said property during the receivership, which lien was prior to that of the mortgage lienors.

A referee was appointed by the court on December 14, 1914, the property having been previously sold by the receiver and such sale confirmed by the court. The referee made findings which were approved by the court, denying the claims of plaintiffs for liens upon both grounds, holding as to the first ground contended for by the plaintiff that by reason of plaintiffs' failure to bring suits to establish their statutory liens within one year from the accrual thereof as provided by the stat-

ute, or to present their claims in this court in this cause within said period, and their failure to give notice as required by the provisions of the statutes, they were barred. And as to plaintiffs' second contention, that the lien in equity for materials and labor furnished to railroad within six months prior to the appointment of a receiver could not exist only as to surplus income in the hands of the receiver after the payment by him of claims for operating and expenses incurred for such operation and taxes upon the property in his hands, and made further findings which were approved by the court, that no such surplus existed, and therefore the plaintiffs were not entitled to a prior lien upon the mortgaged property or moneys in the hands of the receiver derived from the sale of such property under an order of the court, and such findings on the latter contention is fully sustained by the decisions of the Supreme Court of the United States in the case of *Gregg v. Metropolitan Trust Co.*, 197 U. S. 188, 25 Sup. Ct. 415, 49 L. Ed. 717; also by the Circuit Court in *Kan. Loan & Trust Co. v. Electric Light Co.*, 106 Fed. 702, and *Chicago & A. R. v. United States & Mex. T. R. Co.*, 225 Fed. 940, 141 C. C. A. 64.

The plaintiffs' contention that this action being brought by the First National Bank of Tulsa, to foreclose its mortgage and the appointment of a receiver, as was done in this case, precluded them from bringing suit mentioned in section 3869, supra, cannot be maintained. The action was instituted by the holder of a mortgage lien to foreclose the same, and upon its motion a receiver was appointed and directed to take charge of all the property, goods, money, and effects of the said defendant, and preserve the same until further order of the court. The action was in no character one that would of necessity result in the distribution of the property of the defendant among its creditors. The appointment of a receiver did not in any manner prevent the claimants from making their inchoate lien effectual by instituting their actions at law, or otherwise, against the Oklahoma Union Traction Company, and should such an action have been filed by the claimants the judgment could have been obtained to the same extent as if a receiver had never been appointed.

The action provided for in the statute is simply an action on the claims and does not render it necessary to sequester the property. Hence there was nothing to prevent the preservation of the plaintiffs' liens in the manner provided by the laws of their creation, and there was not the slightest impediment to the claimants instituting their actions against the Oklahoma Union Traction Company within the year, nor was there anything to have prevented the plaintiffs from intervening in this case within the year. *Tarbell v. Parker*, 106 Mass. 347; *Doe v. Er-*

win, 124 Mass. 90; *Parsons v. Clark*, 56 Mich. 414, 26 N. W. 656.

The plaintiffs in error insisted, and so argued, in their briefs, that this action as originally brought was in the nature of a creditor's bill. Mr. Black in his *Law Dictionary*, on page 300, defines a creditors' bill as follows:

"A creditors' bill, strictly, is a bill by which a creditor seeks to satisfy his debt out of some equitable estate of the defendant which is not liable to levy or sale under an execution at law."

The Supreme Court of the territory of Oklahoma, in the case of *Miller v. Melone*, 11 Okl. 241, 67 Pac. 479, 56 L. R. A. 620, approved the foregoing definition of Judge Black.

The record in this case discloses, as herein before stated, that the plaintiff the First National Bank of Tulsa filed its action to foreclose a mortgage upon the property of the defendant the Oklahoma Union Traction Company, and upon its application a temporary receiver was appointed and took charge of the street railway and operated the same for a period of about three years, before the plaintiffs in error intervened in the action and asked that they be adjudged to have a priority lien upon the property or the proceeds thereof, the property having been sold by reason of order of the court, and the proceeds of the sale were in the hands of the receiver, claiming priority by reason of the statute quoted, which statute by its terms required that the suit to establish the lien mentioned should be brought by claimants within one year from the accrual of their cause of action or claim, and that a prior notice of their intention to assert such a lien should be served upon the defendant for a period of ten days before the bringing of their action, neither of which was done. It was not until December 14, 1914, if at all, that this suit was treated by the court as a suit in the nature of a creditors' bill, for it was on that date that a referee was appointed and directed to notify the creditors and the defendant to file claims, and it was thereafter that such referee had hearings in support of claims of creditors and made findings as to priority of liens and his conclusions of law in respect to the same. Hence, this suit not having been originally an action in the nature of a creditors' bill, and had not become such until the court undertook to administer the affairs of the defendant in the interest of all its creditors. Under the rule announced by the Supreme Court of the territory of Oklahoma, in the case of *Miller v. Melone*, supra, there was no suspension or tolling of the statutes of limitations of one year as claimed by the plaintiff in error, and by reason thereof their rights to liens under the statute had long since been barred, and the holdings of the referee to that effect should be sustained. *Mill-*

er v. Melona, *supra*; Tube Works Co. v. Bal-lou, 146 U. S. 523, 13 Sup. Ct. 165, 36 L. Ed. 1072; Ross v. Duval, 13 Pet. 45, 10 L. Ed. 51; McAleer v. Clay Co. (C. C.) 42 Fed. 667; Glenn v. Dorsheimer (C. C.) 23 Fed. 695; Supreme Court, N. D. in Bank v. Braithwaite, 7 N. D. 358, 75 N. W. 244, 66 Am. St. Rep. 653.

[4] The rule of construction of lien statutes which create a right and provide a remedy is: That in all such cases the requirements of the statutes and conditions prescribed in the statutes are the measure of the right, and the court cannot declare purposeless and useless that which the Legislature has made a condition of the lien. This is the rule announced by the Supreme Court of Tennessee in the case of Norman & Co. v. Edington, Groner & Griffiths, 115 Tenn. 309, 89 S. W. 744; Supreme Court of California, in Duncan v. Hawn, 104 Cal. 10, 37 Pac. 626; Supreme Court of Colorado in Greeley S. L. O. P. Ry. Co. v. Harris, 12 Colo. 226, 20 Pac. 764; Cleveland, C. & S. Ry. Co. v. Knickerbacker Trust Co. (C. C.) 86 Fed. 73; Tod et al. v. Union Ry. Co., 52 Fed. 241, 3 O. C. A. 60, 18 L. R. A. 305.

In Elliott on R. R., §§ 1071 and 1074, it is said:

"Where a lien is wholly statutory, the statutory mode must be pursued in order to obtain it." Johnson v. Garner (D. C.) 233 Fed. 756; Moore et al. v. Southern States Land & Timber Co. (C. C.) 83 Fed. 399; Hazard v. Board of Education (N. J. Ch.) 75 Atl. 237.

The record discloses that the referee found that there had been no diversion by the receiver of the income derived from the operation of the property of the defendant, and that there was no surplus net income from such source, and in fact, that a deficit had been created on account of such operation and on account of taxes, and that such deficit has been paid from the proceeds of the sale of the property covered by the mortgages. Such findings of the referee were reasonably supported by the evidence and were in all things approved by the court.

We find, and so hold, that this appeal presents no reversible error, and the judgment of the trial court is affirmed.

(76 Okl. 227)

STATE ex rel. BOARD OF COM'RS OF
CREEK COUNTY v. FOSTER, Clerk,
et al. (No. 10645.)

(Supreme Court of Oklahoma. Oct. 28, 1919.)

(Syllabus by the Court.)

APPEAL AND ERROR § 773(2)—DISMISSAL FOR
FAILURE TO FILE BRIEF.

Where a cause has been regularly assigned for submission, and plaintiff in error fails to

file brief, or to offer any excuse for not doing so, it will be presumed the appeal has been abandoned, and the same will be dismissed.

Error from District Court, Creek County; M. L. Bozarth, Judge.

Action by the State on the relation of the Board of County Commissioners of Creek County, against P. O. Foster, Clerk, and others, for mandamus. Judgment for defendants, and relator brings error. Dis-mitted.

Earl Foster, Co. Atty., of Sapulpa, for plaintiff in error.

Ernest B. Hughes, of Sapulpa, for defend-ants in error.

PER CURIAM. This cause was advanced on motion of the county attorney and as-signed for submission. Plaintiff in error has failed to file brief, as required by rule 7 of this court (165 Pac. vii), or to offer any ex-cuse for not doing so.

The appeal is therefore dismissed.

(76 Okl. 227)

JAMESON v. FLOURNOY et al. (No. 8570.)

(Supreme Court of Oklahoma. Feb. 26, 1918.
On Rehearing, Oct. 28, 1919.)

(Syllabus by the Court.)

1. TRIAL § 139(1)—DEMURRER TO EVIDENCE
PROPERLY OVERRULED.

When all the facts which the evidence in a reasonable degree tends to prove and all in-ferences or conclusions which may be reason-ably drawn therefrom are sufficient to support the verdict, it is not error for the court to overrule a demurrer to the evidence on the ground that the same is insufficient to support the verdict.

2. TRIAL § 219 — REFUSAL OF INSTRUCTION
DEFINING WORDS OF GENERAL MEANING.

It is not error for the court to refuse to define a word of general and accepted mean-ing, which is understood by men of reasonable intelligence in all walks of life, and has a well-understood, accepted, and general meaning.

Commissioners' Opinion, Division No. 2.
Error from Superior Court, Tulsa County;
M. A. Breckenridge, Judge.

Action by W. G. Flournoy and R. D. Flour-noy, partners doing business as Flournoy Bros., against John B. Jameson. Judgment for plaintiffs, and defendant brings error. Affirmed.

Carroll & Mason and C. H. Rosenstein, all of Tulsa, for plaintiff in error.

Randolph, Haver & Shirk, D. G. Elliott, and Elton B. Hunt, all of Tulsa, for defend-ants in error.

WEST, C. On the 23d day of November, 1914, defendants in error sued plaintiff in error in the superior court of Tulsa county, Okl., for the sum of \$1,155, which they claimed as a balance due them upon a drilling contract, wherein they were to drill an oil and gas well in Wagoner county, Okl. Upon a trial to a jury defendants in error, plaintiffs below, recovered a judgment for the amount sued for, and plaintiff in error, defendant below, has prosecuted this appeal. Parties will hereinafter be referred to as they appeared in the court below.

There are only two questions involved in this appeal which are seriously urged by appellants, both involving the construction of the following clause of the contract, to wit:

"The well, when completed as aforesaid, shall be delivered to the party of the second part by the party of the first part, free from all liens, claims or incumbrances for work and labor done, or materials furnished to the party of the first part; and until said well is completed and delivered as hereinbefore provided, unless the same is abandoned in the manner above provided, none of the sums hereinbefore provided to be paid to the party of the second part shall be due."

First. Did plaintiffs deliver or offer to deliver the well free from all lien claims and incumbrances?

Plaintiffs sued upon the drilling contract, attaching a copy of same to their pleadings: to plaintiffs' petition, defendant filed answer, first paragraph being a general denial, and following this by specifically denying that the well had been drilled to the depth of 1,200 feet as stipulated in the contract, denied the delivery thereof, and set up a counterclaim for damages on account of money paid in advance of the terms for payment specified in the contract. To the affirmative allegations contained in defendant's answer, plaintiffs filed a general reply.

The first proposition contended for by appellant was that plaintiff failed to prove in the trial of the cause below that, at the time he claimed he delivered, or offered to deliver, said well, the same was free from all lien claims and incumbrances.

Upon an examination of the pleadings and the issues as presented to the trial court below, it appears that there was no contention on the part of the defendant that there was a lien or incumbrance against the well, but the main issue that seemed to be involved, and which was contested, was whether or not the well had been drilled to the depth specified in the contract, to wit, 1,200 feet. After plaintiff had closed his evidence, a demurrer to the same was presented raising the question that the evidence on the part of the plaintiff did not affirmatively show that there was no lien claims or incumbrances against the well. One of the plaintiffs below was asked if he had carried out all of the requirements under the contract, and he

replied that he had. While this was rather a vague and indefinite way to prove affirmatively that he had complied with all the conditions imposed upon plaintiffs by the contract, still, inasmuch as this was not an issue in the court below, and the defendant had a right, if he was seriously contending that there were liens or incumbrances against the well, to have gone into this subject, and failed to do, we are of the opinion that this evidence is sufficient, in the absence of any other, to prove that there was no lien claim or incumbrance against the well. This proposition goes only to the question as to whether or not the evidence was sufficient to support the verdict.

[1] In case of *Eoff v. Lair*, 156 Pac. 185, the second paragraph of the syllabus is as follows:

"When the evidence, with all the inferences that can be properly drawn from it, is insufficient to support a verdict, it is reversible error to overrule a demurrer thereto."

Under the rule laid down in this case can we say, in view of the issues that were really contested in the court below, that the evidence, with all the inferences that can properly be drawn therefrom, is insufficient to support the verdict? We think not, because plaintiff testified that he had complied in all respects with the conditions of the contract; that is, he had carried out all the conditions of the contract imposed upon plaintiffs. The inference to be drawn from this testimony is that every condition which was imposed upon plaintiffs by the terms of said contract, or which had been imposed upon them by the contract, had been performed by plaintiffs.

In the case of *Johnson v. Jones*, 39 Okl. 323, 135 Pac. 12, 48 L. R. A. (N. S.) 547, the sixth paragraph of the syllabus is as follows:

"A general verdict on conflicting evidence presumptively includes a finding of all the facts necessary to establish the prevailing party's claim."

The rule in this jurisdiction seems to be that, when all the facts which the evidence in the slightest degree tends to prove, and all inferences or conclusions which may be reasonably and logically drawn therefrom, that is sufficient to support the verdict.

When we consider the evidence quoted above in the light of the pleadings and the contested issues below, it seems to us that all the evidence considered together, and all inferences or conclusions which may reasonably be drawn therefrom, were sufficient to show that at the time of the alleged delivery or the offer to deliver the well, there was no valid lien or incumbrance against the same.

On the second proposition, defendant complains of the following paragraphs of the court's charge:

"Four. You are instructed that, unless you believe from a preponderance of the evidence that the plaintiffs did drill the well to a depth

of 1,200 feet or more, and thereafter delivered, or offered to deliver, said well to the defendant, then your verdict should be for the defendant.

"Five. You are instructed that if you believe from a preponderance of the evidence that the plaintiffs drilled a well to the depth of 1,200 feet or more, and thereafter delivered, or offered to deliver, said well to the defendant completed to a depth of 1,200 feet or more, then your verdict should be for the plaintiffs in the sum of \$1,102.50; and, if you further believe from a preponderance of the evidence that after said well was drilled, if you find that it was drilled to a depth of 1,200 feet or more, the plaintiffs were employed by the defendant to pull the casing and plug the well, and they did so, then the plaintiffs would be entitled to recover such sum as you find from the evidence they are entitled under said contract, not to exceed the sum of \$25. If you find that the contract has been complied with on the part of the plaintiffs then they would be entitled to attorney's fees under said contract not to exceed the sum of \$25. In all, your judgment for the plaintiffs, if you find they have complied with their contract, cannot exceed the sum of \$1,152.50, with interest at 6 per cent. from the 21st day of April, 1914."

[2] The objections directed against these paragraphs of the charge complained because the court did not define the word "delivered." In reading these paragraphs we do not think that the instructions of the court are open to this assault. The word "delivered" or "deliver" has a general and accepted meaning, which is understood by men of reasonable intelligence in all walks of life. All men understand that the "delivery" of a deed or of a note or of a written instrument, and most chattels, for that matter, is accomplished by the passing of the actual physical possession of the same, but that the "delivery" of a farm, a mill, or an oil well would have a somewhat different meaning. A man of ordinary intelligence, when considering what was meant by the "delivery" of an oil and gas well, would necessarily understand that it contemplated an opportunity to examine and inspect the same, and, if desired, to go into the possession thereof.

It is our opinion that the word "delivery" or "deliver" is so generally used in the everyday affairs of life, being involved in almost every transaction, however simple or complex, it has a general accepted and well-understood meaning, and that any effort on the part of the court to explain or define what was meant thereby would have been more likely to have misled and confused the jury than to have aided and assisted them in applying the word in the connection in which it was employed in this contract.

Finding no error, it is our opinion that the judgment should be affirmed; and it is so ordered.

PER CURIAM. Adopted in whole.

On Rehearing.

PER CURIAM. The petition for rehearing in this case was heretofore granted, and the cause has been reheard on oral argument and briefs submitted. After further consideration of the questions urged for reversal of the judgment of the trial court, we are of the opinion that the former decision is correct, and the opinion of the commission, filed on February 26, 1918, is adopted as the opinion of the court in this case.

(16 Okl. Cr. 505)

BROWN v. STATE. (No. A-3420.)

(Criminal Court of Appeals of Oklahoma. Nov. 8, 1919.)

(Syllabus by the Court.)

CRIMINAL LAW §1181(4) — ACCEPTANCE OF PAROLE CAUSE FOR DISMISSAL OF APPEAL.

When an appeal from a judgment of conviction is pending in this court, and the plaintiff in error is granted a parole and accepts the same, and the fact that a parole has been granted and accepted is brought to the attention of this court, the appeal will be dismissed, as having been abandoned.

Appeal from District Court, Payne County; John P. Hickam, Judge.

Arnold Brown was convicted of manslaughter in the first degree, and he appeals. Appeal dismissed, and cause remanded.

E. G. Wilson, of Tulsa, J. M. Springer, of Stillwater, and Norman Prulett, of Oklahoma City, for plaintiff in error.

The Attorney General and W. C. Hall, Asst. Atty. Gen., for the State.

DOYLE, P. J. The plaintiff in error, Arnold Brown, and Frank Ison, were by indictment jointly charged with the murder of P. T. Connor, alleged to have been committed in Payne county on the 26th day of September, 1916. Upon his separate trial the plaintiff in error was convicted of manslaughter in the first degree, and on appeal the judgment was reversed and remanded for a new trial. Arnold Brown v. State, 14 Okl. Cr. 115, 167 Pac. 762.

On a retrial the plaintiff in error was convicted of manslaughter in the first degree, and his punishment assessed at imprisonment in the penitentiary for a period of 11 years. From the judgment rendered on the verdict an appeal was perfected, by filing in this court on August 8, 1918, a petition in error, with case-made.

His counsel of record have moved to dismiss the appeal on the ground and for the reason that plaintiff in error has been granted a parole and has accepted the same. In

Cowley v. State, 11 Okl. Cr. 561, 149 Pac. 924, it is said:

"When an appeal from a judgment of conviction is pending in this court, and the plaintiff * * * applies for a parole, and the same is granted and accepted by the plaintiff in error, and the fact that a parole has been granted and accepted is brought to the attention of this court, the appeal will be dismissed, as having been abandoned."

The appeal herein is therefore dismissed, and the cause remanded to the trial court.

ARMSTRONG and MATSON, JJ., concur.

(16 Okl. Cr. 446)

RHOADES v. STATE. (No. A-2940.)

(Criminal Court of Appeals of Oklahoma.
Oct. 18, 1919.)

(Syllabus by the Court.)

1. CRIMINAL LAW §1032(5), 1129(6) — ASSIGNMENT OF ERROR INADEQUATE TO RAISE QUESTION OF SUFFICIENCY OF INFORMATION.

An assignment of error that "the verdict is contrary to the law and the evidence" does not raise the question of the sufficiency of the information. To raise the question of the sufficiency of an information in the appellate court, a demurrer or other proper objection should be made thereto in the trial court.

2. CRIMINAL LAW §1159(2) — CONVICTION WILL NOT BE REVERSED WHERE EVIDENCE SUFFICIENT TO SUPPORT.

Where there is evidence in the record which, if believed by the jury, is sufficient to support the conviction, the appellate court will not reverse the judgment because of the alleged insufficiency of the evidence.

3. CRIMINAL LAW §814(20) — INSTRUCTIONS AS TO DEGREES OF CRIME OF WHICH THERE IS NO EVIDENCE ERRONEOUS.

The trial court should not instruct upon any degree of the crime of which there is no evidence tending to show the defendant's guilt.

4. CRIMINAL LAW §1130(2) — RULINGS ON EVIDENCE WILL NOT BE REVIEWED WHEN EVIDENCE NOT SET OUT IN BRIEF.

Where the brief on behalf of defendant fails to comply with rule 7 of this court (165 Pac. x), by incorporating therein "the full substance of the evidence admitted or rejected, stating specifically the objection thereto," this court will not closely scrutinize the record for the purpose of substantiating defendant's claim, when the alleged error relates solely to the admission or rejection of evidence.

5. CRIMINAL LAW §988(1) — NEW TRIAL ON NEWLY DISCOVERED EVIDENCE IN DISCRETION OF TRIAL COURT.

Motions for a new trial on the ground of newly discovered evidence are addressed to the discretion of the trial court, and, unless the newly discovered evidence is material to the

issues and it is clearly probable that upon a subsequent trial a different result would occur because of such evidence, a new trial will not be granted.

6. CRIMINAL LAW §1172(10) — WHEN JURY PROBABLY MISLED BY ERRONEOUS INSTRUCTION, CONVICTION REVERSED.

Where the trial court gives certain oral instructions to the jury, part of which were afterwards reduced to writing and filed as a part of the record in the case, and part of which were not reduced to writing, and it is apparent to this court, after a careful consideration of the entire record, that the jury was probably misled as to the law of the case to the substantial prejudice of the defendant by reason of the giving of such oral instructions, the judgment of conviction will be reversed, and the cause remanded.

Appeal from District Court, Canadian County; Geo. W. Clark, Judge.

Grover Rhoades was convicted of the crime of robbery, and sentenced to serve a term of 10 years' imprisonment in the state penitentiary, and appeals. Reversed and remanded.

This is an appeal from a judgment of conviction in the district court of Canadian county against the defendant for the crime of robbery, in which a sentence was imposed against him of 10 years' imprisonment in the penitentiary at McAlester.

The defendant and his brother, Homer Rhoades, were residents of the city of El Reno, Okl., and had been for over 20 years. The defendant at the time of this occurrence was engaged in keeping a rooming house in the northwest part of El Reno, at which said house the evidence shows intoxicating drinks were to be had. Across from the defendant's place of business, his brother, Homer Rhoades, had a similar establishment, and it was at or near Homer Rhoades' place that this alleged crime was committed.

The prosecuting witness, Truscott, and a man by the name of Ermis, and another by the name of Mosig, happened into El Reno on the day of this alleged crime. Ermis claims to have come from Herrington, Kan., and to have arrived at El Reno about 10 o'clock in the morning. Truscott and Mosig came in on the same train that day, arriving about 10 o'clock at night. Truscott claims to have come from some place in Kansas, and Mosig got on the train at Enid, Okl. Ermis, Truscott, and Mosig all testified that their meeting in El Reno on that day was purely by accident; that there was no prearrangement to meet there between them, Truscott and Mosig testifying that they were on their way to Oklahoma City, while Ermis testified that he happened into El Reno for the purpose of selling some "temperance drinks" called "Temp Brew" and "Non Tax," for which he was agent, having a distributing house for these articles in Kansas City, Mo. It appears

from the evidence that Mosig and Ermis had been acquainted with each other for some 6 or 7 years, also that Mosig and Truscott had known each other for some five or six years, but Truscott and Ermis claim not to have known each other before their meeting in El Reno on this occasion.

Mosig was a professional gambler, and one commonly known as a "card sharp." This he admits. Truscott is shown by his testimony to be practically an habitual gambler, although he denies making a living at gambling, but his testimony shows that he has wandered about the country considerable and engaged often in the pastime of gambling. Ermis also, while engaged in the wholesale liquor business in Kansas City, Mo., was very fond of the sport of gambling, and frequently engaged in it. According to Mosig, Ermis was what was called by professional gamblers a "sucker." Rhoades is also shown to be not averse to participating in the great American game of draw poker, and when these four gentlemen of such similar proclivities met on the night of the 18th of July, 1916, it is not surprising that a game of draw poker was arranged between them. This game took place on the premises of "Babe" (or Homer) Rhoades in the city of El Reno. It commenced about midnight, and lasted some two hours, when it broke up in a general row, which resulted in the institution of this prosecution.

It seems that Mosig was engaged in the fine art of "daubing" the cards, according to his own special process, the implements for which he carried with him, consisting of a thimble worn on the forefinger and some special ink. The discovery of the process of "daubing" the cards by the defendant Rhoades broke up the game, and caused the trouble. Truscott had won a big "pot" from Rhoades, and a dispute arose in which the brother of Grover Rhoades, Homer Rhoades, grabbed the cards from the table with the remark that, "You fellows can't win any money off of us." Truscott says that then he put the money in front of him into his pocket, and was immediately struck in the face with a beer bottle by the defendant, Grover Rhoades. Thereupon the lights went out, and Truscott said that, after being beat over the head considerably in the house, he managed to get out through the door and onto the street, where he was followed by the defendant, Grover Rhoades, who continued to beat him over the head, and took from his person all of the money that he had, consisting of \$57 which he had taken with him that evening and about \$60 additional which he had won in the poker game. Truscott testifies that this money was taken from his person by force and by putting him in fear of immediate and serious bodily harm. Shortly after this occurrence, Truscott appeared at the Southern Hotel in El Reno, badly beat up and bleeding from wounds on the head and face. Truscott is corroborated in the main as

to what occurred before the lights went out by the witness Ermis.

The defendant, Rhoades, tells a different story as to what occurred, contending that he did not take any money off of the person of Truscott, but that, when he saw that he was being cheated in the card game by Truscott and his associates, he snatched from the table the money that was in the last "pot," which Truscott claimed to have won, and put it in his own pocket. Rhoades denies taking any money off of the person of Truscott on the outside of the house, or at any other time or place, but admits that he went out of the house and was with Truscott on the outside of the house, but went out there because Truscott was calling for assistance and to see if he could not help him by getting a doctor to dress his wounds.

After the trouble subsided, Truscott, Mosig, and Ermis went back to the Southern Hotel. Rhoades also went up there, and left with the night clerk of the hotel \$130 in currency. Truscott's wounds were dressed by a physician, who testified that Truscott appeared somewhat dazed and stated that he had been relieved of some money, but did not state who did it. There is also some evidence that Rhoades told the other parties that they had better get out of town and avoid any further trouble.

The investigation of the trouble by the officers led to the commencement of this prosecution against Rhoades, and in his subsequent conviction of robbery in the first degree.

Prulett, Day & Sniggs, of Oklahoma City, for plaintiff in error.

S. P. Freeling, Atty. Gen., and R. McMillan, Asst. Atty. Gen., for the State.

MATSON, J. (after stating the facts as above). Counsel for defendant group the second and fourth assignments of error, and discuss the same together. Such assignments are:

"(2) The verdict is contrary to the law and the evidence."

"(4) The court erred in overruling the demurrer of the defendant to the evidence of the state."

Under these assignments, counsel urge that the information is defective, also that there was a variance between the allegations of the information and the proof of the crime of which the defendant was convicted, and for these reasons it is urged that the overruling of the demurrer of the defendant to the evidence was reversible error. The argument interposed, or rather the reasons given, in support of the assertion that the second and fourth assignments of error constitute grounds for reversal of the judgment of conviction, have no relation whatever to said assignments.

[1, 2] No demurrer was interposed to the information; neither was any request made of the trial court to instruct the jury to return a verdict of not guilty because of variance between the allegations and the proof. The information not being attacked in the trial court, it is too late to urge that the same is defective for the first time in this court. An examination of the information, however, discloses a sufficient charge of robbery in the first degree against the defendant, and had a demurrer been interposed, it would not have been error to have overruled the same. There is no merit in the assignment that the court erred in overruling the demurrer of the defendant to the evidence of the state. The testimony of Truscott and Ermis, if believed by the jury, was sufficient to support a conviction of robbery in the first degree. *Caldon v. State*, 7 Okl. Cr. 139, 122 Pac. 734; *Prather v. State*, 14 Okl. Cr. 327, 170 Pac. 1176; *Bell v. State*, 14 Okl. Cr. 167, 168 Pac. 827.

The third, fifth, and eight assignments of error are grouped together and presented as one proposition. Said assignments are as follows:

"(3) The court erred in admitting over the objection of defendant incompetent, irrelevant, and immaterial testimony."

"(5) The court erred in refusing to instruct the jury to the effect that, if the defendant's only purpose was to recover money that he was cheated out of or lost in the game by fraudulent means upon the part of Truscott, they should acquit him."

"(8) The court erred in refusing to define robbery in the second degree in its instructions to the jury."

[3] Assignment No. 8 will be considered first. An examination of the record discloses no refusal upon the part of the trial court to instruct on or define robbery in the second degree. Counsel for defendant made no such request of the court. Section 5905, Revised Laws 1910, provides:

"In charging the jury, the court must state to them all matters of law which it thinks necessary for their information in giving their verdict, and if it states the testimony of the case, it must in addition inform the jury that they are the exclusive judges of all questions of fact. Either party may present to the court any written charge and request that it be given. If the court thinks it correct and pertinent, it must be given; if not, it must be refused. Upon each charge presented and given or refused the court must indorse or sign its decision. If part of any written charge be given and part refused the court must distinguish, showing by the indorsement or answer what part of each charge was given and what part refused."

From the foregoing section it appears that the trial court must instruct the jury on all matters of law which it thinks necessary for their information in giving a verdict. The court is not required to instruct on the law applicable to any degree of the crime than

that charged unless there is evidence which tends to establish a degree different and less than that charged. In this case the state's evidence established, if it established the crime of robbery at all, robbery in the first degree. The evidence on the part of the defendant did not tend to reduce the crime to robbery in the second degree, but the defendant interposed a complete defense to the crime; one which would justify his acquittal either of robbery in the first or the second degree. As no issue was presented by the evidence which tended in any way to reduce the crime to that of robbery in the second degree, the court was not required, in giving the law of the case, to instruct upon that issue. *Footshee v. State*, 8 Okl. Cr. 666, 108 Pac. 555; *Inklebarger v. State*, 8 Okl. Cr. 316, 127 Pac. 710.

The fifth assignment of error is without merit. There is no evidence in the record that would require the court to instruct in substance on the matters assigned therein. The defendant denied entirely taking any money from the prosecuting witness as charged in the information. His defense was that the money was not taken by him forcibly from the person of the defendant, or by putting him in fear, but that he grabbed some money off of the gambling table, and that the money was not in the possession of the defendant.

[4] The assignment that the court erred in admitting incompetent, irrelevant, and immaterial testimony is apparently abandoned, as the brief nowhere sets out in substance the testimony of any witness which it is alleged was erroneously admitted, as required by rule 7 of this court (165 Pac. x). As was recently held in the case of *Bradshaw v. State* (No. A-2874) 16 Okl. Cr. 624, 185 Pac. 1102:

"Where counsel for defendant have wholly failed to comply with rule 7 of this court by incorporating in the brief 'the full substance of the evidence admitted or rejected, stating specifically the objection thereto when the alleged error relates to the admission or rejection of evidence,' * * * this court will not closely scrutinize the record for the purpose of substantiating the defendant's claim."

In presenting alleged errors of this kind, it is the duty of counsel, as required by the rule of this court, to present the matter in the brief in such a way that this court may pass intelligently upon the merits of the question without having to search the entire record for the purpose of determining whether any error has been committed. Mixed questions of law and fact like this involve a very considerable time in making research where rule 7 of this court is not complied with. The numerous cases appealed to this court preclude, and the court is not required to brief, these questions, and counsel should at least take the time, where the burden is upon them, to present such questions as this in accord-

ance with the court's rule, or else the court will be compelled to treat the same as practically abandoned, and therefore without merit.

[5, 6] It is also contended that the court erred in not granting a new trial on the ground of newly discovered evidence. The newly discovered evidence is contained in an affidavit, attached as an exhibit to the motion for a new trial and in support thereof, of one W. I. Ritchey, who states in substance:

"That he is a resident of Oklahoma City, and that, about two weeks prior to the time Grover Rhoades was charged with robbing B. B. Truscott, he, the said Ritchey, had a conversation with Truscott in which Truscott told him that he, Truscott, and Mosig were going to El Reno and 'trim' the Rhoades boys; that Truscott showed affiant the daub and copping wax which he said he would use if he and Mosig could get the Rhoades boys to play black jack; they could cheat them out of all their money in a short time; that about a month before said conversation affiant had a letter from Mosig, in which he stated he knew where he and Truscott could get some money, and asked affiant if he knew where Truscott was at that time, and, if so, to tell Truscott, Mosig wanted him."

It was clearly not error for the court to overrule the motion for a continuance on this ground, as the evidence was not material to the issues, and for the further reason that it was to a large extent cumulative, because the witness Mosig testified that he used the "daub and copping wax" and was caught cheating in the game of draw poker by the defendant, and it was apparent in the trial that the fact that Mosig was caught cheating resulted in breaking up the game and the taking of the prosecuting witness' money by the defendant. Motions for a new trial on the ground of newly discovered evidence are addressed to the discretion of the trial court, and unless the newly discovered evidence is material to the issues, and it is clearly probable that upon a subsequent trial a different result would occur because of such evidence, a new trial should not be granted. We find no error in overruling defendant's motion for a new trial on the ground of newly discovered evidence.

In this case the record shows that the verdict of the jury was returned on the 18th day of August, 1916, while instructions Nos. 13 and 14, given orally by the court, were not filed and did not become a part of the record in the case until the 19th day of August, 1916. There is nothing in the record to show whether the jury ever received these instructions in writing before the jury concluded its deliberations. Furthermore, the record affirmatively discloses that all the law given to the jury orally by the court was not fully covered by the additional instructions which were afterwards reduced to writing and filed as part of the record in the case.

It appears also that in the colloquy that

took place between the trial judge and some members of the jury certain portions of the court's statements to the jury did not fully and fairly to the defendant state the law of the case as applicable to the evidence, and from the record before us it is apparent that the jury was to some appreciable extent misled by matters stated orally by the court which were not at any time incorporated into the written instructions.

Again it appears as a part of the discourse between the trial judge and members of the jury that instruction No. 9, which contained the only affirmative law covering the defense interposed by the defendant, was withdrawn from consideration by the jury, and two additional instructions submitted in lieu thereof; yet the record before us indicates that instruction No. 9 was thereafter attempted to be amended orally, and said instruction is incorporated in the record as part of the instructions originally given by the trial court, although amended by interlineation. It is apparent that, if the jury got the impression that instruction No. 9 was intended to be withdrawn from consideration, the defendant did not receive the benefit of any affirmative instruction covering the law applicable to the defense interposed by him. The record before us as to the intention of the trial judge relative to the withdrawal of instruction No. 9 is surrounded with considerable doubt. Had the court left the jury with the instruction as first given, this court would not hesitate to affirm the judgment of conviction, because from such instructions the law of the case was fairly presented without substantial prejudice to the defendant's cause.

In the motion for a new trial the matters occurring between the court and the jury when the jury returned into open court for further information were set up as grounds for reversal, and acted upon adversely to the contentions of the defendant, and proper exceptions saved.

It is apparent to this court that in giving further instructions orally to the jury, the jury was misled as to the law of the case, to the substantial prejudice of the defendant, and that he, by reason thereof, did not receive that fair and impartial trial to which he is entitled under the laws of this state.

After a careful investigation of the entire record in this case, the conclusion is reached that the defendant is entitled to the benefit of a new trial in order that his ground of defense may be more accurately and correctly stated to the jury in the court's instructions, to the end that substantial justice may be afforded him.

For the reasons stated, the judgment of conviction is reversed, and the cause remanded for further proceedings not inconsistent with this opinion.

DOYLE, P. J., and ARMSTRONG, J., concur.

(16 Okl. Cr. 492)

CREEK v. STATE. (No. A-3174.)

(Criminal Court of Appeals of Oklahoma.
Nov. 8, 1919.)*(Syllabus by the Court.)*1. WITNESSES \S 275(1)—CROSS-EXAMINATION OF DEFENDANT AS A WITNESS.

It is the established rule in this jurisdiction that a defendant, offering himself as a witness, subjects himself, as regards cross-examination, to all the rules governing other witnesses.

2. WITNESSES \S 269(1) — SCOPE OF CROSS-EXAMINATION.

The cross-examination of a witness is not to be confined to the particular questions asked, nor the precise subjects called to his attention, on direct examination. The correct rule is to allow the cross-examination to extend to any matter not foreign to the subject-matter of the examination in chief, which tends to limit, explain, or modify the same.

3. WITNESSES \S 277(4) — SCOPE OF CROSS-EXAMINATION OF DEFENDANT.

For matters held to be within the legitimate scope of the cross-examination of the defendant, under the issues in this case, see body of opinion.

4. CRIMINAL LAW \S 829(1)—REPETITION OF REQUESTED INSTRUCTIONS.

It is not error for the trial court to refuse to give a requested instruction if the principles of law therein contained are covered in the general instructions.

Appeal from District Court, Okmulgee County; R. P. De Graffenreid, Assigned Judge.

Carl Creek was convicted of manslaughter in the first degree, his punishment fixed at 15 years' imprisonment in the state penitentiary, and he appeals. Affirmed.

Earl Kelly was shot and killed by Carl Creek at the latter's apartment in the town of Morris, Okmulgee county, Okl., on the 25th day of March, 1916, at about 4 o'clock in the afternoon. The killing was accomplished by means of a 32-caliber automatic pistol, the defendant firing about five shots at the deceased, inflicting mortal wounds on the left side of the body, one of which penetrated the abdomen and caused death about three hours after the shooting.

Both defendant and deceased were workers in the oil fields, and had known each other for some time prior to the commission of the homicide.

According to the state's witnesses, in the early afternoon of the 25th of March, 1916, the deceased called defendant by telephone, and advised defendant not to come up town, that the officers would arrest him; also telling the defendant that he would take some-

thing down to the defendant's apartment. Thereafter deceased went to defendant's apartment, and was invited in by either Creek or his wife. A short time after the deceased went into the house of defendant, some one was heard to say, according to the testimony of persons who were living in other apartments of the same building, "Now, by God, I've got you," to which the reply was made, "Carl, don't do that; don't do that." Almost immediately thereafter several shots were fired, and Kelly was seen to fall out the front door of Creek's apartment, mortally wounded.

Before his death, Kelly made a number of dying statements, to the effect that Creek had killed him, had called him down to his house, and shot him down like a dog.

There is also evidence on the part of the state's witnesses to the effect that the defendant was drunk at the time of his arrest shortly after the shooting; that he resisted arrest by one officer, and was finally arrested by three other officers and taken to the jail at Okmulgee, Okl. The deceased was unarmed at the time of the shooting, but there is some evidence in the record to the effect that deceased had been drinking some before the shooting, and carried a flask of whisky with him to the home of the defendant.

The defendant interposed the plea of self-defense, and also that the deceased had been intimate with defendant's wife, which fact had become known to the defendant, having caused previous trouble between him and the deceased, in which the defendant states that the deceased shot at him about the month of December, 1914.

Defendant testified that the deceased came to his house on the afternoon of the killing with a half-pint flask of whisky; that deceased was under the influence of whisky when he arrived, and invited the defendant to drink with him; that the defendant, who was not well at the time, took a sip out of the flask, but that the whisky burned so much that he told deceased he could not drink it. Thereupon defendant's wife offered to make them each a toddy out of the whisky, which was done, and that both drank their toddies. Thereafter deceased followed defendant's wife into a back room, and was seen by the defendant to punch or strike his wife on the hip or leg, and also deceased was heard to remark at the time, "Why haven't you got the big son of a bitch out of here?" Defendant testifies that his wife then returned to the room in which he was resting, and asked him to put the deceased out of the house because deceased was intoxicated. Defendant then says that he asked deceased to leave, and that thereupon deceased remarked, "Put me out, you big son

of a bitch," at the same time making a motion towards his hip pocket, whereupon the defendant reached under a pillow on his bed, pulled out his pistol, and fired five times in rapid succession at the deceased, four of which shots took effect, resulting in the death of deceased as heretofore detailed.

On direct examination, defendant, when asked why he shot deceased, stated, "Because I thought he had a gun and would kill me; that he had tried it, and thought that he had at one time." On redirect and recross-examination, the following questions were asked and answers made by the defendant:

"By Mr. Eaton: Q. Mr. Creek, at the time you fired at or shot Kelly, what was the condition of your mind as to being worried or not?"

"Mr. Carter: We object to that as incompetent, irrelevant, and immaterial.

"Q. Over your wife's relation?"

"The Court: Why?"

"Mr. Carter: Because he has been over that two or three times.

"The Court: I think he may answer that.

"A. Angry.

"Q. Well in regard to your family troubles? A. Well, sir, when he insulted that woman everything came in front of me just like I had seen it for the past four or five months; the thought that was through my head was that it was either kill him or get killed; that is what I thought, when I shot him.

"By Mr. Eaton: That is all."

Recross-examination:

"By Mr. Carter: Q. Do you know now, Mr. Creek, or can you tell the jury now, whether you shot him because you thought he was going to shoot you, or did you kill him just because you were mad? A. I shot him because I thought he was going to kill me.

"Q. It wasn't over your family troubles at all then? A. It was over both."

The foregoing excerpts from the defendant's testimony support the theory that he shot and killed the deceased in self-defense, and that, although there had been previous trouble between defendant and deceased because of the belief of the defendant that deceased was intimate with defendant's wife, and such matters flashed as a picture in the mind of the defendant at the time of the killing, the cause that impelled the defendant to fire the shot, according to his own testimony, is the belief that he thought deceased was going to kill him at the time. So that, under the evidence in this case, the issue is clearly defined, the evidence on the part of the state supporting the theory that the homicide was murder, while that of the defendant, although admitting anger on his part, would tend to justify the killing; at least sufficient provocation is shown by defendant's testimony to reduce the degree of homicide to manslaughter in the first degree.

The jury returned a verdict of manslaughter in the first degree, and assessed the pun-

ishment at 15 years' imprisonment in the state penitentiary. The court pronounced judgment in accordance with the verdict, from which judgment the defendant has appealed to this court, assigning several grounds of error, which will be discussed in the opinion proper.

Joe S. Eaton and John Caruthers, both of Okmulgee, for plaintiff in error.

S. P. Freeling, Atty. Gen., and W. C. Hall, Asst. Atty. Gen., for the State.

MATSON, J. (after stating the facts as above). [1-3] The first alleged error relied upon for a reversal relates to the admission of incompetent, irrelevant, and immaterial testimony elicited on the cross-examination of the defendant, over the objection and exception of counsel for the defendant. The defendant was cross-examined at some length in regard to escaping on two different occasions from the county jail after he had been arrested and charged with this offense. It is contended that to permit such a cross-examination was prejudicial to the substantial rights of the defendant, and improper because the question of the defendant's breaking and escaping from jail was not gone into in his testimony in chief, and for the further reason that the court in effect required the defendant to furnish evidence against himself by permitting the cross-examination to go beyond its legitimate scope.

On the other hand, the Attorney General contends that the cross-examination was proper under the issues in this case, first, because the general subject-matter was gone into by counsel for the defendant in the cross-examination of the state's witnesses in an attempt to prove that the defendant, immediately after he shot and killed Kelly, called the sheriff of Okmulgee county over the long-distance telephone, and requested the sheriff to come and arrest him, and also the defendant, on direct examination, testified that he did not attempt to resist arrest as testified to by Constable Heath, but did not submit to arrest by Heath for the reason that Heath had no warrant for his arrest, and for the further reason that the defendant had called the sheriff and had notified the sheriff that he was ready and willing to surrender; that the defendant, claiming to have been so zealous in his efforts to surrender and place himself in the hands of the law immediately after the commission of the alleged offense, cannot complain of a cross-examination which in effect had bearing on the question of his good-faith surrender by disclosing a disposition on the part of the defendant to escape jail and flee on two different occasions after he was taken into custody.

Secondly, it is contended that this cross-examination would not constitute reversible

error in this case, because it could not have amounted to an abuse of discretion on the part of the trial court in the admission of evidence.

As part of its case in chief, the state was permitted to introduce testimony, without objection by defendant's counsel, to show that the defendant resisted arrest. In explanation of this testimony, the defendant was permitted to testify to the effect that he had no intention to resist arrest, but that nobody other than a constable without a warrant of arrest attempted to arrest him, and in further explanation of his conduct, he was also permitted to testify that he had voluntarily called the sheriff of the county over the long-distance telephone immediately after the shooting, and told him of his willingness to surrender and submit to arrest for this particular crime.

A sharp conflict thereupon arose between the testimony of the witnesses for the state and the testimony of the defendant himself. According to the state's witnesses, the defendant made armed resistance to arrest. This fact was strenuously denied by the defendant, who stated that he was at all times willing to submit to arrest, going so far as to telephone the sheriff to that effect. To rebut the presumption that the defendant was willing to submit to arrest, as testified to by him in chief, and in support of the testimony of the state's witnesses to the effect that the defendant had resisted arrest, the court permitted the county attorney, in his cross-examination of the defendant, to ask the defendant about his escaping from jail on two different occasions and while awaiting trial. We think this cross-examination was proper under the issues in this case.

A defendant offering himself as a witness subjects himself, as regards cross-examination, to all the rules governing other witnesses. *Harrold v. Territory*, 18 Okl. 395, 89 Pac. 202, 10 L. R. A. (N. S.) 604, 11 Ann. Cas. 818; *State v. Lewis*, 56 Kan. 374, 43 Pac. 265; *State v. King*, 67 Wash. 651, 122 Pac. 323. The foregoing is the established rule in this jurisdiction.

In *Gibbons v. Territory*, 5 Okl. Cr. 212, 115 Pac. 130, this court held:

"The cross-examination of a witness is not to be confined to the particular questions asked, nor the precise subjects called to his attention on direct examination. The correct rule is to allow the cross-examination to extend to any matter not foreign to the subject-matter of such examination, and tending to limit, explain, or modify the same."

When the defendant takes the witness stand in his own behalf, he is to be considered a witness for all purposes, and is subject to a proper cross-examination upon all matters material to the issues joined. If, on

direct examination, he opens a certain subject for investigation, he cannot be heard to complain if on cross-examination questions are asked him, the answers to which would tend to limit, explain, or modify the testimony he has given in chief.

We do not undertake to say that if the trial court would permit the cross-examination of the defendant to go beyond its legitimate scope, extending beyond the subject-matter concerning which he was examined in chief, but that by such conduct the trial court would commit reversible error, but such is not the condition confronting us in this case. The examination here was confined to the issues presented, had a bearing on the question of the defendant's guilt or innocence, and was within the scope of the subject-matters inquired into in the examination in chief. In *Hopkins v. State*, 9 Okl. Cr. 104, 130 Pac. 1101, Ann. Cas. 1915B, 736, this court held:

"On cross-examination of a witness, as a general rule, the party cross-examining should be confined to the matters concerning which the witness has been examined in chief, but this rule should be liberally construed so as to permit any question to be asked on cross-examination which reasonably tends to explain, contradict, or discredit any testimony given by the witness in chief, or to test his accuracy, memory, veracity, character, or credibility. This must necessarily include impeaching questions, although they may relate to matters independent of the questions testified to in chief."

Applying the foregoing rules to the question here presented, we are of opinion that the trial court did not commit error in permitting the defendant to be asked on cross-examination questions regarding his escape from jail and flight after he was arrested and while awaiting trial, for the reasons above stated.

It is also contended that the trial court erred in permitting the defendant to be cross-examined concerning his domestic relations, and relative to a certain letter written by him to his wife while incarcerated in jail; that the only purpose of this examination was to create an atmosphere of "veiled suspicions" that the wife of the defendant was a fallen woman before he married her, and that this fact was known to the defendant; also that the defendant was compelled in said cross-examination to admit that he had written a letter to his wife without asking her to become a witness in his behalf, although requesting her to produce the defendant's 13 year old stepdaughter to testify for him.

The general subject of the defendant's domestic relations was testified to by him in chief, the defendant stating that he had reason to believe that his wife and the deceased were guilty of improper relations with each other, and that this illicit relationship had been carried on for some months prior to the

killing. Also the defendant testified of his own volition that after his incarceration in jail his wife left the country with another man, so that no person can read the record in this case without getting the impression that the wife of the defendant was a woman of lewd habits, and that her relationship, especially with the deceased, was known to the defendant for a considerable length of time prior to the commission of the homicide.

The fact, therefore, that the defendant wrote a letter requesting his wife to produce her 13 year old daughter as a witness in his behalf, without requesting that she become a witness in his behalf herself, could not have worked any prejudice to his cause under the theory upon which his defense was based. He could hardly have been expected to ask the woman who was sustaining illicit relations with the deceased to be a witness for him, especially after it had become known to him that since the commission of the homicide she had fled from their former home with another man. Her conduct was such as to lead the defendant to believe, as he had a right to do, that her testimony would at least not be favorable to his cause.

In view of the fact that the defendant voluntarily testified as to these illicit relationships between his wife and other men, he certainly cannot now complain that he was prejudiced by a cross-examination which tended to show only that he was unwilling to use such a woman as a witness in his own behalf. We find no error or abuse of discretion upon the part of the trial court in permitting the defendant to be cross-examined on this subject.

[4] It is also contended that the court erred in refusing to give the defendant's requested instruction No. 1, which is as follows:

"Gentlemen of the jury, you are instructed that the defendant had the right to act upon the appearances of danger as they were indicated to him at the time of the killing. He was not bound to wait until the deceased was in the very act of doing him some great bodily harm, but he had the right to act upon any hostile demonstration, upon the part of the deceased, which indicated to the defendant that the deceased was then about to draw a weapon from his pocket with a purpose, as the defendant thought, to shoot him or do him some great bodily harm.

"What is or is not an overt action—that is, what act upon the part of Kelly, the deceased, would justify the defendant in taking his life—is a question for your determination in the light of all the facts and circumstances which are disclosed by the evidence submitted by both sides. Under some circumstances the slightest movement may justify instant action on the part of the person threatened with danger, upon the ground of reasonable apprehension of danger. Under other circumstances this might not be true, and it is for you, viewing the facts and circumstances in evidence from the defend-

ant's standpoint, to determine how this may be."

Upon the general subject of the requested instruction, the trial court gave the following instructions:

"You are further instructed that the defendant in this case admits the killing of the deceased, but contends that the killing was justifiable on the ground of self-defense, and that, viewed from his standpoint, it became and was necessary, in order to save his own life, or to protect himself from great bodily harm at the hands of the deceased, to take the life of the deceased; and in this connection you are instructed that in order to justify a homicide on the ground of self-defense it is not necessary that the party killing should have been in actual danger of losing his life, or of receiving serious bodily injury at the hands of the person killed at the time of the homicide, but it is sufficient to justify the killing if the acts or words, coupled with the acts of the party killed, viewed from the defendant's standpoint, were such as to reasonably cause the party killing to apprehend that he was in apparent danger of losing his life, or of having serious bodily injury inflicted upon him by the party killed; he would be justifiable in killing his antagonist, and it is immaterial whether the danger was real or not, it being sufficient in law to justify the homicide if it only be apparent.

"You are therefore instructed that if you believe from the evidence in this case that while the defendant was in his room the deceased came into said room, and that the defendant tried to get him to leave the room and to leave his house, and while thus trying to persuade the deceased to leave that the deceased threw his hand behind him to his hip pocket as though he intended to draw a revolver, and the defendant in good faith believed that he was about to draw a pistol, and that he in good faith believed that the deceased was about to do him great bodily harm, or take his life, and, acting under the circumstances, he shot and killed the deceased, it will be justifiable homicide, and it would be immaterial whether the deceased was armed or not, but if it appeared to the defendant that he was armed, and that he was about to draw his pistol and do him great bodily harm or take his life, the killing, as aforesaid, would be justifiable on the ground of self-defense, and if you so believe from the evidence, it will be your duty to return a verdict of not guilty; and in this connection you are instructed that, after a full and fair consideration of the whole case, if you entertain a reasonable doubt as to whether the killing was justifiable as defined to you in these instructions, you will give the benefit of such doubt to the defendant and acquit him.

"You are instructed what is meant by the term 'reasonable expectation or fear of death, imminent and pressing,' as used in these instructions, is that it is not necessary that the defendant be in any real danger, but apparent danger is enough to excuse him in acting in self-defense; that is, a danger which to his mind was real and imminent, and that the defendant at the time he fired the shot that took the life of the deceased was about to suffer or

receive great bodily injury at the hands of the deceased."

It has been repeatedly held by this court not to be error for the trial court to refuse to give a requested instruction if the principles therein contained are covered in the general instructions. *Manning v. State*, 7 Okl. Cr. 367, 123 Pac. 1029; *Miller v. State*, 9 Okl. Cr. 55, 130 Pac. 813; *Ryan v. State*, 8 Okl. Cr. 623, 129 Pac. 685; *Conley v. State*, 15 Okl. Cr. —, 179 Pac. 480.

The instructions as a whole fully cover the law of the case, and are as favorable to the defendant as the evidence would warrant. A careful reading of the instructions impresses this court that the trial court covered every theory of the defense in a manner fair to the defendant, and as favorable as the evidence justified. We think that the trial court did not err in refusing to give the requested instruction, because the substance of the law therein contained was fully covered by the instructions given.

This killing was the result of too much bad whisky. The defendant admits that he was angry at the time this shooting took place. He had the benefit of very able counsel, who were zealous in their endeavor to protect his rights at every step throughout the trial. That a conviction of manslaughter only resulted is attributable rather to the able manner in which he was defended than to his own testimony and conduct at the time of the killing and subsequent thereto.

The defendant was unfortunate in having selected as his mate a woman of loose character, untrue to her marriage vows. In this respect he is to be pitied; but, as held in *January v. State*, 15 Okl. Cr. —, 181 Pac. 514, "the so-called unwritten law—the right to avenge wrongs a female member of a defendant's family by killing the wrongdoer"—does not exist in this state."

For the reasons stated, the judgment is affirmed.

DOYLE, P. J., and ARMSTRONG, J., concur.

(16 Okl. Cr. 719)

STATE v. SULLIVAN et al. (No. A-3315.)

(Criminal Court of Appeals of Oklahoma. Nov. 12, 1919.)

(Syllabus by Editorial Staff.)

CRIMINAL LAW §1184(3)—APPEAL BY STATE FROM JUDGMENT SUSTAINING DEMURRER TO AN INDICTMENT DISMISSED.

Where trial court, in sustaining demurrer to indictment against two for conspiracy, made no order authorizing submission to another grand jury or directing prosecution by information, and petition in error was filed, but no brief was filed by county attorney or special prosecutors, the Attorney General's motion to dismiss appeal, because attempted prosecution was at an end and case presented only a moot question, in-

volving only an elementary principle of pleading, will be granted.

Appeal from County Court, Bryan County; Lewis Paullin, Judge.

Henry Sullivan and Boss Neal were charged by indictment with the crime of conspiracy. From a judgment sustaining a demurrer to the indictment, the State appeals. Dismissed.

S. P. Freeling, Atty. Gen., W. C. Hall, Asst. Atty. Gen., and Chas. P. Abbott, Co. Atty., and Utterback & MacDonald, all of Durant, for the State.

Hatchett & Ferguson, of Durant, for defendants in error.

PER CURIAM. In this case the state appeals from a judgment rendered in the county court of Bryan county, sustaining a demurrer to an indictment charging Henry Sullivan and Boss Neal with the crime of conspiracy.

It appears from the record that the trial court, in rendering judgment sustaining the demurrer to the indictment, made no order authorizing the matter be submitted to another grand jury, or directing that the defendants be prosecuted by information. A petition in error was filed in this court on April 6, 1918, and no brief has been filed by the county attorney or special prosecutors. When the case was called for final submission, the Attorney General moved that the appeal be dismissed; that for the reasons stated the attempted prosecution is at an end, and "this case presents only an academic or moot question, involving only an elementary principle of pleading, which would not justify this office in filing a brief solely in support of it."

The appeal herein is therefore dismissed.

(43 Nev. 61)

LOVE et al. v. MT. ODDIE UNITED MINES CO. (No. 2813.)

(Supreme Court of Nevada. Nov. 8, 1919.)

1. MINES AND MINERALS §38(22)—QUESTION OF FACT WHETHER WORK DONE IMPROVED CLAIMS.

It is purely a question of fact whether or not development work done in a particular shaft by the locator of claims so tended to improve the entire group of claims as to prevent forfeiture thereof.

2. APPEAL AND ERROR §1065—REVERSAL IN EQUITY FOR ERRONEOUS INSTRUCTION.

In equity cases, a judgment will not be reversed because of an erroneous instruction.

3. MINES AND MINERALS §23(2)—IMPROVEMENT WORK ON SINGLE LOCATION DEVELOPING ENTIRE GROUP.

Improvement work, within the meaning of the federal statute as to the location of mining

claims, is deemed to have been performed, whether the claim consists of one location or several, when in fact the labor is performed or the improvements are made for the development of the whole claim, that is, to facilitate the extraction of metals, though the labor and improvements may be on ground originally part of only one of the locations, and it is not necessary that the work "manifestly" tend to the development of all the claims in the group; "manifest" meaning evident or obvious to the mind.

[Ed. Note.—For other definitions, see. Words and Phrases, First and Second Series, Manifest.]

4. MINES AND MINERALS ¶23(2)—DEVELOPMENT WORK ON GROUP OF CLAIMS.

In the exercise of judgment as to where development work should be done on a group of mining claims and locations, a wide latitude should be allowed the owners of the property.

5. MINES AND MINERALS ¶38(20)—EVIDENCE NOT SHOWING DEVELOPMENT WORK INSUFFICIENT.

In an action to quiet title to a group of eight mining claims, wherein verdict was rendered in favor of plaintiff relocators for four of the claims, evidence that the development work done in one place by defendant company on such claims was insufficient to prevent forfeiture *held* not such as to sustain the judgment.

6. TRIAL ¶375—VIEW OF PREMISES BY COURT.

A view of the premises involved in mining litigation cannot be considered as evidence, but only to enable the court better to understand and comprehend the evidence introduced and intelligently to apply it.

Appeal from District Court, Nye County; Mark R. Averill, Judge.

Action by Frank Love and Martin Evensen against the Mt. Oddie United Mines Company. From judgment for plaintiffs in part, and from an order denying its motion for new trial, defendant appeals. Reversed.

For former opinion, see 181 Pac. 133.

H. B. Cooke, of Tonopah, for appellant. Norcross, Thatcher & Woodburn, of Reno, for respondents.

Henry M. Hoyt, of Reno, amicus curiæ.

COLEMAN, C. J. This is an action to quiet title to a group of eight mining claims. The complaint is in the usual form. The case was tried before a jury. Verdict was rendered in favor of the plaintiffs for four of the claims. From an order denying a motion for a new trial and from the judgment, an appeal has been taken.

Prior to January, 1911, defendant was the undisputed owner of the ground in question consisting of a group of eight claims, under and by virtue of its location as mining claims and a compliance with the laws, rules, and regulations pertaining thereto. On July 25, 1913, plaintiffs, asserting that the labor for

the year 1912 had not been done upon the claims by the defendant company, entered upon and located them. It is admitted by plaintiffs that the defendant company did enough work on one of the claims (the Verna) to constitute the labor upon said group, if such work can be considered, but contend that the work done at that point did not tend to develop the group.

[1] It is agreed between counsel that it is purely a question of fact as to whether or not the work done in the Verna shaft in 1912 so tended to improve the entire group of claims as to prevent a forfeiture thereof; and such is the law. *Big Three M. & M. Co. v. Hamilton*, 157 Cal. 130, 107 Pac. 304, 137 Am. St. Rep. 118.

[2, 3] Before proceeding to consider the main question of the case, we will dispose of the error assigned to the giving of that portion of plaintiffs' instruction No. 4, wherein the court told the jury that where work is done upon one claim for the benefit of an entire group, it "must manifestly tend" to the development of all the claims in the group. It is a general rule that in equity cases a judgment will not be reversed because of an erroneous instruction. We might dispose of this phase of the question without saying more; but, in view of the fact that the learned trial judge in his written opinion holds that such is the law, and was evidently controlled by that view of the law in reaching his conclusion, we deem it proper to express our interpretation of the law for the guidance of the courts in the future.

The trial judge, in his written decision, cited section 630 of Lindley on Mines in support of his views. He no doubt accepted the statement of Mr. Lindley without having examined the authorities cited by that eminent author in support of the text, as was most natural, in view of the arduous labors incident to his position; and, while we entertain great deference for the views of Mr. Lindley, we cannot accept his statement of the law. We have examined the decisions of the various courts cited, and do not find that they support the author; nor do we see how such a view can be sustained. The word "manifest" means "evident to the senses; evident to the mind; obvious to the mind." Webster's Int. Dict. The courts uniformly hold that annual labor may be done outside of a claim, or group of claims, upon a patented mining claim, or upon the public domain. Certainly work done outside of a claim, upon a patented mining claim, or upon the public domain, cannot be said to "manifestly" tend to develop such claims; but it is the universal rule that proof may be offered to show that such work was done for the purpose of developing such other claims, and that in fact it tends to develop them, and when so shown it complies with all requirements. If it were

the rule that the work "must manifestly" tend to develop a group of claims, work done on the public domain could not count, as by no possible stretch of the imagination could it be said that such work would "manifestly" tend to develop such group, nor could proof cause it to "manifestly" so appear. The correct rule to apply to the situation here presented is declared by the Supreme Court of the United States in *Smelting Co. v. Kemp*, 104 U. S. 636, 26 L. Ed. 875, as follows:

"Labor and improvements, within the meaning of the statute, are deemed to have been had on a mining claim, whether it consists of one location or several, when the labor is performed or the improvements are made for its development, that is, to facilitate the extraction of the metals it may contain, though in fact such labor and improvements may be on ground which originally constituted only one of the locations, as in sinking a shaft, or be at a distance from the claim itself, as where the labor is performed for the turning of a stream, or the introduction of water, or where the improvement consists in the construction of a flume to carry off the debris or waste material."

Whatever other courts may think or say, the law as laid down by the court mentioned upon this question is final, though, so far as we know, all of the courts of the land are in accord with the view thus expressed, and some of the authorities so holding are *Copper Mt. M. & M. Co. v. Butte, etc.*, 39 Mont. 437, 104 Pac. 540, 133 Am. St. Rep. 595; *Chambers v. Harrington*, 111 U. S. 350, 4 Sup. Ct. 428, 28 L. Ed. 452; *Fredricks v. Klauser*, 52 Or. 110, 90 Pac. 679; *Big Three M. & M. Co. v. Hamilton*, 157 Cal. 130, 107 Pac. 304, 137 Am. St. Rep. 118; *Nevada Ex. & M. Co. v. Spriggs*, 41 Utah, 171, 124 Pac. 773; *Lindley on Mines* (3d Ed.) § 629; *Snyder on Mines*, § 480; *Costigan on Mines*, p. 278.

[4] It may be said that it is the policy of the law to encourage the doing of annual labor on mining claims in a manner which will best develop the property and lead to the discovery of mineral, and for that reason annual labor upon a group of mining claims may be done all in one place, the object of the government being to encourage such development as is most likely to result in the production of the precious minerals; and since depth is usually necessary in the making of a mine, it is much better, as a general rule, to spend \$800 in one place than to distribute \$800 in eight or more places, provided it is done in an honest effort to make a mine, and in a manner tending to develop all of the claims. And in the exercise of judgment as to where work should be done, we think a wide latitude should be allowed the owners of property, consisting of several claims, as to where the work shall be done to develop a group of claims. And in this view we are sustained by ample authority. In *Big Three M. & M. Co. v. Hamilton*, supra, it was said:

"Work done on one of a group of mining claims which has a tendency to develop or bene-

fit all of the claims in said group inures to the benefit of each and all of said claims, even though the system adopted may not be the best that could have been devised under the circumstances."

Judge Farrington, in *Walles v. Davies* (C. C.) 158 Fed. 867, in determining a case in which the question before us was involved, said:

"The statute does not require * * * that the work shall be wisely and judiciously done."

See, also, *Mann v. Badlong*, 129 Cal. 577, 62 Pac. 120.

With these observations in mind, we will consider the evidence in the case, as shown by the bill of exceptions. Only three witnesses were called in behalf of the plaintiffs, viz. the plaintiffs themselves and one McCarthy, and the latter testified in rebuttal only. We reiterate here what we said in our previous opinion:

"The bill of exceptions contains only about 1½ typewritten pages of the direct testimony of the witness Love, who testified in behalf of plaintiffs, and is confined solely to that portion of his testimony showing his experience as a prospector and miner. It does not contain one word of testimony given by the witness mentioned on direct examination concerning the material and vital issue in the case, but it does contain about 25 pages of his cross-examination upon the vital issue. The bill of exceptions is in substantially the same condition as to the testimony of the witness Evensen."

But, notwithstanding this fact, the trial judge denied a motion for nonsuit at the conclusion of plaintiffs' testimony in chief.

There being no evidence in the record on direct examination for us to consider, tending to sustain the judgment, we are confined to the cross-examination, replete with asterisks, as it is. From the cross-examination of plaintiff Love we quote the following extracts:

"Mr. Cooke: Q. * * * All right. Then if you were not concerned in that land, not interested in it, made no examination of the shaft or the character of the work that was done there, why do you say, as you did say awhile ago, that that shaft did not benefit the Daisy and the Jackie ground so as to prevent Evensen from relocating it? * * * A. I didn't think it was, where it is situated in the northwest corner there, I can't see how it can benefit them."

"Q. Is that the best answer you have to that question? A. Well, it is the best I know."

"Q. Well, of course that is all you can say, is what you know. That is the best answer you can make, is it? A. (Witness hesitates.)"

"Q. You have no further answer to make to that? A. No full answer?"

"Q. No further, I say. A. I don't understand you."

"Q. I want to give you an opportunity to answer that if you want to now, if you have any further answer to make; if not, we will proceed with something else."

"Mr. Sanders: I think that is enough."

"Mr. Cooke: Well, if you are satisfied, I am."

"Mr. Sanders: Well, let us go on with something else. * * *

"Mr. Cooke: Q. * * * That shaft, so far as you know, was within the lines of the Verna claim, wasn't it? A. It was, but pretty near the Halifax.

"Q. Well, what has that got to do with it? A. Well, it shows that it wasn't in a place to develop that group of ground."

"Q. What is the reason you jumped the Verna claim when there was \$300 worth of work at least done there during that year? A. Because I couldn't see what there was hardly benefiting any claim; I can't see where it benefited more than one-half of the Verna.

"Q. Not even the claim on which the shaft was sunk? A. Well, it didn't look to me that way; that was my purpose of taking it up; I didn't think the work was in the right place; it was a straight shaft, and right near the corner of the Halifax, and I didn't see where it was even benefiting one claim.

"Q. It didn't even develop the Verna? A. Well, that is my idea."

"Mr. Cooke: Q. Do you undertake to say, Mr. Love, that the sinking of that shaft 50 feet deep on the Verna claim didn't tend to develop that claim? A. The way it is I can't see where it did; I never could get it into my head where it did.

"Q. Do you say as a miner that the sinking of a 50-foot shaft on that claim didn't tend to develop it? A. I say it didn't tend to develop the whole claim; it wasn't put there for that purpose; that is my idea of it.

"Q. Did it tend to develop that part of the claim on which it was sunk? A. It would do that if they had anything to show; I don't think they have got anything there to show for it.

"Q. Have they got to find mineral in a shaft before it tends to develop the claim? A. No.

"Q. What do you mean them to show in it? A. Want them to put the work in the proper place for to develop the group, if they are trying to hold it for the group.

"Q. Well, but couldn't they hold the Verna claim, which you jumped; couldn't they hold that whether they could hold the others or not, with that 50-foot shaft? A. My idea is that they could not."

"Q. Then, Mr. Love, with your experience as a miner, the sinking of a 50-foot shaft upon a claim, in the rock, and timbering it up, doesn't tend to develop the claim? A. Just as I told you, I can't see where it can, the whole of the claim."

"Q. Well, put it that way, because they made a show, and still spent at least \$300 in sinking a shaft on the Verna claim that you admit was within the lines of the Verna claim, that they ought to suffer the loss of that claim, and you ought to take it, is that your position? A. Yes."

"Q. Now, Mr. Love, coming back to this Verna: There was a shaft put in there, and there were timbers put in there. Now, you say the shaft didn't count for anything because in your judgment it wasn't located in the right place, and it didn't tend to develop the ground. Now, then, building a building upon a mining claim tends to develop the ground, doesn't it, isn't that good as annual labor? A. It does as far as it goes.

"Q. How far does this blacksmith shop go? A. Oh, I couldn't tell you. It don't go very far.

"Q. If you couldn't tell, what business had you to jump the ground? A. It couldn't amount to a great deal to hold that whole group, that I know.

"Q. Well, if it held one claim, what right did you have to locate that claim on which the blacksmith shop was located? A. I located it because I didn't think the work was done in good faith.

"Q. You then assume to be the judge of the good faith of the work done, and if you conclude that it isn't done in good faith, you would go and jump any property, no matter if there was \$10,000 worth of work done on it. Is that your style of doing business? A. No; it ain't.

"Q. Well, it was your style in this case, wasn't it, Mr. Love? A. It wasn't for that purpose.

"Q. Well, did you assume to judge about the good faith because this wasn't located in the place where you thought it ought to be, notwithstanding that it was a number of times in excess of the required amount of expenditure for one claim on which these improvements were placed, didn't you? A. I located it because it wasn't done in the right place for good faith; it wasn't located for development; that is why I took it."

"Q. Now, if the work actually does tend to show the presence or the likelihood of the presence of ore in the ground, isn't it annual work, even though it is done with the idea of making a showing? A. It shows the way, that is, to me, and I can't get it any other way; it is not showing good faith, putting it in that corner."

"Q. Then why, when you now admit that the work did benefit the Verna, you now admit it was worth \$300, why did you relocate the Verna? A. Because just where the shaft was I didn't think that it was right to develop it.

"Q. It wasn't the right place to put it? * * *

"Q. Well, if you have two claims adjoining each other, and I wanted to do the work on the two of them, on one of them for the benefit of both, and I sink a shaft in the corner of one of them at a cost of \$175, is it your understanding that you could jump both of those claims because \$175 wasn't sufficient to include both, and because I had put my shaft in a corner instead of the middle? A. No; if one benefits the other.

"Q. Well, how about the claim on which the shaft is sunk, can I hold that whether I can hold the other one or not? A. Well, yes; you can hold that one.

"Q. Yes. Then why couldn't the Mt. Oddie United Mines Company in this case hold the Verna? A. Because it wasn't done from a good intention."

"Q. Was the little Billie developed to any extent, or benefited to any extent, by the sinking of that shaft in the northwest corner of the Verna? A. I can't see that it was.

"Q. You can't see it. That is all the reason you know of, Mr. Love, that you just can't see it? A. I can't see it that way.

"Q. You know of no other reasons? A. That is all the reasons I have. It don't look possible to me.

"Q. It don't look possible to you that a shaft sunk in the rock 50 feet deep could develop more than 700 feet away? A. No; it don't."

The following extracts we take from the testimony of plaintiff Evensen:

"Mr. Cooke: Q. * * * Well, if the Verna shaft, sunk in 1912, which was worth approximately \$300 to sink, and a blacksmith shop was put up there at the valuation you have given us, and the concrete work was done there, and the shaft was timbered, on what grounds do you claim in this case that the Verna was open for relocation in July, 1913? A. It don't develop any group, that shaft.

"Q. Don't develop any group? A. No.

"Q. Because it didn't develop the group that left the Verna open to relocation; is that the proposition? A. Yes. Don't see to develop even the Verner.

"Q. Well now right there, do you say, as a mining man of such experience as you have had, that the sinking of that shaft in the Verna claim did not tend to develop the Verna claim? Just cut out these other claims for the time being. A. No. * * * Well, I don't know. I ain't much of a mining man myself, so far as mining expert or anything. * * *

"Q. Well, if you don't know anything about it, why do you say that this work didn't tend to develop the Verna claim? A. Well, that is what I say, I don't know."

"Q. Well, if you don't know, why do you say that a shaft 50 foot wouldn't develop it? A. Well, I suppose a lawyer ought to know it.

"Q. Just answer the question. A. Well, I got the information from a lawyer that that shaft didn't develop that group. I went to him and asked him first.

"Q. Asked him if it developed it? A. Yes.

"Q. And you relied upon that rather than your own judgment, in making the relocation? A. Why, sure I did.

"Q. Did Love do the same thing? A. I think he did. * * *

"Mr. Cooke: Q. Then you didn't know anything about what the effect of sinking a shaft on one claim is with reference to its developing adjoining claims? * * * A. I don't know."

[5] Such is the testimony on cross-examination, as it appears from the bill of exceptions, upon which we must sustain the judgment, if it is to be sustained at all. Notwithstanding the rule that an appellate court is reluctant to reverse a judgment of a trial court purely upon the ground that the evidence does not sustain the judgment, we do not find that this is such a case. The evidence in favor of respondents, as presented to us, consists of nothing but conclusions. There is not a statement of a fact contained in the bill of exceptions worthy of serious consideration, and the testimony of the plaintiff Evensen shows that his conclusion as to the sufficiency of the work was based solely upon the opinion of his attorney. He said that he did not know whether or not the work would tend to develop the entire group. His testimony is worthless.

To permit a judgment to stand upon such evidence would be to make a farce of judicial proceedings; to substitute conclusions of interested parties for facts. Defendant called eight or ten disinterested witnesses, some of whom were men of technical training and of wide experience as mining operators in

the Tonopah District, who gave testimony to the effect that the shaft in question was sunk in the proper place to develop the group of claims. In behalf of the defendant company, evidence was given that at a meeting of the officers and board of directors the question of doing the annual labor for all of the claims at the point at which it was done was considered, and the advantages thereof, and it was decided to adopt that plan for the development of the group of claims, and the work was done accordingly. In the face of the record, we are clearly of the opinion that the judgment of the lower court should have been in favor of the defendant company.

There is no substantial evidence in the record to sustain the judgment. The undisputed evidence shows that more than enough work was done for the entire group. If mining claims can be forfeited upon such testimony as that before us, development of mining ground when several claims are held in a group will be greatly retarded, to the disadvantage of the industry, of a mining district, and of the state. In this connection, we quote with approval the language of the Supreme Court of Wyoming in *Sherlock v. Leighton*, 9 Wyo. 297, 308, 63 Pac. 580, 583:

"With the single exception of the testimony of the adverse claimant, who expressed as his opinion that the tunnel in no way tended to the benefit of the claim, there is no support in the evidence of the allegations of forfeiture. To hold, upon the strength of his testimony alone, as against all the other facts in the case and the judgment of other experienced miners, that there had been an abandonment or forfeiture, although the locator had, in good faith, made the required expenditure, believing that the work done would inure to the advantage of his claim, and assist in its development, would shock our sense of justice. It would amount to substituting for the honest judgment of the locator the judgment, doubtless equally as honest, of his adversary, who has sought to get possession of the property by taking advantage of the supposed forfeiture. It seems to us that in determining the question as to the beneficial character of a tunnel such as was constructed in this case, where the opinions of expert witnesses differ upon the question, some force should be given to the honest intention and good faith of the locator, and in a doubtful case that might be sufficient to turn the scale. But, according to most of the witnesses in the case at bar, the work was of benefit, and that opinion appears to us to be supported by the facts in the case. The great weight of the evidence upon the proposition is clearly opposed to the theory of the defendant in error. We regard the conflict, so far as the facts are concerned, as so slight and unimportant that the case does not call for the application of the rule by which an appellate court is guided where a decision upon a question of fact is found to rest upon conflicting evidence. In our judgment, the evidence is insufficient to sustain the allegation of forfeiture of the Cleveland lode."

[6] A point is sought to be made of the fact that the court viewed the premises in

question. It is the rule in this state that a view cannot be considered as evidence, but only for the purpose of enabling the court to better understand and comprehend the evidence introduced, and to intelligently apply it. *Albion M. Co. v. Richmond M. Co.*, 19 Nev. 225, 8 Pac. 480. But if the contrary rule existed, we do not think that, in the face of the record in this case, the view would justify the judgment. As we look upon the record, there is no substantial oral evidence therein in behalf of plaintiffs, and a mere view, considering the nature of the case, is not sufficient to sustain the judgment, and certainly not in the face of the evidence in behalf of appellant.

There being no evidence in the record to sustain the judgment, it is reversed.

DUCKER, J., concurs.

NOTE.—SANDERS, J., having been counsel for the plaintiffs in the trial court, did not participate in the consideration of this case.

(43 Nev. 280)

DIXON v. MILLER. (No. 2377.)

(Supreme Court of Nevada. Nov. 4, 1919.)

1. BILLS AND NOTES \S 90, 97(1)—WANT OF CONSIDERATION A DEFENSE AGAINST ORIGINAL PAYEE.

As against the original payee who was not a holder of a note in due course, the maker may, under Negotiable Instruments Law, \S 28, urge the absence or failure of consideration.

2. BILLS AND NOTES \S 476(1)—ANSWER ALLEGING WANT OF CONSIDERATION SUFFICIENT.

In an action on a note, the answer of the maker held sufficient to present as against the payee the defense of want of consideration.

3. EVIDENCE \S 432—PAROL EVIDENCE ADMISSIBLE TO SHOW WANT OF CONSIDERATION.

The rule that parol evidence is not admissible to contradict or vary an absolute engagement to pay money on the face of a bill or note does not exclude evidence as between the immediate parties of a total failure or want of consideration, and the Negotiable Instruments Law, \S 28, recognizes the right to urge want of consideration.

4. BILLS AND NOTES \S 537(3)—EVIDENCE \S 598(1)—WANT OF CONSIDERATION JURY QUESTION.

Ordinarily a mere equality in the number of witnesses does not constitute a balance of evidence, and hence in an action on a note, where defendant urged want of consideration and testified to facts in support of his claim, which testimony was contradicted by plaintiff, the payee, the question is for the jury.

Appeal from District Court, Washoe County; Thos. F. Moran, Judge.

Action by J. B. Dixon against A. Grant Miller. From a judgment for defendant plaintiff appeals. Affirmed.

J. M. Frame and J. B. Dixon, both of Reno, for appellant.

Gray Mashburn and A. Grant Miller, both of Reno, for respondent.

DUCKER, J. The appellant and respondent are attorneys at law. The appellant, who was plaintiff in the court below, brought this action on a promissory note of which the following is a copy:

\$1,500.00. Reno, Nevada, June 14, 1910.

Three months after date, for value received, I promise to pay to J. B. Dixon or order, the sum of fifteen hundred dollars with interest at the rate of eight per cent per annum until paid. In case this note is not paid at maturity and proceedings are taken to collect the same in court or otherwise, I agree to pay in addition to principal, interest and costs, reasonable attorney's fees. This note is secured by a chattel mortgage bearing even date herewith. [Signed] A. Grant Miller. A. Grant Miller, as Trustee for Union Printing & Publishing Company.

The defendant answered, and, besides certain other matters, alleged as two separate defenses that the note and chattel mortgage referred to therein were executed by him in a representative capacity as the agent and trustee of the Union Printing & Publishing Company, a corporation; that the note and chattel mortgage were executed and delivered by respondent in said representative capacity to appellant to secure a certain contingent fee which appellant was to receive as an attorney in the event he successfully defended certain actions at law, in which one George W. Condon was plaintiff and the Forum Publishing Company, a corporation, Union Printing & Publishing Company, a corporation, A. Grant Miller as trustee for said last-mentioned corporation, and A. Grant Miller were defendants.

It is alleged in the reply that the chattel mortgage referred to was and is not a subsisting security for the payment of the promissory note at the time of the commencement of the action and for a long time prior thereto, for the reason that the property described therein had been taken out of the possession of appellant against his will by the sheriff of Washoe county and sold under a decree of court, thereby depriving appellant of his security. It is averred in the reply that there was a good, valid, and valuable consideration for said note, and denied therein that respondent acted merely as agent for said Union Printing & Publishing Company in the executing and delivering of said note. It is alleged that respondent, at appellant's request, made and executed the note sued upon and the chattel mortgage, both individually and as trustee for said Union Print-

ing & Publishing Company, at appellant's request, and denied that appellant agreed to defend said actions for a contingent fee.

The lower court found that respondent made the note in a representative capacity only, as agent and trustee for the Union Printing & Publishing Company, and executed the chattel mortgage as such agent and trustee, as security for the payment of the contingent fee alleged in the answer; that judgments in said actions at law were rendered in favor of the plaintiff therein, and that appellant earned no fee under the contingent agreement; that there was no consideration passing from appellant for the note. Judgment was rendered in favor of respondent, and from the judgment and order of the court denying a motion for a new trial, this appeal is taken.

Eighty-one errors are assigned by appellant, and as the action is upon a promissory note it seems incredible that the court could have had even an opportunity to commit so many. Many of the errors alleged do not merit a discussion, and were not urged in the oral argument before this court. These, therefore, will receive no attention in this decision. It seems to us that there are but two questions necessarily involved in this appeal: (1) Did the facts alleged in the answer concerning the oral agreement as to the note and chattel mortgage being given as security for a contingent fee from which a lack of consideration is claimed, or the facts alleged showing that respondent acted in a representative capacity only in executing and delivering the note to appellant, constitute legal defenses in the action? (2) If either amounted to a defense in law, was there substantial evidence to support the finding of the court in this regard?

[1] If these questions are answered in the affirmative, the judgment must be affirmed. Section 28 of the Negotiable Instruments Law (St. 1907, c. 62) provides in part as follows:

"Absence or failure of consideration is a matter of defense as against any person not a holder in due course."

Appellant is not a holder of the note in due course, but is the payee thereof, and therefore under the statute respondent is entitled to defend by impeaching the consideration of the instrument.

[2] The averments of the answer in this respect show that appellant and respondent, prior to the time of the execution of the note and mortgage, entered into an oral agreement by the terms of which appellant agreed to defend two actions at law, in which one George W. Condon was plaintiff and Forum Publishing Company, a corporation, Union Printing & Publishing Company, a corporation, A. Grant Miller as trustee for said last-mentioned corporation, and A. Grant Miller were defendants, for an attorney fee of 25 per cent. of the property involved in the suits, valued at \$6,000, and that appel-

lant should receive no fee for his services unless he was successful in securing judgments in the actions in favor of the defendants; that, thereafter, at appellant's request, respondent made and executed a promissory note in his favor in the sum of \$1,500 and secured it by a chattel mortgage upon the goods and chattels of the said Union Printing & Publishing Company, to secure appellant's contingent fee in case he won said cases, and in the event that other creditors of the Union Printing & Publishing Company should attach the property involved; that appellant did not successfully defend these actions, and judgment was entered in both actions in favor of the plaintiff therein.

We think that a legal defense of failure of consideration is sufficiently pleaded in this statement of facts. They show that appellant was entitled to no fee unless he succeeded in obtaining judgments for the defendants in the two cases, and that, the note having been made and executed only for the purpose of securing his fee, if earned, a failure of consideration for the note ensued from his failure to earn the fee in accordance with the parol agreement. The defendants did not get what they were to have—a successful defense of their cases.

[3] Appellant demurred to this defense upon the ground of insufficiency of facts. The demurrer was overruled, and on the trial of the case objection was made to the evidence, tending to establish it upon the ground that parol evidence of an oral agreement is inadmissible to contradict or vary the terms of a written instrument. This is not the effect of the evidence admitted. It does not contradict or vary the terms of the note, but does tend to impeach the consideration.

"The rule that parol evidence is not admissible to contradict or vary an absolute engagement to pay money on the face of the bill or note does not exclude evidence as between the original parties showing a total or partial failure of consideration." 8 R. C. L. 943.

This is the rule at common law in cases where notes or other instruments for the absolute payment of money are given. As stated by Chief Justice Parson more than 100 years ago, in *Barker v. Prentiss*, 6 Mass. 430:

"It is every day's practice, notwithstanding a promissory note is expressed to be for value received, to admit the promisor * * * to prove that there was no consideration."

The common-law rule is recognized in our statute which has expressly provided for this defense. Necessarily, to give effect to the statute, parol evidence must be admitted to show what the consideration was, as well as to show that it has failed. The reason is obvious. The real consideration for a promissory note is never apparent from its face. No conclusive presumption arises from the words "for value received," and when a note

is challenged for want or failure of consideration the fact must be learned from extrinsic evidence which relates to the point of time when the note was executed and discloses the dealings between the parties. *Smith v. Dotterweich*, 200 N. Y. 299, 93 N. E. 985, 83 L. R. A. (N. S.) 892; *Julius Kessler & Co. v. Parelius*, 107 Minn. 224, 119 N. W. 1069, 131 Am. St. Rep. 459.

[4] The note purporting to be signed by the respondent and also as trustee for the Union Printing & Publishing Company was introduced as evidence. Appellant testified that it was executed and delivered to him by respondent in consideration of legal services rendered by him at respondent's request in two actions against respondent and other defendants, brought by one George W. Condon as plaintiff in the above-entitled court, and a third suit, brought by said Condon in the Sparks justice court; that he was the owner and holder of the note, and that no part of it had been paid, and that the whole amount of \$1,500, with interest from date, was due and payable; that respondent signed his name to the note and mortgage first as an individual and then as trustee. Appellant and respondent were the only witnesses, and their testimony upon the issues was in the main flatly contradictory.

Respondent testified that he signed and delivered the note and mortgage to appellant, and, touching the issue of want of consideration, testified that he employed appellant to defend the said actions for himself personally, for the Union Printing & Publishing Company, for himself as trustee of said company, and for E. H. Beemer, as intervener, he being a stockholder of said Forum Publishing Company; that he had several consultations with appellant as to the defense of the suits, and before he took any action in court, they agreed that appellant, as attorney, should defend the suits on a contingent fee of 25 per cent. of the value of the goods mentioned in the chattel mortgage, valued at \$6,000, which had been purchased by respondent from the Forum Publishing Company as trustee for the Union Printing & Publishing Company; that he acted as agent and trustee of said Printing & Publishing Company in employing appellant as attorney on a contingent fee; that in June, 1910, and subsequent to such employment, appellant requested respondent to make and execute the note and chattel mortgage for and on behalf of the said Printing & Publishing Company upon the goods and chattels of said Union Printing & Publishing Company to secure the contingent fee; that appellant lost the two suits; that the reason assigned by appellant for desiring the note and mortgage to secure his contingent fee was that he was certain he could win the suits, but he was afraid that after he won them other creditors of the Union Printing & Publishing Company would attach the property involved,

and he would lose his contingent fee; that no money passed from appellant to the respondent as a consideration for said note; that appellant rendered certain services in said actions. The foregoing is in substance all of respondent's testimony that has any bearing upon this phase of the case. He testified that appellant did not earn and was not entitled to any fee, and that there was no consideration for the note, but these are conclusions, and without any probative force.

The appellant on rebuttal testified in detail as to the services he had rendered, and contradicted respondent as to any agreement to defend the cases for a contingent fee. On this phase of the case he said, in substance:

"After several consultations with A. Grant Miller, late in March and early in April, 1910, I was retained and employed by him to conduct the defense of himself as an individual, the Union Printing & Publishing Company, and of himself as trustee for said last-named corporation, and also to act for E. H. Beemer, a stockholder of the Forum Publishing Company, as intervener, in actions Nos. 7114 and 7119. I did not agree or consent to take the cases on a contingent fee, or either of them, but the amount of my fee was not then fixed, for it was unknown what services would be required. As the trials of the two cases were approaching and it was possible then to determine approximately the value of the services already rendered and further probable services, I told Mr. Miller that the amount of my fees must be settled, and that if cash could not be paid I wanted some security. After some discussion it was agreed orally that \$1,500 would be the reasonable value of my services, and Mr. Miller said that neither he nor the other defendants could pay cash, but that he would give me his promissory note for \$1,500 and secure it by a mortgage on the personal property he had bought from the Forum Publishing Company. The note and mortgage were dated June 14, 1910, but were not executed and delivered to me until June 20 or 21, 1910. Neither at the time of the oral agreement made by me with Mr. Miller, nor at the time of the execution and delivery of the note and mortgage, was anything said by either Mr. Miller or myself that this note should be in any way contingent on the result of the suits or either of them."

It thus appears that there is a direct conflict of testimony between the parties as to the contingent fee agreement. Neither is corroborated by any other testimony or circumstance in the case as to this phase of it. The case made out by respondent, and upon which the trial court based its findings, is therefore not strong. It could not stand in some jurisdictions, where the rule prevails that where the claim of a party rests upon his unsupported testimony, and is met by the positive denial of the other, so that the case presented is merely oath against oath, there is no preponderance, and the party having the burden must fail. This, however, is not the general rule.

"The general rule undoubtedly is that a mere equality in number of witnesses does not constitute a balance of evidence any more than disparity in number discloses a preponderance, which it sometimes does. It cannot be held as a proposition of law that, simply because an equal number of witnesses testify in opposition to each other upon a given question of fact, therefore the evidence is equally balanced. The intelligence and integrity of the witnesses, their means of information, as well as many other things, are to be considered in determining upon which side is the preponderance or greater weight of evidence. Facts may exist which will turn the scale on the one side—interest, motive, prejudice, manner of testifying. These and other kindred things are to be considered in determining which of the witnesses is entitled to the greater credit." *Moore on Facts*, vol. 1, p. 108; *Howlett v. Dilts*, 4 Ind. App. 23, 80 N. E. 313; *Johnson v. People*, 140 Ill. 350, 29 N. E. 896; 10 B. C. L. 1007.

We are not inclined to disturb the finding of the lower courts in this regard. The duty of judging the credibility and weighing the testimony of the two litigants rested entirely upon the trial court. There is substantial conflict in the evidence, which gives effect to the finding of the trial court.

"If there is a substantial conflict in the evidence, then the duty and responsibility of finding the facts from the evidence devolves upon the trial court, and constitute a question concerning which this court has nothing to do, even though we may feel that upon the whole evidence we should have come to a different conclusion." *Bigelow, C. J.*, in *Gardner v. Gardner*, 23 Nev. 215, 45 Pac. 140.

See, also, *Thompson v. Tonopah Lumber Co.*, 37 Nev. 183, 141 Pac. 71; *Leete v. Southern Pacific Co.*, 37 Nev. 49, 139 Pac. 29; *Robinson Mining Co. v. Riepe*, 37 Nev. 27, 138 Pac. 910; *Turley v. Thomas*, 31 Nev. 181, 101 Pac. 568, 135 Am. St. Rep. 667.

From these views we are led to affirm the judgment, and deem it unnecessary to discuss the evidence bearing upon the question as to whether respondent acted in a representative capacity in executing and delivering the note to appellant.

Judgment affirmed.

COLEMAN, C. J., and SANDERS, J., concur.

(55 Utah, 129)

LYNCH v. JACOBSEN. (No. 8886.)

(Supreme Court of Utah. Oct. 9, 1919.)

1. CONSTITUTIONAL LAW §34 — PROVISION FOR DOUBLE LIABILITY OF BANK STOCK IS SELF-EXECUTING.

A constitutional provision imposing double liability on bank stockholders is self-executing.

2. BANKS AND BANKING §49(1)—ENFORCEMENT OF DOUBLE LIABILITY OF STOCKHOLDERS.

Where Constitution provides double liability for bank stockholders in favor of creditors, but does not fix how it shall be enforced the bank's creditors may enforce the liability in an ordinary action, either at law or in equity, though it seems that actions in equity have the preference under such circumstances.

3. BANKS AND BANKING §49(1)—ENFORCEMENT OF DOUBLE LIABILITY OF STOCKHOLDERS.

Where constitutional provision imposing double liability on stockholders of banks fails to determine by whom the liability for benefit of creditors may be enforced, the Legislature may at any time determine who may sue the stockholders and what the nature of the proceedings shall be.

4. BANKS AND BANKING §77(3)—RECEIVER MAY ENFORCE DOUBLE LIABILITY OF STOCKHOLDERS.

Where Constitution imposes a double liability for benefit of creditors on bank stockholders, a receiver, appointed to take charge of an insolvent bank's assets and wind up its affairs, may, under section 34, c. 25, Laws Utah 1911, sue to enforce the liability.

5. BANKS AND BANKING §49(8)—DETERMINATION OF DOUBLE LIABILITY OF SHAREHOLDERS.

The order or judgment of the court declaring a bank insolvent and finding that it is necessary to enforce the stockholders' additional liability to pay the bank's debts in the absence of fraud or collusion, is conclusive upon stockholders, and they may not assail it save in a direct proceeding.

6. CONSTITUTIONAL LAW §169—CHANGE OF MODE OF ENFORCEMENT OF DOUBLE LIABILITY OF STOCKHOLDERS.

Where state Constitution imposes a double liability on bank stockholders, the method of enforcing the liability may be changed by the Legislature, provided such change does not affect or enlarge the liability of the stockholders, and the Constitution does not itself provide a method of procedure.

7. BANKS AND BANKING §47(2)—ENFORCEMENT OF STOCKHOLDERS' DOUBLE LIABILITY.

It is not essential to the enforcement of double liability imposed by law upon bank stockholders that all of the bank's assets be first exhausted, where it is apparent that the bank is insolvent.

8. CONSTITUTIONAL LAW §34—SELF-EXECUTING PROVISIONS FIXING LIABILITY OF BANK STOCKHOLDERS.

Where the Constitution imposes a liability without prescribing a remedy, the provision is a mere limitation on the power of the Legislature which may fix a remedy, but until the Legislature acts the courts will, the constitutional provision being self-executing, enforce the liability in accordance with some known remedy.¹

¹ *Steinke v. Loofbourrow*, 17 Utah, 253, 54 Pac. 120; *McLaughlin v. Kimball*, 20 Utah, 254, 59 Pac. 685.

9. CONSTITUTIONAL LAW ¶169 — ENFORCEMENT OF DOUBLE LIABILITY ON BANK STOCK.

The right to enforce the double liability imposed by Const. art. 12, § 18, on bank stockholders for the benefit of creditors, is not given by the Constitution to creditors; and, while not technically an asset of the corporation, it was competent for the Legislature to provide as it did by Laws 1911, c. 25, § 34, for enforcement of such liability by a receiver appointed on insolvency of a bank.

10. BANKS AND BANKING ¶77(3)—RECEIVER MAY ENFORCE STOCKHOLDERS' LIABILITY.

Under Laws 1911, c. 25, § 34, providing that a receiver, if appointed for a bank, shall, under direction of the court, take possession of the assets of every description, and may, if necessary to pay the debts, enforce all the individual liabilities of stockholders, a receiver is not limited to the general assets, but may, under order of court, enforce the stockholders' liability.

11. CONSTITUTIONAL LAW ¶48 — STATUTES HELD VALID UNLESS CLEARLY UNCONSTITUTIONAL.

A legislative act cannot be stricken down on the ground that it is unconstitutional unless it is clearly and palpably so.²

12. STATUTES ¶117(1)—TITLE OF ACT AUTHORIZING RECEIVER TO ENFORCE DOUBLE LIABILITY ON BANK STOCK.

The title of Laws 1911, c. 25, which in section 34 authorizes a receiver of an insolvent bank to enforce the double liability of stockholders, held sufficient to include that provision.

13. STATUTES ¶117(1) — TITLE OF ACT AUTHORIZING RECEIVER TO ENFORCE DOUBLE LIABILITY ON BANK STOCK.

The provisions authorizing a receiver of an insolvent bank to enforce the double liability of stockholders, found in section 34 of the General Banking Act, is not a separate and distinct subject from the general act.

14. BANKS AND BANKING ¶49(7) — COMPLAINT IN ACTION ON DOUBLE LIABILITY OF SHAREHOLDERS.

The allegations of a complaint by a receiver of an insolvent bank seeking to enforce the double liability of stockholders, that the bank was hopelessly insolvent, and that its assets were insufficient to pay its debts, and that it was necessary to collect the full amount of the statutory stockholders' liability, sufficiently show the necessity of enforcing stockholders' liability.

15. ACTION ¶32—ABOLITION OF FORMS OF ACTION.

While the Constitution abolished forms of action, there are still equitable as contradistinguished from legal rights and remedies, but the rights of a litigant depend entirely on the nature or character of the facts and the law applicable thereto.

² *Marloneaux v. Cutler*, 22 Utah, 475, 91 Pac. 355; *Edler v. Edwards*, 34 Utah, 13, 95 Pac. 367; *State v. Candland*, 36 Utah, 406, 104 Pac. 255; *Salt Lake City v. Wilson*, 46 Utah, 60, 148 Pac. 1104.

16. BANKS AND BANKING ¶49(5)—ENFORCEMENT OF STOCKHOLDERS' LIABILITY.

Receiver of insolvent bank who finds it necessary to enforce stockholders' double liability may sue as many of the stockholders in one and the same action as may be most convenient, indeed, if he wish, he may sue all stockholders in a single action; and for the same reason a stockholder sued separately may, where the rights of others would not be prejudiced, have his case heard in connection with cases against other stockholders.

Appeal from District Court, Juab County; Geo. Christenson, Judge.

Action by Stephen H. Lynch, as receiver, against A. P. Jacobsen. From a judgment for defendant, plaintiff appeals. Reversed and remanded, with directions.

Cheney, Jensen & Holman, of Salt Lake City, for appellant.

Thos. H. Burton, of Nephi, for respondent.

A. R. Barnes, James Ingebreton and M. E. Wilson, all of Salt Lake City, for other stockholders of Merchants' Bank not parties to this action.

FRICK, J. This action was commenced in the district court of Juab county by the plaintiff, as receiver of the Merchants' Bank of Salt Lake City, against the defendant as a stockholder of said bank, to recover from him the additional liability which is imposed under the provision of the Constitution of this state, to which reference will hereinafter be made. After the case had been submitted by the plaintiff and defendant several attorneys, who represent other stockholders in actions now pending in the district court of Salt Lake county, applied for and were granted leave to file briefs and arguments in support of the contentions advanced by the defendant in this action. The briefs and arguments filed by those attorneys have been considered by the court in connection with the arguments presented by counsel who represent the parties in this case, and hereinafter we shall only refer to the objections urged by counsel without referring to the counsel making them.

The plaintiff, in his complaint, in substance, alleged: That in a certain proceeding he was, by the district court of Salt Lake county, duly appointed receiver of the Merchants' Bank. That said bank was organized pursuant to the laws of Utah about July 1, 1908, with a capital stock of \$250,000, divided into 2,500 shares of the par value of \$100 each, and that all of said stock was issued and outstanding, and that the defendant is the owner of 5 of said shares. That "at the time of the appointment of said receiver and prior thereto the said bank was hopelessly insolvent, and its assets were and are insufficient to pay its debts and liabilities, and

in order to pay the same it is necessary to collect the full and entire amount of the statutory stockholders' liability provided by chapter 25, Session Laws of Utah 1911, and on or about the 2d day of December, 1918, in due course of administration and upon petition of said receiver duly made, served, and filed in the said receivership proceedings, and upon hearing thereon regularly noticed and had, and evidence duly presented, the said * * * district court, being fully advised in the premises and satisfied of the propriety and the necessity therefor, duly made and entered its order as follows: "That the necessity for collecting the full amount of the statutory stockholders' liability fully appearing, Stephen H. Lynch, as receiver in the above-entitled cause, is hereby authorized and directed to notify the stockholders of the Merchants' Bank that the full amount of their statutory stockholders' liability is now due and payable to him as such receiver, and that, unless same is paid within ten days after notice, suit will be instituted by said receiver to enforce collection of the same, and said receiver is further authorized and directed to institute and prosecute such suits pursuant to the terms of said notice as may be necessary and appropriate, whether in the state of Utah or elsewhere, and to incur such expense and employ such counsel as may be necessary and expedient." That the plaintiff brings and prosecutes this action pursuant to the said order and authorization and in the discharge of his duties as receiver, as provided in chapter 25, Session Laws of Utah 1911." That the plaintiff had duly notified the defendant that the full amount of his additional liability was due and payable, etc. That the defendant had failed to pay, and that the whole amount of his additional liability, to wit, the sum of \$500, is due, for which amount he prayed judgment.

To this complaint the defendant demurred: (1) That the facts stated do not constitute a cause of action against the defendant; (2) that the complaint is uncertain and ambiguous (stating various particulars wherein it is so); (3) that the plaintiff has not legal capacity to sue, for the reason, among others, that the right of action is in the creditors of the bank and not in plaintiff as receiver; (4) that there is a defect of parties, in that the other stockholders are necessary parties to the action and are not made so; and (5) that the act authorizing the receiver to maintain an action to enforce the stockholders' additional liability is unconstitutional and therefore void for the reasons stated in the demurrer, and which will hereinafter more specifically be referred to.

The district court sustained the special demurrer, upon the sole ground, however, that the act authorizing the receiver to sue the stockholders and recover from them the additional liability is void because the stockholders are liable to the creditors of the bank

only for the additional liability imposed by the Constitution.

The plaintiff elected to stand upon his complaint, and the district court entered judgment dismissing the action, from which order plaintiff appeals, assigning the ruling of the court before referred to as erroneous upon various grounds.

[1-9] We remark that, in view that the sufficiency of the complaint is attacked generally, and as counsel for both parties have requested it, we shall dispose of all the legal questions that are necessarily raised by the demurrer. We deem it more convenient, however, to consider the constitutional ground of the demurrer first.

Our Constitution, art. 12, § 18, provides:

"The stockholders in every corporation, and joint-stock association for banking purposes, in addition to the amount of capital stock subscribed and fully paid by them shall be individually responsible for an additional amount equal to the amount of their stock in such corporation for all its debts and liabilities of every kind."

The foregoing constitutional provision was incorporated into the Revised Statutes of 1898, as section 382 of that revision, in the exact language as it was adopted in the Constitution except that in the last line the word "its" is omitted from the statute. Section 382 was subsequently carried forward into Compiled Laws Utah 1907, in the precise language as it is copied into the Revised Statutes of 1898. In the Revised Statutes of 1898, in section 390, it was also provided:

"The secretary of state, upon becoming satisfied that any bank has become insolvent, or that its capital has become and is permitted to remain impaired, or that it has violated any provision of law, may, through the attorney general, apply to the district court, or a judge thereof, for the appointment of a receiver to take charge of and wind up the business of such bank."

That section was also carried forward into Compiled Laws Utah 1907.

It will be observed that nothing was said, either in the section as found in the Revised Statutes of 1898 or in Compiled Laws Utah, 1907, respecting the receiver's right to enforce the stockholders' additional liability.

The law remained in that condition until March, 1911, at which time the Legislature passed chapter 25, Laws Utah 1911, in which section 382 aforesaid is again copied in the language of the Constitution, with the exception of the word "its" as before stated. That act (section 34) also provides for the appointment of a receiver in case a bank becomes insolvent or in case its capital is so impaired that it cannot comply with the conditions imposed by the act. Section 34 aforesaid, among other things, provides:

"The receiver, if any be appointed, shall, under the direction of the court, take possession of the books, records and assets of every de-

scription of such bank, collect all debts, dues and claims belonging to it, sell or compound all bad or doubtful assets, and sell all the real and personal property of such bank on such terms as the court shall direct, *and may, if necessary to pay the debts of such bank, enforce all individual liabilities of the stockholders, and shall make a report to the bank commissioner of all his acts and proceedings.*" (Italics ours.)

The italicized portion is in the language of the federal act authorizing the Comptroller of the Currency to proceed to recover the stockholders' additional liability. The same language is also used in many of the laws of the different states to which reference is made in the cases hereinafter cited.

We remark that neither in the constitutional provision nor in anything that is said in the Revised Statutes of Utah of 1898, nor in Compiled Laws Utah 1907, nor in the act of 1911, is there any intimation whatever with respect to what the nature of the proceedings shall be. Indeed, until chapter 25, *supra*, was passed in 1911 nothing had been said in either the Constitution or the statutes as to who should enforce the stockholders' additional liability. In chapter 25 it is, however, expressly provided that the receiver may do so.

Before proceeding to a consideration of the various contentions urged on behalf of the defendant, we here insert certain propositions which, in our judgment, are supported by the great weight of the more recent decisions emanating from both state and federal courts. Those propositions may, for convenience, be stated thus:

(a) A provision like the one in our Constitution is self-executing. *Willis v. Mabon*, 48 Minn. 140, 50 N. W. 1110, 16 L. R. A. 281, 31 Am. St. Rep. 626, and cases there cited; *Fletcher Ency. Corps.* § 4143. To the same effect are many of the decisions hereinafter cited on other propositions.

(b) Where the Constitution or statute merely imposes or fixes the liability without providing how it shall be enforced, the bank's creditors may enforce it in an ordinary action either at law or in equity, and under such circumstances it seems that actions in equity have the preference.

(c) In case the Constitution or the statute fixing the liability fails to determine by whom the liability may be enforced for the benefit of the creditors, the Legislature may at any time determine who may sue the stockholders and what the nature of the proceedings shall be. *Gardiner v. Bank of Napa*, 160 Cal. 577, 117 Pac. 667; *Wilson v. Book*, 13 Wash. 676-679, 43 Pac. 939; *Milroy v. Spurr Mountain Min. Co.*, 43 Mich. 231-238, 5 N. W. 287; *Howarth v. Lombard*, 175 Mass. 576, 56 N. E. 888, 49 L. R. A. 301; *Selig v. Hamilton*, 234 U. S. 652, 34 Sup. Ct. 926, 58 L. Ed. 1518, Ann. Cas. 1917A, 104; *Miners' Bank v. Snyder*, 100 Md. 57, 59 Atl. 707, 68 L. R. A. 312, 108 Am. St. Rep. 390.

(d) Under a constitutional provision like ours, when authorized by statute as in section 34, chapter 25, Laws Utah 1911, the receiver who is appointed to take charge of an insolvent bank's assets and wind up its affairs is the proper person to bring actions to enforce the stockholders' additional liability. In many cases it is held that the bank examiner or bank commissioner, or other officer discharging similar duties, may bring an action if authorized by statute. *Hanson v. Soderberg* (Wash.) 177 Pac. 827; *Davis v. Johnson* (N. D.) 170 N. W. 520; *Collier v. Smith* (Tex. Civ. App.) 169 S. W. 1168; *Lamar v. Taylor*, 141 Ga. 227, 80 S. E. 1085; *Harris v. Taylor*, 148 Ga. 663, 98 S. E. 86; *Elson v. Wright*, 134 Iowa, 634, 112 N. W. 105.

(e) Unless the statute (as is the case in Iowa) provides a different rule, the order or judgment of the court declaring the bank insolvent and adjudging that it is necessary to enforce the stockholders' additional liability to pay the bank's debts, in the absence of fraud or collusion, is conclusive upon the stockholders, and they may not assail the same except in a direct proceeding. *Howarth v. Lombard*, 175 Mass. 570, 56 N. E. 888, 49 L. R. A. 301; *Converse v. Ayer*, 197 Mass. 443, 84 N. E. 98; *Straw & Ellsworth Co. v. Kilbourne, etc., Co.*, 80 Minn. 125, 83 N. W. 36; *London, etc., Co. v. St. Paul P. L. Co.*, 84 Minn. 144, 86 N. W. 872; *Bernheimer v. Converse*, 206 U. S. 516, 27 Sup. Ct. 755, 51 L. Ed. 1163; *Sanger v. Upton*, 91 U. S. 56, 23 L. Ed. 220; *Hawkins v. Glenn*, 131 U. S. 319, 9 Sup. Ct. 739, 33 L. Ed. 184; *Austin v. Campbell* (Tex. Civ. App.) 210 S. W. 277; *Stringfellow v. Patterson* (Tex. Civ. App.) 192 S. W. 555.

(f) The method of procedure to enforce the liability may be changed by the Legislature if such change does not enlarge or affect the liability of the stockholder in case the Constitution, as before stated, does not provide a method of procedure. *Western Nat. Bank v. Lawrence*, 117 Mich. 669, 76 N. W. 105; *Miners' Bank v. Snyder*, 100 Md. 57, 59 Atl. 707, 68 L. R. A. 312, 108 Am. St. Rep. 390; *Bernheimer v. Converse*, 206 U. S. 516, 27 Sup. Ct. 755, 51 L. Ed. 1163; *Henley v. Myers*, 215 U. S. 373, 30 Sup. Ct. 148, 54 L. Ed. 240.

(g) Under constitutional and statutory provisions like ours it is not essential that all of the bank's assets be first exhausted before proceeding to enforce the stockholders' additional liability, where it is made apparent that the bank is insolvent.

We remark that in referring to the foregoing cases we do not wish to be understood as having exhausted the number that might be cited in support of any one of the propositions. In that connection we also desire to state that there are also decisions to the contrary upon nearly all of the foregoing propositions. In our judgment, however, the

foregoing propositions are sustained by the great weight of modern authority.

Recurring, now, to our constitutional provision by which the stockholders' additional liability is imposed. It will be observed that the liability is couched in the most general terms. The liability that the Constitution imposes is a general one, namely, that the stockholders "shall be individually responsible for an additional amount equal to the amount of their stock in such corporation *for all its debts and liabilities of every kind.*" (Italics ours.) It is too well settled to admit of controversy, although not always kept in mind by either courts or counsel, that where certain rights are granted or certain liabilities are imposed by state Constitutions, all that is intended thereby, unless otherwise expressed in the instrument itself, is that the Legislature is bound by the constitutional provision as written. In other words, such Constitutions are merely limitations upon the powers of the state Legislatures. If, therefore, the Constitution is silent respecting the remedy by which or through whom the right that is granted or the liability that is imposed shall be enforced, the Legislature possesses full power to provide such a remedy, provided it is adequate, to effectuate the purpose of the constitutional provision. In imposing the stockholders' additional liability the framers of our Constitution did not in the slightest degree limit the right of the Legislature to provide a remedy for its enforcement. That matter, like other remedies, was left entirely to the judgment of the Legislature. True, as before pointed out, the constitutional provision was self-executing, and, in view of that fact, the principle that is invoked by the courts is that in case a right is created and there is no special method provided for its enforcement the courts will enforce such right in accordance with some known remedy which can be made applicable. In the absence of any special remedy, therefore, the courts of this state would enforce the constitutional liability in accordance with some known remedy. That is precisely what this court held in the cases of *Steinke v. Loofbourow*, 17 Utah, 252, 54 Pac. 120, and *McLaughlin v. Kimball*, 20 Utah, 254, 58 Pac. 685, 77 Am. St. Rep. 908. As the law stood when those cases were decided no special remedy had been provided, and hence it was held that the right to enforce the stockholders' additional liability was not vested in the general receiver of the defunct bank, but was vested in the bank's creditors, and that the remedy must be sought in a court of equity. In the case of *McLaughlin v. Kimball*, however, the court was careful to point out that the decision was based solely upon the fact that the Legislature had not provided a special remedy, and that to do so was within its power. Referring to that question the court said:

"Admitting that it would be a convenient and desirable remedy for the receiver of a corporation to collect for the creditors their dues from the stockholders, the relief is to be sought at the hands of the Legislature and not the court."

The Utah cases, therefore, do not support the contention of defendant's counsel that the right to sue the stockholders to recover the additional liability is exclusively vested in the creditors of the bank. Upon the contrary, the cases clearly recognize the doctrine stated in proposition (f), above set forth, and are in harmony with the cases cited in support of that proposition.

Counsel have, however, cited and specially rely upon the case of *Golden v. Cervenka*, 278 Ill. 409, 116 N. E. 273, in which the Supreme Court of Illinois held that the right to sue is exclusively vested in the bank's creditors. That decision, however, is based upon former decisions of the same court, and seems to be based upon the wording of Illinois Constitution, art. 11, § 6, which provides that the stockholders "shall be individually responsible and liable to its creditors"; that is, the bank's creditors. It is there held that the right to enforce the liability is a personal right vested in the creditors by the express terms of the Constitution. As already pointed out, however, our Constitution merely provides that the stockholders shall be liable for the "debts and liabilities" of the bank. That does not mean or imply that a stockholder may be sued to enforce that liability by any creditor at any time the bank fails or refuses to pay the creditor's demand.

While the right to sue is held to be in the bank's creditors in California, it was so held by virtue of a special statute, which provides that—

"Any creditor of the corporation may institute joint or several actions against any of its stockholders, for the proportion of his claim payable by each." Cal. Civ. Code, § 322.

The California Constitution imposes a liability quite similar to ours, and section 322 was passed as a means of enforcing that liability. No one, so far as we know, has ever questioned the right of the California Legislature to pass that section. In view, therefore, that our Constitution is silent respecting the enforcement of the liability, we can see no legal objection whatever to the right of the Legislature to pass an act for the speedy and economical enforcement of the liability for the benefit of all the bank's creditors.

It is, however, asserted that the funds derived from the stockholders' additional liability are no part of the assets of the bank and hence the general receiver of the bank is not authorized to receive or to administer them. It is cheerfully conceded that the stockholders' additional liability is not an asset of the defunct bank in the sense that that term is generally used and applied. The

liability is, however, imposed as an additional security for the payment of the bank's debts and liabilities. The funds derived from the stockholders' additional liability must, therefore, be applied to the payment of the bank's debts. That, however, may also be said with regard to the general assets of the bank. A perusal of that portion of section 34 of chapter 25 which we have quoted makes it quite clear to our minds that the receiver is not empowered to proceed to enforce the stockholders' additional liability merely by virtue of his office as receiver, but that he is specially authorized to do that if it is necessary to do so to pay the bank's debts and liabilities. If the general assets of the bank are sufficient to pay those debts, no authority is conferred on any one to enforce the additional liability, and none is necessary. It manifestly was the intention of the Legislature that the person who is appointed the general receiver of the bank, in case the general assets are insufficient to pay its debts, is by virtue of the act specially authorized to proceed to enforce the stockholders' additional liability for the purpose of paying the debts of the bank. He thus becomes the special agent or trustee for that purpose precisely as by virtue of his receivership he becomes the arm of the court to collect and to administer the bank's general assets under its orders and direction, the only difference in that regard being that, while the receiver may by the court be permitted to use the general assets of the bank to pay the expenses of administering the affairs of the bank generally and to defray the costs of litigation incident to such administration, the funds derived from the additional liability, as expressed in the Constitution, must be applied in payment of the bank's "debts and liabilities." This fund may therefore not be squandered in litigation, and cannot be used for the purpose of defraying the general expenses of administering the affairs of the defunct bank, but may be used to defray such costs and expenses only as are necessarily incurred in the enforcement of the stockholders' additional liability. In collecting from the stockholder his proportion of what may be necessary to pay the bank's debts, not exceeding the amount fixed in the Constitution, the rights of the stockholder are certainly not only not invaded, but are strictly upheld. Again, in requiring the stockholders to pay the full amount of their liability as fixed by the Constitution and to pay the same to the special agent or trustee aforesaid to the full extent contemplated by the Constitution and for the benefit of the creditors in no way invades or affects their rights.

The contention made by counsel that the right of enforcement of the stockholders' additional liability is exclusively vested in the bank's creditors would necessarily lead to this: That each creditor may exercise his

choice regarding the stockholder he will sue. The creditor could thus compromise with a particular stockholder, or particular stockholders, for a consideration entirely outside of the constitutional liability, and thus one favored stockholder might be required to pay only a small percentage of his total liability to pay the bank's debts while other stockholders might be required to pay 100 per cent. of their liability. Counsel, however, suggest that every creditor has the legal right to either sue or not sue as he may see fit; that he has the legal right to claim all or only a part of the debt owing to him by the bank, and that he may dispose of his claim as he may choose. No one disputes these propositions, and no one can successfully contend that the rights referred to are invaded by the enforcement of the liability as herein suggested. No doubt any creditor of the bank may demand all or only a part of his claim. This, however, is precisely what he may do under the law as it now stands and as we have herein construed it. Will it be contended that any creditor may sue any stockholder without first establishing whatever claim such creditor may have or prefer as constituting a valid indebtedness against the bank? If that be once conceded, does it not inevitably follow that the bank is deprived of its right to interpose any legal defense it may have against the claim preferred by the creditor, and that the stockholder, who knows nothing concerning the transactions between the bank and the claimant, must at his peril defend for the bank? Surely no such incongruity could have been contemplated by the framers of the Constitution.

We think it is manifest that under our Constitution the bank's creditors must establish their claims against the bank in the proceeding pointed out by the law, and that the bank must be given an opportunity to interpose any defense it may have, and that it is only after the bank's debts have thus been established that the stockholders' additional liability may be enforced. If each creditor may sue at any time in any court any stockholder he may elect of whom the court may obtain jurisdiction the ultimate result must be anything but logical, economical, or speedy. We think the state has an interest in these matters, and that by virtue of that interest, when not limited by the Constitution, it may provide a special remedy to enforce the stockholders' additional liability if that be found necessary to pay the bank's debts.

We are also of the opinion that the remedy provided in section 34 of chapter 25, supra, is adequate, economical, and speedy, and in no way contravenes anything that is said or implied in our Constitution. In case no remedy is provided by the Constitution and that instrument merely creates a general liability, the great weight of authority is

to the effect that the Legislature may not only provide a remedy, but may change the remedy from time to time. Such is the effect of the conclusion of the Supreme Court of the United States. In the case of *Bernheimer v. Converse*, 206 U. S. 516, 27 Sup. Ct. 755, 51 L. Ed. 1163, Mr. Justice Day, in speaking for the court, in the course of the opinion, says:

"It may be regarded as settled that upon acquiring stock the stockholder incurred an obligation arising from the constitutional provision, contractual in its nature, and, as such, capable of being enforced in the courts, not only of that state, but of another state and of the United States, *Whitman, etc., v. Bank*, 176 U. S. 559 [20 Sup. Ct. 477, 44 L. Ed. 587], although the obligation is not entirely contractual and springs primarily from the law creating the obligation. *Christopher v. Norvell*, 201 U. S. 216 [26 Sup. Ct. 502, 50 L. Ed. 732, 5 Ann. Cas. 740].

"Is there anything in the obligation of this contract which is impaired by subsequent legislation as to the remedy enacting new means of making the liability more effectual? The obligation of this contract binds the stockholder to pay to the creditors of the corporation an amount sufficient to pay the debts of the corporation which its assets will not pay, up to an amount equal to the stock held by each shareholder. That is his contract, and the duty which the statute imposes, and that is his obligation. Any statute which took away the benefit of such contract or obligation would be void as to the creditor, and any attempt to increase the obligation beyond that incurred by the stockholder would fall within the prohibition of the Constitution. But there was nothing in the laws of Minnesota undertaking to make effectual the constitutional provision to which we have referred, preventing the Legislature from giving additional remedies to make the obligation of the stockholder effectual, so long as his original undertaking was not enlarged. There is a broad distinction between laws impairing the obligation of contracts and those which simply undertake to give a more efficient remedy to enforce a contract already made.

"This principle was stated by Mr. Chief Justice Marshall in *Sturges v. Crowninshield*, 4 Wheat. 122 [4 L. Ed. 529], as follows:

"The distinction between the obligation of a contract and a remedy given by the Legislature to enforce that obligation exists in the nature of things, and, without impairing the obligation of the contract, the remedy may certainly be modified as the wisdom of the nation may direct."

There are numerous other cases, emanating from both state and federal courts, announcing the same doctrine, many of which are cited in support of some of the several propositions we have hereinbefore stated.

[10] It is, however, further contended that section 34 of chapter 25 merely authorizes the receiver to collect the bank's general assets. If the contention were not urged by counsel of whose ability we entertain the highest regard, we should hardly deem it of sufficient importance to merit special reference thereto. A mere cursory reading of

section 34, *supra*, clearly shows that the Legislature intended to and did refer to both the general assets and to the stockholders' additional liability imposed by the Constitution, and that the authority to enforce the latter was conferred only in case it was necessary to pay all of the bank's debts. If the general assets are sufficient for that purpose, no authority is vested in any one to enforce the additional liability. The section, therefore, cannot be construed as counsel contend. While it is true that counsel's contention prevailed in the case of *Williams v. Carver*, 171 Cal. 653, 154 Pac. 472, it is equally true that such a construction was forced upon the Supreme Court of California in view of an existing statute. That court, therefore, was compelled to apply the familiar doctrine that where conflicting provisions exist the effect of the language must at times be restricted or enlarged in order to harmonize and give effect to all of the conflicting provisions if such a course is permissible. That is precisely what the Supreme Court of California did in deciding the case of *Williams v. Carver*, *supra*. Such a dilemma is not presented to us here. We are required, however, to give force and effect to all that is said in section 34 of chapter 25, and if we do that no other construction is permissible than the one we have given it.

[11, 12] It is also contended that section 34 of chapter 25 is invalid for the reason that the subject-matter thereof is not expressed in the title of the act, and that it is not clearly expressed therein as provided by our Constitution. This court is now irrevocably committed to the doctrine that a legislative act may not be stricken down upon the alleged ground that it is unconstitutional, unless it is clearly and palpably so. *Marionaux v. Cutler*, 32 Utah, 475, 91 Pac. 355, where the cases are collated and reviewed. To the same effect are *Edler v. Edwards*, 34 Utah, 13, 95 Pac. 367; *State v. Candland*, 36 Utah, 406, 104 Pac. 255, 24 L. R. A. (N. S.) 1260, 140 Am. St. Rep. 834, and *Salt Lake City v. Wilson*, 46 Utah, 60, 148 Pac. 1104. It would largely be a work of supererogation to enter again upon a discussion of the question just stated and decided in those cases. It is true that the Supreme Court of California, in *Williams v. Carver*, *supra*, held that the title to the California banking act was insufficient, but the holding in that case was based upon a title which was very much restricted. The title there in question reads: "An Act to Define and Regulate the Business of Banking." *Session Laws, Cal. 1909*, p. 87. The court seemingly gave little or no force to the word "regulate." Be that as it may, however, the title to chapter 25 is much more comprehensive than was the title to the California act. Instead of comprising only 10 words, as was the case in the California act, the title to chapter 25

contains more than 150 words. While the number of words is not necessarily controlling, yet the words must all be given their ordinary meaning, and if that be done the title to chapter 25 is sufficient to indicate the subject-matter of the whole act.

[13] Nor does section 34 constitute a separate and distinct subject within the constitutional provision. It is also well settled, as pointed out in *Marloneaux v. Cutler*, *supra*, that a title may be so restricted as to prevent matters which under a more comprehensive title might well be included in the act from being included therein because of the restricted character of the title.

In any event, however, the title to chapter 25 is not so clearly defective as to authorize us to declare the act invalid for the reason stated.

[14] It is also vigorously urged that the complaint is insufficient because it contains no allegation that it is necessary to enforce the stockholders' additional liability. The allegation of the complaint in that regard is that the bank is "hopelessly insolvent, and its assets were and are insufficient to pay its debts and liabilities, and in order to pay the same it is necessary to collect the full and entire amount of the statutory stockholders' liability," etc. That allegation is supplemented by a statement that the district court, in a certain proceeding and upon due notice and evidence, had found and had entered an order or judgment that it was necessary to collect the full amount of the stockholders' additional liability in order to pay the debts of the bank. These allegations, it seems to us, are quite sufficient to meet counsel's objections. They, however, insist that the order or judgment is without force or effect because the court was not authorized to make such an order or to enter such a judgment. That contention, to say the least, is somewhat remarkable. How is the question whether the general assets of the bank are sufficient or insufficient to pay its debts to be determined except in a judicial proceeding? How can any one know the amount of the bank's debts or who are its creditors unless those questions are judicially determined? In every case where it becomes necessary to wind up a bank's affairs upon the ground of insolvency the amount of its liabilities, as well as the extent of its assets and who are its creditors, must be determined by a court having jurisdiction of the proceedings. In view of the allegations in the complaint that the district court, upon a hearing "regularly noticed and had and evidence duly presented," found that the full amount of the statutory liability was necessary to pay the bank's debts, we must assume that that is precisely what was done in this case. That order or judgment, as we shall see, is binding upon the stockholders, and of necessity must be so upon all creditors who presented their claims.

That such is the law there is little if any room for doubt.

In the case of *Howarth v. Lombard*, *supra*, in referring to the effect to be given to the order or judgment in which the necessity of enforcing the stockholders' additional liability is determined, it is said:

"The ascertainment is like a common case of a judgment against a corporation which is binding on stockholders. The members of such corporations, as well as the corporations themselves, are within the jurisdiction of the local court so far as is necessary for the determination of the rights and liabilities of the corporation and its members among themselves. In reference to this kind of liability such decisions and orders are binding on stockholders who are not before the court otherwise than by virtue of their membership in the corporation. *Elderkin v. Peterson*, 8 Wash. 674 [36 Pac. 1089]; *Hawkins v. Glenn*, 131 U. S. 319 [9 Sup. Ct. 739, 33 L. Ed. 184]; *Great Western Telegraph Co. v. Purdy*, 162 U. S. 329, 336 [16 Sup. Ct. 810, 40 L. Ed. 986]; *Glenn v. Liggett*, 135 U. S. 533 [10 Sup. Ct. 867, 34 L. Ed. 262]; *Sanger v. Upton*, 91 U. S. 56, 58 [23 L. Ed. 220]; *Marson v. Deither*, 49 Minn. 423 [52 N. W. 38]; *Lewis v. Glenn*, 84 Va. 947, 979 [6 S. E. 866]; *Hamilton v. Glenn*, 85 Va. 901 [9 S. E. 129]; *Glenn v. Williams*, 60 Md. 93, 116."

In *Sanger v. Upton*, *supra*, the Supreme Court of the United States, in referring to the question, held that in contemplation of law every stockholder is "before the court in all proceedings touching the corporation," and thus he must be deemed to have been before the court in the proceedings wherein the liability of the bank is ascertained and fixed and in which the indebtedness of the bank is determined. Any other conclusion would necessarily lead to interminable litigation. If, however, the stockholders are "before the court" in such a proceeding and are bound thereby, it would seem that they should likewise have the right to directly attack the order or judgment for fraud or collusion, etc., and have it set aside. See 2 Black, *Judgments*, § 583. The attack must, however, be made directly and at the proper time and in the proper manner, and not collaterally by each stockholder when he is sued to recover the additional liability. If the right to assail the order or judgment directly for fraud, etc., is given to the stockholders they are deprived of no legal rights. Moreover, such an attack would be regular, orderly, and expeditious, while to permit each stockholder to assail such an order or judgment in the action in which his additional liability is sought to be enforced might lead to most incongruous results. Of course, any stockholder may set up any facts which show he is not liable.

In this connection it is also important to keep in mind that it is not necessary to exhaust and apply all of the general assets of the bank before proceedings to the enforce-

ment of the stockholders' additional liability, in case it is made to appear that the funds to be derived from that liability are necessary to pay the bank's indebtedness. In referring to that subject the Supreme Court of Mississippi, in *Pate v. Bank of Newton*, 116 Miss. 666, 77 South. 601, which is a recent case, decided in February, 1918, in the course of the opinion, said:

"There is no requirement to await a collection and application of the debts and property of the bank before bringing this suit against the stockholders. In many cases it would require a considerable period of time to collect the debts and dispose of all the personal and real estate belonging to a bank, even though it might be perfectly manifest that when this is done there would still be a large deficit due to the depositors. If the bank or its liquidators were required to await until the debts had been collected and the assets converted into cash, many of the stockholders might escape liability by becoming insolvent or moving out of the jurisdiction of the court. When the stockholders pay this liability into the bank and it is applied to the satisfaction of the depositors' claims, and after the debts of the bank are paid, if there were any funds left the stockholder would naturally secure this remainder as a stockholder of the bank; and, of course, a stockholder who had paid the liability would first be repaid before any stockholder who had not paid such liability would be entitled to any dividend from the proceeds of the bank. We therefore think that the suit can be maintained whenever it is reasonably apparent that the assets of the bank will not pay the depositors."

[15, 16] Other courts have expressed the same thought in different language. A moment's reflection should convince that the reasons are practical, sound, and salutary. Why, in case a bank is hopelessly insolvent and cannot pay its debts, should its creditors be obliged to wait the slow process of converting all of the general assets of the bank into cash before calling upon the stockholders' additional liability to pay the debts which they are obligated to pay? If such a course be pursued it must often result in sacrificing valuable assets by too hastily converting them into cash. It is for the best interests of all stockholders that the assets of the bank be converted into cash at the best price obtainable therefor, and as nearly for their actual value as the conditions and circumstances will permit. It is not possible to do that if all of the assets are converted into money within a short or limited time. Again, any amount of money that is left after the debts are paid must by the receiver be distributed among the stockholders. Those who have paid their additional liability must, as a matter of course, be preferred to those who have not paid up or only partly paid. In case, therefore, where it is manifest that a bank is insolvent it is to the best interests of all concerned that its debts be paid at as early a date as possible, and that the assets of the bank be not unnecessarily

and unreasonably sacrificed by a forced conversion into cash at any price. The courts should exercise their full power in safeguarding, preserving, and protecting the rights of all the interested parties, stockholders as well as creditors, and require the receiver to proceed with reasonable expedition, but with fairness and justice to all. If such be done the method or nature of the proceedings to collect the stockholders' additional liability becomes of secondary importance. It therefore seems to us quite needless to waste time or energy respecting what the character or nature of the proceedings should be so long as the rights and interests of both the creditors and stockholders are preserved and protected. Moreover, this court has repeatedly held that under our Constitution all forms of action are abolished. That instrument explicitly directs, "There shall be but one form of civil action and law and equity may be administered in the same action." Why, then, longer quibble about what the form or nature of an action shall be? Under the foregoing constitutional provision the only question that should arise in any case is what relief, and the extent thereof, the complaining party may be entitled to under the law when applied to the conceded or established facts in the case. True, there are still equitable as contradistinguished from legal rights and remedies. Neither the rights nor the relief to which the litigants may be entitled, however, depend upon the form or nature of the action, but are entirely dependent upon the nature or character of the facts and the law applicable thereto. In this case, therefore, we see no reason whatever why, as a matter of economy and convenience if for no other reason, the receiver may not sue as many of the stockholders in one and the same action as may be most convenient for all concerned. Nor do we see why he should not sue all the stockholders in one action if he can obtain legal service upon them or if they voluntarily appear. Nor do we see why a stockholder, in case he is sued separately, may not ask that his case be heard in connection with other cases in case such a course would not prejudice the rights of others. We can well understand that, in view that there may be stockholders who have defenses that are not common to all stockholders, such stockholders may desire to try their cases separately. That, it seems to us, however, is no reason why all the stockholders within the jurisdiction of the court may not be sued in one action. If it should appear that they might, or some of them might, be prejudiced by a joint trial, the court should grant them separate trials or hearings. All that may be done in conformity with our procedure and without sacrificing the rights or interests of any one. Nor should such a course prevent any stockholder from appealing to this court separately. We are of the opinion, therefore, that the

defendant's contention that he, as a matter of right, may demand to be sued jointly with all other stockholders, or that any stockholder may, as a matter of right demand to be sued separately, or that he may only be sued by a creditor or by several creditors is not well founded. Each stockholder may, however, have his rights protected as hereinbefore stated.

We remark that we perhaps have dwelt upon certain phases of the case longer than seems necessary. In view, however, that there are a large number of other actions pending in different courts and before different judges, we have deemed it best to state our reasons fully and in detail, to avoid, if possible, further delays and unnecessary litigation.

The judgment of the district court of Juab county is therefore reversed, and the cause is remanded to that court, with directions to overrule both the general and special demurrers, to permit the defendant to answer the complaint, and to set up such legal defenses as he may have, and to proceed with the case in accordance with the views herein expressed. Defendant to pay costs of this appeal.

WEBER, J., being disqualified, did not participate herein.

CORFMAN, C. J., and GIDEON and THURMAN, JJ., concur.

(55 Utah, 204)

ROE v. SCHWEITZER. No. 3285.)

(Supreme Court of Utah. Oct. 18, 1919.)

1. TRIAL \S 45(1)—OFFER OF PROOF STANDS IN SAME POSITION AS PLEADING.

An offer of proof stands in the same position as a pleading, and if it is in any sense contradictory it will be construed when presented against him who relies upon it.

2. EVIDENCE \S 459(2)—EXTRINSIC PROOF INADMISSIBLE TO DISCHARGE AGENT FROM PERSONAL LIABILITY.

In an action to recover from an agent of a corporation \$200 paid to him for stock, for which he receipted individually and without designation as such agent, extrinsic proof that he acted in a representative capacity was not admissible to discharge him from liability.

Appeal from Third District Court, Salt Lake County; J. Louis Brown, Judge.

Action by J. E. Roe against Thea Schweitzer. From judgment for plaintiff, defendant appeals. Affirmed.

King, Straup, Nibley & Leatherwood, of Salt Lake City, for appellant.

Olson & Lewis, of Salt Lake City, for respondent.

STEPHENS, District Judge. In this case the respondent brought an action against the

appellant in the District Court of the Third Judicial District for Salt Lake County, Utah, to recover \$200 alleged to have been paid to the appellant for 200 shares of the capital stock of the Fine Gold Placer Mining Company. The assertion of the respondent was that the appellant had failed to deliver the stock upon demand after full payment of the \$200. At the trial of the cause the respondent introduced in evidence the following instrument:

"Plaintiff's Exhibit 1.

"December 15th, 1913.

"Sold to J. E. Roe two hundred shares Fine Gold Placer Mining Company's capital stock at one (\$1.00) dollar per share, to be paid at the rate of \$50.00 per month.

"Thea Schweitzer.

"Dec. 15/13. Recd. this date fifty dollars (\$50.00). Thea Schweitzer.

"Jan. 15/14. Recd. this date forty dollars (\$40.00). Thea Schweitzer.

"Feb. 19/14. Recd. this date sixty dollars (\$60.00). Thea Schweitzer.

"July 18/14. Recd. this date twenty-five (\$25.00) dollars. Thea Schweitzer.

"Aug. 17/14. Recd. this date twenty-five (\$25.00) dollars. Thea Schweitzer."

Thereafter the respondent proved payment of the \$200, and rested. The appellant then opened his case, testified that when Exhibit 1 was made out by the parties they had "considerable conversation," and was then asked the following question:

"Now, state whether or not anything was said to you at that time by Mr. Roe relative to where or how he wanted this stock delivered, answer that 'Yes' or 'No.'"

To this question the respondent interposed the objection that it was irrelevant and immaterial, unless it sought to vary the terms of the written Exhibit 1, and that, if it did tend so to vary the terms of Exhibit 1, it was incompetent. The court, treating the question as one calling for the utterance itself, as distinguished from the fact of utterance, sustained the objection. Thereafter the appellant, according to the practice of making a record for appeal by offering, after an adverse ruling, the proof claimed to be excluded by the ruling, made the following offers of proof: (Because of their importance to the point in this appeal they are quoted from appellant's abstract in extenso. The reference in the first offer to "the hundred shares of stock" relates to a point not material upon this appeal.)

"I offer to prove by this witness that at the time the memorandum introduced in evidence in this case was made and delivered to the plaintiff, that the plaintiff had prior negotiations with this defendant for the purchase of stock of the Fine Gold Mining Company, and that in the purchase of the stock—of the hun-

dred shares of stock, I understood it is admitted he got that—he purchased it in the same way and took a receipt from the defendant and received his stock from the Fine Gold Placer Mining Company; that at the time and on the date on which this memorandum of agreement was drawn up and delivered, to wit, the 15th day of December, 1915, that the plaintiff specifically requested and demanded of the defendant in this case that he simply turn the money over to the company, make provision there for the delivery of the stock to the plaintiff when it should be paid for,—and we further offer to prove by this witness that in compliance with that request and demand upon the part of the plaintiff, that the money as it was paid in was promptly turned over to the treasurer—the treasurer of the Fine Gold Placer Mining Company, and was deposited in the bank by that company and that the records of the company show that the money was received. We further offer to prove by this witness that after the receipt of the last payment the Fine Gold Placer Mining Company stood ready and willing at all times to deliver to the plaintiff 200 shares of stock; that all that was done with reference to depositing the money as it was paid into the company was simply to perfect title to the stock on the part of the defendant, and put it in a position to be delivered immediately to the plaintiff upon his presentation of the receipt, which was simply for the purpose of showing that in paying,—and to show the Fine Gold Placer Mining Company that the delivery was to be made as indicated. We further offer to prove by this witness that this arrangement was consented to by the Fine Gold Placer Mining Company, and that they, simply as a matter of accommodation, and at his request were ready to deliver it to the plaintiff,—the stock after it was paid for. We further offer to prove by this witness that soon after the payment for this stock that the Fine Gold Placer Mining Company recognized, in substance and effect that the plaintiff was the owner and holder of 200 shares in addition to the 100 shares which he already had of the capital stock; that the plaintiff participated. * * *

"I offer to prove by Dr. C. N. Ray of this city, who, at the time of the transaction in question, was a resident physician of Bingham Canyon, Utah, that he was the secretary of the Fine Gold Placer Mining Company, and that immediately after the payment of the last money due under the memorandum of agreement, that he stood ready and willing to deliver to the plaintiff 200 shares of the capital stock of the Fine Gold Placer Mining Company in controversy in this action, and that at all times the stock was in readiness and condition to be delivered to the plaintiff upon his presenting the receipt for the full payment."

"I now offer to show by Mr. A. E. Custer, a witness now present in court, that he was the president of the Fine Gold Placer Mining Company, and that as such president he stood ready and willing as the executive officer, the head of the corporation known as the Fine Gold Mining Company, to deliver to Mr. Roe, the plaintiff in this action, the 200 shares of capital stock referred to in the memorandum of agreement in this action at any time after the payment for the same by the plaintiff upon the presentation of the receipt of Mr. Schweit-

zer showing that the money had been paid; in other words, that the company for and on behalf of Mr. Schweitzer through Mr. Custer as its president, and Dr. C. N. Ray as its secretary, held and stood ready and willing to deliver to him the stock which he had requested from the defendant."

These offers being rejected by the court, the appellant rested, and the court then directed a verdict in favor of the respondent. To these rulings, and to the direction of a verdict, the appellant duly excepted, and upon such rulings and direction of verdict, as well as upon the denial of a motion for a new trial, he assigns error. It is the contention of the appellant that by the rulings of the trial court he was denied the right to show an agreement, extrinsic to Exhibit 1, relating to place of delivery of the stock sold, and that he had that right under the view that Exhibit 1 is an incomplete writing.

If the offers of proof made by the appellant could be said to concern an extrinsic agreement upon a place of delivery, a subject upon which Exhibit 1 is silent, it would be proper and necessary here for the court to state the law relating to extrinsic proof where writings are asserted to be incomplete, that is, where it is contended that their "legal act" has not by the parties been "reduced into a single memorial," so that "all other utterances of the parties on that topic are legally immaterial for the purpose of determining what are the terms of their act." (Wigmore on Evidence, vol. 4, § 2425.) But the offers of proof do not concern place of delivery. Therefore any statement of the law upon the point just mentioned would be obiter here.

[1] Examination of the offers of proof shows them to concern not place of delivery, the subject upon which Exhibit 1 is silent, but the capacity in which the appellant was acting at the time of the execution of Exhibit 1. Upon this subject Exhibit 1 is not silent. On the contrary, it expressly and definitely, without even descriptio personæ, shows the appellant to have signed in a personal, not a representative, capacity. In substance and effect the offers are offers to prove that the appellant was acting, at the time of the execution of Exhibit 1, not as seller, but as agent to sell. That is, the probative effect of the testimony offered, had it been received, would have been that of showing that, notwithstanding the fact that the appellant signed Exhibit 1 in his personal capacity, he was nevertheless in reality acting in a representative capacity, so that the real seller was the Fine Gold Placer Mining Company, and the appellant only an agent thereof. The following points would have been established if the proof offered had been received: That the money paid to the appellant was not to be retained by him, but was

to be turned over to the Fine Gold Placer Mining Company; that the money, as paid, was in fact turned over to the treasurer of the Fine Gold Placer Mining Company, and deposited in the bank by that company; that it was credited to the respondent on the books of the company; and that the Fine Gold Placer Mining Company stood ready, after the receipt of the last payment, to deliver the stock to the respondent. Nothing except express use of the terms "principal" as applied to the Fine Gold Placer Mining Company, and "agent" as applied to the appellant, could characterize more clearly than these points offers to show it to have been known that the appellant was merely an agent to sell, not a seller in his own right. The Fine Gold Placer Mining Company was to get, and, according to the proof sought to be introduced, did get, the respondent's money. The respondent was to get the stock directly from the Fine Gold Placer Mining Company. If the appellant was seller in his own right, why not also retainer of the purchase money? If the Fine Gold Placer Mining Company was but bailee to hold for delivery, why also ultimate retainer of the purchase price? There is one phrase in the offers, " * * * that all that was done with reference to depositing the money as it was paid into the company was simply to perfect title to the stock on the part of the defendant (appellant) and put it in a position to be delivered immediately to the plaintiff upon his presentation of the receipt, which was simply for the purpose of showing that in paying,—and to show the Fine Gold Placer Mining Company that the delivery was to be made as indicated," which might be taken as an offer of proof that the appellant was himself and in his own right purchasing from the Fine Gold Placer Mining Company, and then reselling the same stock to the respondent, and at the same price (itself an improbable construction of a business contract of sale); but that meaning is upset by the offer to show that the money as paid was credited to the respondent. If the appellant was purchaser in the first instance, the price paid would surely have been credited to him. There is a phrase in the offers, "in other words, that the company, for and on behalf of Mr. Schweitzer * * * held and stood ready and willing to deliver to him (respondent) the stock which he had requested from the defendant," which, were it not for the plain contrary meaning of the balance of the proof offered, might be taken to indicate an agency in the Fine Gold Placer Mining Company, or that that company was a gratuitous bailee to hold the stock for delivery. And the phrase, "this arrangement was consented to by the Fine Gold Placer Mining Company. * * * and they, simply as a matter of accommodation, and at his request, were ready to deliver

it to the plaintiff (respondent) * * * the stock after it was paid for," might give rise, taken alone, to a similar inference. But from the standpoint of exactitude these are dangerous phrases. "For and on behalf of" is at least a mixed question of law and fact. And what was the scope of the "arrangement" to which there was "consent"? The term "arrangement" is broad. It must be taken to include the ultimate payment to the Fine Gold Placer Mining Company of the purchase price, a point which seriously weakens the idea of proof of a gratuitous bailment. And in any event, allowing such phrases full face value, they do not overbalance the heavy counterweight of the rest of the proof offered upon the same subject. "An offer must be judged exclusively by its specific contents regarded as a whole." Wigmore on Evidence, vol. 1, § 17b. And note that while three witnesses were offered here, they were all offered upon the same subject, so that in legal effect there is but one offer. An offer of proof stands, moreover, in the same position as a pleading. If it is in any sense contradictory it will be construed, when presented, against him who relies upon it. There seems to the court, finally, nothing in the offers which, if received, would have substantiated the contention of the appellant, as argued under an analogy, that the situation was one where goods sold under a memorandum were by oral agreement to be taken by the seller to the place of business of a third party and there left for the buyer. It does not appear from these offers that the stock sold was in the possession of the seller—appellant, and by him actually taken to the place of business of the Fine Gold Placer Mining Company. On the contrary, it fairly appears from the offers that the stock always was in the possession of the Fine Gold Placer Mining Company. No mention is made of specific certificates being in the hands of the appellant. Indeed, certificates, as such, are not mentioned in the offers at all, though the word is once used in the amended answer referred to below.

If there were any doubt upon the face of the offers themselves that they would have had the effect of proving, not an extrinsic agreement concerning place of delivery, but that the appellant was only an agent, not personally interested in the sale, that doubt would be completely dissolved by paragraphs I, II, and IV of appellant's amended answer, wherein it is alleged as follows (the italics are the writer's):

"I. That at the time said two hundred shares of the capital stock of the Fine Gold Placer Mining Company were sold to this plaintiff by defendant and that *notwithstanding the fact that said memorandum of sale was signed by this defendant personally, that it was understood by and between plaintiff and defendant that as payments were made for said stock that defend-*

ant would give plaintiff a receipt for the same and that when the full amount was paid, plaintiff would present his receipt to the Fine Gold Placer Mining Company and receive his said two hundred shares of stock, and it was further agreed and understood by and between plaintiff and defendant at the time said stock was purchased that defendant would pay to the Fine Gold Placer Mining Company all money received by him from plaintiff as the same was paid, and defendant further alleges that plaintiff fully understood and agreed to present his receipt to said company and receive said two hundred shares of stock as referred to in said receipt.

"II. Defendant further alleges that all payments received by him from plaintiff in payment for said stock to the full amount of \$200 was promptly paid by defendant to the Fine Gold Placer Mining Company at the several times when said payments were received by the defendant from the plaintiff, and defendant further alleges that the plaintiff was at said times credited upon the books of the Fine Gold Placer Mining Company with the several amounts so paid in to the full amount of \$200, and that the plaintiff was further credited with stock upon the books of said company to the full amount of two hundred shares which said stock was subject to plaintiff's order and to be delivered to plaintiff upon the presentation of his receipts showing payment for the same."

"IV. Defendant further alleges that he received no benefit or profit whatsoever as a result of the sale of said stock to this plaintiff and defendant is further informed and believes and upon such information and belief alleges that at all times since plaintiff paid for said stock he could have had a certificate for the same by presenting his receipt to the Fine Gold Placer Mining Company as plaintiff agreed to do."

Note respecting this answer this point: That it does not say "notwithstanding the fact that said memorandum of sale was left silent as to delivery it was nevertheless understood and agreed that delivery should be made at the place of business of the Fine Gold Placer Mining Company," or words to such effect; it says "notwithstanding the fact that said memorandum of sale was signed by this defendant personally, that it was understood and agreed by and between plaintiff and defendant * * *"—and thereafter it is alleged that the money was to be paid ultimately to the Fine Gold Placer Mining Company, that the stock was to be received from that company, that the money was so paid, that the defendant "received no benefit or profit whatsoever as a result of the sale" of the stock, and that the plaintiff (respondent) could have had a certificate by presenting his receipt to the Fine Gold Placer Mining Company. This seems to the court a clear case of pleading that though

the appellant signed in a personal capacity he was only an agent. Therefore the proof offered must have been to that effect, or at variance with the pleading. Note especially that the allegation that the defendant (appellant) "received no benefit or profit whatsoever as a result of the sale" of the stock is consistent with the allegation that the Fine Gold Placer Mining Company ultimately received the purchase money, and is consistent with the theory that that company, not the appellant, was the seller, and is inconsistent with the theory that the appellant was the seller and the Fine Gold Placer Mining Company merely an agent, or bailee, to deliver.

[2] From the conclusion thus compelled, that appellant's offers of proof concern, not place of delivery, but the capacity in which the appellant was acting at the time of the execution of Exhibit 1, it necessarily follows that the action of the trial court in rejecting the proof, directing a verdict, and denying the motion for a new trial was correct. The law is well settled that where an agent has signed a contract in a personal capacity, that is, executed it in a manner clearly indicating that the liability is his alone, extrinsic proof is not admissible to discharge him from liability upon it. If he personally is, in unambiguous terms, bound to fulfill, he must fulfill. *Higgins v. Senior*, 8 M. & W. 884; *Fisher v. Marsh*, 6 B. & S. 411, 416; *Cream City Glass Co. v. Friedlander*, 84 Wis. 53, 54 N. W. 28, 21 L. R. A. 135, 36 Am. St. Rep. 895; *Western Publishing House v. Murdick*, 4 S. D. 207, 56 N. W. 120, 21 L. R. A. 671; *Nash v. Towne*, 72 U. S. (5 Wall.) 689, 18 L. Ed. 527; *Bulwinkle & Co. v. Cramer and Blohme*, 27 S. C. 376, 3 S. E. 778, 13 Am. St. Rep. 645; *Rapid Safety Filter Co. v. Lautkin* (Sup.) 167 N. Y. Supp. 378; *Wigmore on Evidence*, vol. 4, § 2438 (3); *Jones Commentaries on Evidence*, vol. 3, § 452. The doctrine of *Pym v. Campbell*, 6 Bl. & Bl. 369, and *Rogers v. Hadley*, 2 H. & C. 226, that it can be shown that a writing was not intended by the parties to have effect as a contract, is not here applicable.

It is unnecessary to comment upon the authorities cited by the appellant. They do not concern the rule stated above.

The judgment is affirmed; costs to the respondent.

WEBER, J., being disqualified, did not participate herein.

CORFMAN, C. J., and FRICK, GIDEON, and THURMAN, JJ., concur.

(20 Ariz. 508)

EARP v. STATE. (No. 471.)

(Supreme Court of Arizona. Nov. 13, 1919.)

1. INDICTMENT AND INFORMATION \S 110(31) — **INFORMATION INSUFFICIENT FOR FAILING TO STATE ACTS CONSTITUTING OFFENSE.**

In view of Pen. Code 1913, §§ 934, 936, 938, 939, 943, and Const. art. 2, § 24, an information charging that accused, "on or about the 27th day of December, 1918, at and in the county of Y., state of A.; did then and there willfully and unlawfully give, sell, and dispose of intoxicating liquor to another, contrary," etc., was fatally defective, in that it did not contain a statement of the acts constituting the offense in ordinary and concise language, notwithstanding the rule as to the sufficiency of charging offense in the language of the statute.

2. INTOXICATING LIQUORS \S 219 — **INFORMATION MUST GIVE NAME OF BUYER OF LIQUOR.**

An information for violation of the Prohibition Law must, in view of Pen. Code 1913, §§ 934, 936, 938, 939, 943, and Const. art. 2, § 24, name the person to whom the liquor was sold or given.

Cunningham, C. J., dissenting.

Appeal from Superior Court, Yuma County; F. L. Ingraham, Judge.

Bailey Earp was convicted of violating the Prohibition Laws, and appeals. Reversed, with directions.

A. J. Eddy, of Yuma, for appellant.

Wiley E. Jones, Atty. Gen., C. M. Gandy, L. B. Whitney, A. B. Baker, and F. J. K. McBride, Asst. Attys. Gen., and W. F. Timmons, County Atty., of Yuma, for the State.

ROSS, J. The appellant was charged with violating the prohibition laws by information, the accusing part thereof being as follows:

"The said Bailey Earp, on or about the 27th day of December, 1918, * * * at and in the county of Yuma, state of Arizona, did then and there willfully and unlawfully give, sell, and dispose of intoxicating liquor to another, contrary. * * *"

To this information he demurred because, as he alleges—

"it does not contain a statement of the acts constituting the offense in ordinary and concise language and in such a manner as to enable a person of common understanding to know what is intended, and is not direct and certain as to the offense charged or the particular circumstances of the offense charged."

The demurrer was overruled, and upon a trial appellant was convicted. He assigns the overruling of the demurrer as error.

The information does not give the name of the person who, on or about December 27th, purchased from appellant the intoxicating liquor, nor does it set forth any other fact

or facts to identify the particular transaction intended to be charged. The only definite and certain allegation is that a sale was made by appellant "to another" in Yuma county, Ariz. The date of the sale as given does not tend to identify the offense because a conviction could be had under the law by proof establishing a sale in Yuma county at any time within two years before the filing of the information. Penal Code, § 939.

It is provided by section 936, Penal Code, that "the indictment or information must be direct and certain as it regards * * * (2) the offense charged; * * *" and, according to section 943, "the indictment or information is sufficient, if it can be understood therefrom * * * (6) that the act or omission charged as the offense is clearly and distinctly set forth in ordinary and concise language, and in such manner as to enable a person of common understanding to know what is intended. * * *"

[1] Does this information meet the requirements of these sections of the statute? It names an offense of a class but it does not point out the particular one of that class for the commission of which appellant is to be tried. It covers any and every possible offense within the class that appellant may have or could have committed within two years before the information was filed, and one as directly and certainly as any other. If the prosecution may, at any time up to and before the introduction of its testimony under the information, select any one of a number of violations of the law by a defendant where the violations may consist in each case in selling liquor to a different person at different times and places, the information is anything but "direct and certain as it regards the offense charged." No person can tell by reading such an information what "act"—sale or gift—was intended to be charged as the offense. The act charged as the offense—some particular, certain act—must be "clearly and distinctly set forth," that is, described so as to distinguish it from any other act of the class to which it belongs, and in such manner as to enable a person of common understanding to know what act is intended" to be charged as constituting the offense. Under other provisions of our statute the indictment or information must charge but one offense (section 938, Penal Code), and it must contain a statement of the acts constituting the offense in ordinary and concise language, and in such manner as to enable a person of common understanding to know what is intended. Section 934, Penal Code.

"The object of these provisions is to present a distinct issue for trial, and clearly inform a defendant of that with which he is charged, that he may prepare to meet it." *People v. Cunningham*, 66 Cal. 668, 4 Pac. 1144.

If the prosecution may await the commencement of the trial and then, for the first time, select one of a class of acts included in the terms of the information upon which a conviction will be asked, all of these objects would be completely defeated. A defendant would be as well apprised of the particular offense laid against him if the information simply alleged "that on or about December 27, 1918, at the county of Yuma, he unlawfully sold intoxicating liquors." Adding the expression that he sold or gave away the liquor "to another" would not assist the court or counsel or the defendant in identifying the particular offense intended to be charged. In *People v. Webber*, 138 Cal. 145, 70 Pac. 1089, it is said:

"The Penal Code does not relieve the prosecuting attorney from the necessity of informing the defendant with reasonable certainty of the nature and particulars of the crime charged against him, that he may prepare his defense. and, upon acquittal or conviction, plead his jeopardy against further prosecution."

In that case the defendant was charged with the crime of burglary by entering a certain railroad car and train owned by the S. P. Company with intent to commit larceny. The comment upon this allegation was:

"In the information before us, the defendant could make no intelligent preparation for his defense without being prepared to defend against the charge of feloniously entering any car that was in the train, any one of which the prosecuting attorney might select at the trial."

In reviewing this question, we have not overlooked the general rule that an indictment or information charging an offense in the language of the statute is ordinarily sufficient, especially if the offense is purely statutory, but, as was said by the Supreme Court in *United States v. Simmons*, 96 U. S. 360, 24 L. Ed. 819:

"To this general rule there is the qualification, fundamental in the law of criminal procedure, that the accused must be apprised by the indictment, with reasonable certainty, of the nature of the accusation against him, to the end that he may prepare his defense, and plead the judgment to any subsequent prosecution for the same offense. An indictment not so framed is defective, although it may follow the language of the statute."

[2] An investigation of the cases discloses that the courts are not in agreement as to whether an indictment or information that omits the name of the purchaser of liquor is sufficient or not where each individual sale, as under our law, constitutes an offense, but we are satisfied that the just and fair rule, and the one intended to be prescribed by our statute, is that the charge must be "direct and certain as it regards the offense

charged," and to be so the information should so identify it as to permit a defendant to prepare his defense. One of the most recent cases to speak on this subject is *Fehringer v. People*, 59 Colo. 3, 147 Pac. 361, and that court came to the conclusion that an information like the one we are considering was insufficient. The learned judge who wrote the opinion brought into review and analysis many cases on both sides of the question, and therefrom deduced the following statement of the law:

"While it is uniformly held that the name of the vendee need not be set forth in the indictment or information where the offense consists in selling liquor within a given distance of a particular building, or place, or by a common dealer, or in keeping liquors for sale, etc., the uniformity of the rule is not maintained where the sales involved constitute separate offenses with a penalty prescribed for each sale, and in decisions thereunder we find some confusion and contradiction. It would seem, however, that the later decisions and best-reasoned cases support the doctrine that the insertion of the name of the vendee, or some other facts sufficient for adequate identification of the offense charged, is essential. *Fletcher v. State*, supra [2 Okl. Cr. 300, 101 Pac. 599, 23 L. R. A. (N. S.) 581]. Moreover, in our judgment the rule should be so determined on principle."

Colorado has a constitutional provision like ours, giving to the accused in criminal cases the right to demand the nature and cause of the accusation against him. Section 24, art. 2, Arizona Constitution. The court said, in speaking of this provision:

"Now, the nature of a thing is its essential character; that is, the sum of qualities and attributes which makes the thing what it is as distinct from others. A general allegation that the accused sold intoxicating liquor in a certain city in contravention of law certainly discloses none of the essential ingredients or attributes of the act to distinguish it from any other act of like character."

A very comprehensive discussion of the cases bearing upon this question will be found in *Fletcher v. State*, 2 Okl. Cr. 300, 101 Pac. 599, and in 23 L. R. A. (N. S.) 581, where the case is fully annotated.

The rule requiring the pleader to insert the name of the purchaser, if known—and if not known, to state that fact or "other facts sufficient for adequate identification of the offense charged"—will work no hardship upon the prosecution, and is eminently necessary to the end that the accused may know what he is charged with, so that he can prepare his defense. This is especially so in this jurisdiction, where the law does not require any preliminary hearing in misdemeanor cases before the filing of the information. *State v. Cole*, 20 Ariz.—, 178 Pac. 983.

The judgment of the lower court is re-

versed, with directions to sustain the demurrer to the information.

BAKER, J., concurs.

CUNNINGHAM, C. J. (dissenting). Our Prohibition amendment of the state Constitution (see Laws 1915, p. 1) art. 23, § 1, very closely resembles—if it was not actually a copy of—section 2139, R. S. U. S. (U. S. Comp. St. § 4136a), having immaterial changes so as to apply to the state instead of applying to the Indian country.

In *Brown v. State*, 17 Ariz. 314, 152 Pac. 578, we said this amendment was borrowed as far as practicable, from R. S. U. S. § 2139, and it may reasonably be given the construction applied by the courts of the United States to the federal statute. In *Parmenter v. U. S.*, 6 Ind. T. 530, 98 S. W. 340, the Supreme Court of Indian Territory, relying principally on the authority of *Nelson v. U. S.* (C. C.) 30 Fed. 112, decided that the indictment was good which had failed to state the name of the person to whom the liquor was sold. In the *Nelson Case*, supra, the United States Circuit Court calls attention to the requirements of the Oregon statute as to pleading, which is the same as ours in that respect.

The court says:

"As to the last assignment of error—the failure to name the vendee of the liquor in the indictment—the authorities are not agreed on the question. *Bish. St. Crimes*, § 1087; 2 *Whart. Crim. Law*, § 1510. The last author says that the prevalent opinion is that in an indictment for selling spirituous liquors in small measure contrary to law the name of the vendee need not be mentioned. But both authors incline to the opinion that, on principle, the name ought to

be given, if known, and, if not known, that fact ought to be averred as an excuse for the omission; and, in my judgment, such is the better practice. But I do not think this omission is a matter that can be alleged here as error. The name can only be required for the more convenient identification of the transaction. It is not a necessary ingredient of the offense, particularly where the prohibition to sell is general, irrespective of persons. If it was a case of prohibition to sell to a particular person or class of persons, * * * there would be more reason for holding that the name of the person to whom the sale was made is a necessary part of the statement of the offense."

The cases cited upon this question leave authorities strong and sufficient for adopting either side of the question, but I am of the opinion that the better reason and the policy of construction adopted by this court support the view that the name of the purchaser at a sale of liquor in violation of the Arizona law need not be averred in the information charging said sale as a crime.

The omission of the name of the purchaser at such sale is, at most, technical error in pleading, and section 22, art. 6, Constitution, prohibits a reversal in such case. The language of the constitutional provision is as follows:

"The pleadings and proceedings in criminal causes in the courts shall be as provided by law. No cause shall be reversed for technical error in pleading or proceedings when upon the whole case it shall appear that substantial justice has been done."

The record in this whole case presents a judgment in accord with substantial justice.

For these reasons, I cannot agree to an order reversing a judgment of conviction.

(76 OKL. 312)

HAYS et al. v. AZBILL. (No. 8106.)

(Supreme Court of Oklahoma. Oct. 28, 1919.
Rehearing Denied Nov. 25, 1919.)*(Syllabus by the Court.)*

1. SALES §38(3)—FRAUDULENT REPRESENTATIONS AS TO VALUE NOT EXPRESSIONS OF OPINION.

False representations, made in the sale of a jack, that such animal was all right and a good breeder, the only purpose for which he was of any value, were not mere expressions of opinion as to value, but amounted to representations of material extrinsic facts affecting value, and are sufficient on which to predicate action for rescission of the contract.

2. SALES §41—RULE OF CAVEAT EMPTOR NOT APPLICABLE ON FRAUDULENT CONCEALMENT.

The rule of caveat emptor does not apply, where the seller is guilty of the fraudulent concealment of a latent defect affecting the value of the property for the purpose for which it is bought.

3. INSTRUCTIONS.

Instructions, considered as a whole, held to correctly state the law and fairly submit the issues to the jury arising upon the proof.

4. APPEAL AND ERROR §1002—VERDICT ON CONFLICTING EVIDENCE NOT REVIEWED.

Where there is a conflict in the evidence as to material facts, and there is evidence reasonably tending to support the findings of the jury, the verdict and judgment based thereon will not be disturbed.

Error from District Court, Alfalfa County; James B. Cullison, Judge.

Action by G. D. Asbill against William Hays and Harry Richter. Judgment for plaintiff, and defendants bring error. Affirmed.

Owen & Hill, of Cherokee, George W. Partidge, of Guthrie, and W. E. Wiles, of Cherokee, for plaintiffs in error.

Titus & Talbot, of Cherokee, for defendant in error.

OWEN, C. J. [1] Asbill brought this action against Hays and Richter to rescind a contract under which he purchased a certain jack from the defendants at public auction. He alleged in substance that the defendants falsely represented that the jack was sound and a good breeder, and purposely concealed a latent defect which rendered the

jack useless and of no value for the only purpose for which he could be used, and for which he was purchased. Defendants answered by general denial, and the case was tried to a jury. There was a sharp conflict as to what representations were made, and as to whether the alleged latent defect rendered the jack valueless, and the jury found for the plaintiff on that issue. The representations which plaintiff alleges were made were of extrinsic facts affecting the value of the jack, and were sufficient on which to predicate an action to rescind the contract. They were not mere expressions of opinion as to value, and fall within the rule announced in the case of *Humphrey v. Baker*, 176 Pac. 896, where representations as to material extrinsic facts affecting value were held sufficient on which to predicate an action of fraud.

[2] Plaintiffs in error contend there was no warranty, and that the rule of caveat emptor applies. The jury evidently found from the evidence there was a fraudulent concealment of a latent defect, and it was held in *Humphrey v. Baker*, supra, the rule of caveat emptor does not apply where the seller is guilty of the fraudulent concealment of a latent defect affecting the value of the property for the purpose for which it is bought.

[3] Counsel urge there was error in the instructions of the court. We deem it unnecessary to set out the instructions, since no novel or unusual question of law is presented; but it is sufficient to say, from an examination of the instructions taken as a whole, they amount to a correct statement of the law, and fairly presented to the jury the issues under the testimony.

[4] It is also urged the evidence is not sufficient to sustain the verdict. The credibility of the witnesses and the weight to be given their testimony was a matter properly submitted to the jury, and, there being evidence reasonably tending to support the verdict, it will not be set aside. *Bass v. City of Atoka* (not yet officially reported) 184 Pac. 573; *Muskogee Electric Traction Co. v. Rye*, 88 Okl. 83, 122 Pac. 339.

Finding no error in the record, the judgment of the trial court is affirmed.

KANE, RAINEY, JOHNSON, and McNEILL, JJ., concur.

(76 Okl. 229.)

STATE ex rel. LAMBERT v. LILLEY.
(No. 10903.)

(Supreme Court of Oklahoma. Oct. 28, 1919.)

(Syllabus by the Court.)

HABEAS CORPUS ¶106—DISMISSAL ON COMPLIANCE WITH ORDER OF LOWER COURT.

Where the petitioner for writ of habeas corpus complies with the order made by the lower court, for the violation of which he was imprisoned, the action in this court will be dismissed.

Original action by the State, on the relation of W. E. Lambert, for writ of habeas corpus against O. R. Lilley. Action dismissed.

Walter Mathews, of Cushing, for petitioner.
Higgins & Berton, of Cushing, for respondent.

PER CURIAM. It having been made to appear that petitioner, W. E. Lambert, has complied with the order of the court, for violation of which he was imprisoned, a determination of the questions presented by his petition for writ of habeas corpus would serve no useful purpose.

The action is therefore dismissed.

(76 Okl. 239.)

COLLINS v. OKLAHOMA STATE HOSPITAL et al. (No. 7794.)

(Supreme Court of Oklahoma. July 25, 1918.
On Rehearing, Oct. 28, 1919.)*(Syllabus by the Court.)*

1. LIBEL AND SLANDER ¶6(1)—WORDS LIBELOUS PER SE.

In this state it is libelous per se to write of or concerning a white person that said person is colored.

2. LIBEL AND SLANDER ¶15 — PLACING WHITE PATIENT IN COLORED WARD.

A cause of action for libel cannot be maintained against a hospital for the insane on account of the act of its officers and employés in placing a white patient in that part of the institution set apart and used for colored patients.

3. LIBEL AND SLANDER ¶19—CONSTRUCTION OF ALLEGED LIBELOUS LANGUAGE.

In construing language alleged to be libelous, the courts should give to said language the same meaning and understanding as is usually applied thereto.

4. LIBEL AND SLANDER ¶15—"OR OTHER FIXED REPRESENTATION," IN STATUTE DEFINING LIBEL, CONSTRUED.

Section 4956 of the Revised Laws of 1910 considered, and held, that the general words, "or other fixed representation," are used for the

purpose of including other species of the same kind as the particular words there used, "writing, printing, picture, or effigy."

5. LIBEL AND SLANDER ¶47—LETTER FROM HOSPITAL FOR INSANE AS PRIVILEGED COMMUNICATION.

The letter which constitutes the second cause of action, and attached to the petition as a part thereof, examined, and the same held to be privileged.

(Additional Syllabus by Editorial Staff.)

6. WORDS AND PHRASES—"COLORED"—"COL."

The word "colored," or its abbreviation, "col.," as applied to persons, is synonymous with "negro."

[Ed. Note.—For other definitions, see Words and Phrases, Second Series, Colored.]

Commissioners' Opinion, Division No. 3.

Error from District Court, Oklahoma County; John W. Hayson, Judge.

Action by Joseph Collins against the Oklahoma State Hospital and others for libel, etc. Demurrer to petition sustained, and plaintiff brings error. Affirmed.

Robert L. McLendon and Chas. West, both of Oklahoma City, Jos. L. Hull, of Muskogee, and H. H. Hagan, of Tulsa, for plaintiff in error.

Parker & Simons, of Enid, Burford, Robertson & Hoffman and S. P. Freeling, all of Oklahoma City, and R. E. Wood, of Oklahoma City, for defendants in error.

HOOKER, C. It is alleged in the petition in this case that Joseph Collins is a white person, and that Lee Collins, a female about 33 years of age, is his daughter by his wife, and is a white person of pure Caucasian blood; that the defendant companies are domestic corporations, and that the Oklahoma Sanitarium Company was on July 14, 1914, engaged in the business of operating for profit a hospital for the insane at Norman, Okl., and that about November 19, 1914, the Oklahoma State Hospital became the successor to the Oklahoma Sanitarium Company in said business; that on or about the 30th of July, 1914, the said Lee Collins having been previously adjudged insane and committed by the proper court to the asylum was taken by the plaintiff to the Oklahoma Sanitarium Company as an insane patient for treatment, where she was received by said company and placed in a ward used by the white people at said place; that a few days thereafter those in charge of the institution placed her in a ward set apart for negro patients, and entered upon its records opposite her name the word "colored," and thereby held her out to the world as a woman having negro blood, which condition continued until February, 1915. It is alleged by the plaintiff that by reason of this act said defendants false-

ly and maliciously imputed to this plaintiff either the commission of a crime against the laws of this state, or else of being of negro blood, and that, inasmuch as he and his family were respected in the community in which they resided and recognized as white people, this false imputation caused a doubt upon his social status, and caused him great humiliation, etc., for which he sought damages in the sum of \$25,000.

In the second cause of action it is alleged that on or about the 22d day of January, 1915, said defendants did commit a wrongful libel by publishing a written statement made by them to Joseph Collins, this plaintiff, in the form of a letter, which is as follows:

"Oklahoma State Hospital,

"Norman, Okl., Jan. 22, 1915.

"Joe Collins, Valliant, Okl.—Dear Sir: I have yours of the 15th inst., in answer beg to say that Lee Collins (Col.) is in fairly good mental condition; also good physical condition. We are unable to say whether this improvement is more than temporary at this time.

Yours truly,
"AAT.AK

D. W. Griffin,
Superintendent."

—and that said letter was exhibited to A. A. Thurlow and other persons, and sent through the United States mail, which contained the false statement that Lee Collins was a negro, and by reason thereof the plaintiff was damaged in the sum of \$25,000.

[1, 2] The first question for us to determine is whether it is libelous within the purview of our statute for the authorities in charge of an insane institution to place a white person in that part thereof set apart for negro patients. It is charged in the petition that the officers and agents of the company placed Lee Collins in a ward set apart for negro patients, and thereby declared to the world that she was a negro woman, and that it entered upon its records opposite her name, wherever it appeared, the word "colored."

It will be noticed that there is no charge in this first cause of action in said petition contained that the word "colored," written opposite the name of Lee Collins, was ever published, and in order to constitute libel there must be a publication. Under the allegations of the petition the writing of the word "colored" opposite her name upon the records of the institution is not a publication, as it is not alleged that the same was ever seen by any one, or that said books had ever been examined by any one whatsoever, or that the word thus written had ever been seen or read by any person whomsoever. This in our judgment is necessary before an action for libel can be based thereon, so far as the writing of said word is concerned. Necessarily the person who wrote the word in the books must have seen it, but that person must have been the agent of the corporation, if the act is to be said to be the act of the corporation,

and such agent was for that purpose the corporation itself. It can hardly be said to be a publication of a libel for one to show the libelous matter to himself.

This eliminates the charge in the first cause of action that the word "colored" was written opposite the name of Lee Collins, and leaves for us to determine whether it is libelous under our statute for an institution of this character to place a white person in a ward set apart for its negro patients. The question whether it is libelous per se to write of or concerning a white person that he is a negro has been before the courts of many states of this Union, and has been decided from both viewpoints. To determine this, however, we must refer to section 4956 of the Revised Laws of 1910, and by that we see that any false or malicious unprivileged publication by writing, printing, etc., which exposes any person to public hatred, contempt, etc., is libelous. In this state, where a reasonable regulation of the conduct of the races has led to the establishment of separate schools and separate coaches, and where conditions properly have erected insurmountable barriers between the races when viewed from a social and a personal standpoint, and where the habits, the disposition, and characteristics of the race denominate the colored race as inferior to the Caucasian, it is libelous per se to write of or concerning a white person that he is colored. Nothing could expose him to more obloquy or contempt, or bring him into more disrepute, than a charge of this character. *Spencer v. Looney*, 116 Va. 767, 82 S. E. 745; *Spotorno v. Fourichon*, 40 La. Ann. 423, 4 South. 71; *Flood v. News*, 71 S. C. 112, 50 S. E. 637; *Jones v. Polk*, 190 Ala. 243, 67 South. 577; *Upton v. Times*, 104 La. 141, 28 South. 970.

Is the placing of a white patient in that part of the institution used and set apart for colored patients libelous, so as to give to the patient or others a cause of action within the statutory definition of libel? What is libel in this state must be determined by the provision of the statute as defined by section 4956 of the Revised Laws of 1910. In other words, a cause of action for libel in this state is statutory, and to determine what is libelous herein we must refer to the statute, as that is controlling.

[3] Section 4956 of the Revised Laws of 1910 is as follows:

"Libel is a false or malicious unprivileged publication by writing, printing, picture, or effigy or other fixed representation to the eye which exposes any person to public hatred, contempt, ridicule or obloquy, or which tends to deprive him of public confidence, or to injure him in his occupation, or any malicious publication as aforesaid, designed to blacken or vilify the memory of one who is dead, and tending to scandalize his surviving relatives or friends."

But we cannot see, under the view that we take of this provision of the statute, how an action for libel can be based thereon. By reference to this statute we find that the general words, "or other fixed representation," follow the enumeration of particular classes of things contained in said section, to wit, "writing, printing, picture, or effigy," and under the well-known rule of statutory construction the general words "or other fixed representation" will be construed as applicable only to the things of the same general nature or class as those enumerated, to wit, "writing, printing, picture, or effigy."

The particular words used are presumed to describe certain species, and the general words are used for the purpose of including other species of the same kind or genus. The words "or other fixed representation," following the enumeration of "writing, printing, picture, or effigy," are therefore to be read as "other such like kind or character." What was the legislative intent in the enactment of this statute, when the words "or other fixed representation" were incorporated therein? If the Legislature had intended the general words, "or other fixed representation," to be used in their unrestricted sense, they would have made no mention of the particular classes mentioned above in said statute. The generic term in this statute is the false and unprivileged publication, and the special words are used to describe the classes or species of the generic term, and the general words are used to include other species of the same kind as those referred to in the particular words above given. In 36 Cyc. p. 1119, it is said:

"By the rule of construction known as 'ejusdem generis,' where general words follow the enumeration of particular classes of persons or things, the general words will be construed as applicable only to persons or things of the same general nature or class as those enumerated. The particular words are presumed to describe certain species and the general words to be used for the purpose of including other species of the same genus. The rule is based on the obvious reason that if the Legislature had intended the general words to be used in their unrestricted sense they would have made no mention of the particular classes. The words 'other' or 'any other,' following an enumeration of particular classes, are therefore to be read as 'other such like,' and to include only others of like kind or character."

See the authorities cited in the notes on page 1120.

In 21 Enc. of Law (2d Ed.) p. 1012, it is said:

"Where general words follow particular ones, the rule is to construe the former as applicable to persons or things ejusdem generis. This rule, which is sometimes called Lord Tenterden's rule, has been stated, as to the word 'other,' thus: Where a statute or other document enumerates several classes of persons or things, and immediately following and classed with

such enumeration the clause embraces 'other' persons or things, the word 'other' will generally be read as 'other such like,' so that persons or things therein comprised may be read as ejusdem generis with, and not of a quality superior to or different from, those specifically enumerated."

See the authorities cited in the note on this page.

This court in the case of *Kansas City Southern Ry. Co. v. Wallace et al.*, 38 Okl. 233, 132 Pac. 908, 46 L. R. A. (N. S.) 112, said:

"It is true that, under the doctrine ejusdem generis, general words, such as those just referred to, for the purpose of ascertaining the intent of the Legislature, are generally restricted in their scope to the specific class of objects named. But, as is said by the Supreme Court of Missouri in the case of *State v. Smith*, 233 Mo. 242, 135 S. W. 465, 33 L. R. A. (N. S.) 179: 'The rule of ejusdem generis is * * * resorted to merely as an aid in construction. If, upon consideration of the whole law upon the subject, and the purposes sought to be effected, it is apparent that the Legislature intended the general words to go beyond the class specifically designated, the rule does not apply. If the particular words exhaust the class, then the general words must have a meaning beyond the class or be discarded altogether.'"

Now we submit that the part of special words here used did not exhaust the class intended, and therefore the general words did not have a meaning beyond the class and cannot be discarded. In other words, there might be a question of doubt as to whether an engraving or a statue or a waxed figure would come within the special words used in this statute; but the Legislature, in order to embrace everything within the class, used the words "or other fixed representation." Numerous authorities could be cited upon either side of this proposition, for it is entirely a matter of legislative intent, to be determined from a construction of the statute. The way we view it, however, and applying what to us is a fair and a reasonable construction of the statute in question, we must hold that the words "or other fixed representation" must be limited to the class intended by the use of the particular words "writing, printing, picture, or effigy" as contained in the first part of the statute.

We cannot say that placing a white patient in that part of the institution set apart for colored patients comes within the application of the statute so as to make the same libelous. However, if it were libelous, we exceedingly doubt, under the provision of our statute, whether the plaintiff would have a cause of action therefor.

[4] As to the second cause of action, it is contended that the communication complained of is a privileged communication; the same being a letter from the superintendent of the asylum to the father of Lee Collins, a pa-

tient at that institution, in reference to her, and being written in reply to a letter addressed to the institution by the plaintiff here. In the brief of the plaintiff in error it is said:

"In this letter in the instant case the subject matter of the letter was the mental condition of Lee Collins. As to that the letter was qualifiedly privileged, but the letter of inquiry did not seek information as to the race of Lee Collins. That fact had no reference to her mental condition and had no bearing upon it. When the information was volunteered that Lee Collins was colored, it was information neither asked for by the letter of inquiry, nor pertinent to the letter of reply. It was entirely foreign, untrue, derogatory matter, for which the defendants cannot claim the cloak of qualifiedly privileged."

[8] Courts, in construing publication alone to be libelous, must adopt the same meaning, and give to the words used the same understanding, as others would ordinarily give to them. If the words as used would ordinarily convey to the public a meaning which would subject one to obloquy, etc., and are otherwise libelous the court should give to them that meaning and understanding. If an abbreviated word is used, the court should give to the abbreviation the same meaning and understanding that is commonly given and understood by the use of such an abbreviated word. Here the abbreviated word for "colored," or "Col.," is used in said letter, and is complained of as libelous. "Col." is an abbreviation for "colored," and the word "colored" is synonymous with the word "negro," and inasmuch as "Col." is an abbreviation for "colored," and the word "colored," as applied to the person, is synonymous with the word "negro," it is libelous per se to write of a white person that he is colored.

[5] We agree with the defendant in error that the entire contents of this letter complained of is privileged. It was written by the superintendent of an institution having in charge the patients of the state, helpless and unfortunate as they are, to the father of one of the patients, no doubt grievously interested in that patient's welfare. The law as well as the dictates of common humanity imposed upon the superintendent of that institution the duty of answering inquiries of such character, and likewise the duty of answering fully, fairly, and freely as to the condition of the patient inquired about. As we view it, the subject-matter of the letter was Lee Collins, and it was the duty of the superintendent to write to her father, not alone as to her mental condition and her physical welfare, but any other fact or circumstance which he should know in order that he might be the better enabled to aid and assist in her comfort and welfare. If she was regarded at the institution as colored, it was his duty to

inform the father of that fact, so that, if an injury was being done to her, it could be remedied; and if the letter, which is the publication complained of, is protected by the rule of being qualifiedly privileged in all other things save and except the use of the abbreviated word "Col.," then the entire subject-matter of the letter was likewise within the rule.

Viewing this matter as we do, we must hold that the allegations contained in the first cause of action of the petition do not set forth facts sufficient to constitute libel within the purview of our statute, and that the libelous matter complained of in the second cause of action is privileged, and the judgment of the trial court in sustaining a demurrer thereto must be affirmed.

PER CURIAM. Adopted in whole.

On Rehearing.

PER CURIAM. The petition for rehearing in this case was heretofore granted, and the cause has been reheard on oral argument and briefs submitted. After further consideration of the questions urged for reversal of the judgment of the trial court, we are of the opinion that the former decision is correct and the opinion of the Commission, filed on July 25, 1916, is adopted as the opinion of the court in this case.

(181 Cal. 468)

CHING WING v. SOUTHERN PAC. CO. et al. (L. A. 5274.)

(Supreme Court of California. Oct. 25, 1919.)

1. APPEAL AND ERROR §-979(2)—REVIEW OF ORDER GRANTING NEW TRIAL.

In an action against a railroad for the death of one lying on the track, where he had been thrown by an automobile, an order setting aside verdict for defendant and granting a new trial to plaintiff cannot be interfered with on appeal, where the record shows ample evidence to indicate that the engineer, if he had exercised due care, could have seen the deceased in ample time to have stopped the train.

2. RAILROADS §-812(4)—LIABLE FOR INJURIES TO PERSON ON TRACK UNDER LAST CLEAR CHANCE DOCTRINE.

Where one was thrown onto a railroad track by an automobile at a crossing, and the engineer, if he had exercised due care, could have seen him in time to have stopped the train, but failed to do so, the railroad was liable for running over him.

Department 1.

Appeal from Superior Court, Los Angeles County; Louis W. Myers, Judge.

Action by Ching Wing, as administrator of the estate of Wong On King, deceased, against the Southern Pacific Company, E. O.

Jordan, and Warren M. Thorne. From an order setting aside a verdict in favor of defendants, and granting a new trial, defendants appeal. Affirmed.

Henry T. Gage and W. I. Gilbert, both of Los Angeles, for appellants.

Harry M. Irwin and Waldo M. York, both of Los Angeles, for respondent.

At the conclusion of the oral argument, SHAW, J., delivered the opinion of the court; LAWLOR, J., and OLNEY, J., concurring:

This is an action for damages for the death of decedent, Wong On King, alleged to have been caused by the conduct of the defendant in negligently propelling its engine along Alameda street in the city of Los Angeles, at a street crossing, over his body then lying on the railroad track, where he had been thrown by a passing automobile. A verdict was given for the defendant, and the court below granted a new trial.

[1, 2] The only point assigned for reversal is that the evidence did not justify the order granting a new trial; that is, that on the evidence, as given, the verdict should have been for the defendant as matter of law. The record shows ample evidence to indicate that the engineer in charge of the train, if he had exercised due care, could have seen the deceased lying on the track in ample time to have stopped the train. Under these circumstances we cannot disturb the order of the court granting a new trial.

The order is affirmed.

(181 Cal. 469)

In re HARTLEY'S ESTATE. (L. A. 6252.)

(Supreme Court of California. Oct. 27, 1919.)

1. WILLS §288(3)—BURDEN TO PROVE INVALIDITY OF CLAUSE OF OLOGRAPHIC WILL.

Where an olographic will was admitted to probate with a separate residuary clause as part of it, on subsequent contest the burden rested on contestants to show the residuary clause objected to was not a valid testamentary disposition by testator because not dated; the original order of probate creating a prima facie presumption that the will, residuary clause and all, was a single instrument covered by the single date.

2. WILLS §130—RESIDUARY CLAUSE OF OLOGRAPHIC WILL COVERED BY DATE OF MAIN INSTRUMENT.

If the separate residuary clause of an olographic will was written by testator when he wrote the body of the instrument as part of the same testamentary act, the instrument as a whole was a single instrument, and the date at the beginning covered both portions of it.

Department 1.

Appeal from Superior Court, Los Angeles County; Lewis R. Works, Judge.

In the matter of the estate of Frank J. Hartley, deceased. From an order revoking probate of a portion of decedent's will, an appeal was taken. Order reversed.

El. E. Rogers, of Los Angeles (L. V. Silverstein, of Los Angeles, of counsel), for appellants.

Clyde C. Shoemaker, George H. Woodruff, and Woodruff & Shoemaker, all of Los Angeles, for respondents.

At the conclusion of the oral argument OLNEY, J., delivered the opinion of the court, SHAW, J., and LAWLOR, J., concurring:

In this case a document entirely written, dated and signed in the hand of the testator, was admitted to probate. The entire document reads as follows:

"Los Angeles, Cal., Aug. 15th, 1917.

"My Last Will.

"Frank J. Hartley—being of sound and disposing mind—as follows—I bequeath,
To my daughter Lillian M. Murphey.. \$500.00
To my daughter Edith F. Haney.....\$500.00
To my son Francis C. Hartley..... \$500.00
To my daughter Loretta T. Hartley... \$500.00
To my son Sylvester B. Hartley..... \$500.00
To my son Lawrence F. Hartley..... \$500.00
To my son Herbert J. Hartley..... \$500.00
To my wife Ida S. Hartley..... \$100.00
and no more as property settlement has long been made, same is of record. And I herein name my son Francis C. Hartley to act as administrator of my estate, and in case of his death my daughter Edith F. Haney to act as my administratrix.

"[Signed] Frank J. Hartley.

"Residue to be divided equally between my daughter Lillian, my daughter Edith and my son Francis C. Hartley.

"[Signed] Frank J. Hartley.

"Funeral expenses to be paid first out of money on hand or life insurance money.

"F. J. H."

After the will had been admitted to probate a contest was inaugurated by certain of the heirs against the portion of the instrument following the first signature of the testator and by which the residue of the testator's estate was given to three of his children.

The point made on the contest is that this portion of the will is a codicil, and, not being separately dated, is void. The question is identical with that presented in the case of *La Grave v. Merle*, 5 La. Ann. 278, 52 Am. Dec. 589, and is there put in this language:

"Where an olographic testament contains several dispositions, of which the first one, at the same time dated and signed, and the second are only signed by the testator, are the latter null for want of date? They are; provided that from the manner those clauses are conceived

and placed, they cannot be considered to have been written immediately after the first, and on the same date that the first was written. But if, according to the contents or position of the second clauses, it appears that they could have been written on the same day with the first, we ought to presume that they were so in effect, consider them as forming but one and the same testament, and apply to the whole, which is composed of different clauses, the general principle that it is sufficient for the validity of theolographic will that it be dated in the context, without its having a date at the end."

[1, 2] It is not necessary in this case to go quite as far as was done in the Louisiana decision, for it appears here that in the first instance the instrument was admitted to probate as the decedent's will with this residuary clause as a part of it, with the result that upon this contest subsequently instituted the burden rests upon the contestants to show that the portion objected to was not a valid testamentary disposition by the testator. If, as a matter of fact, the residuary clause was written by the testator at the same time with his writing the body of the instrument and as a part of one and the same testamentary act, there can be no reasonable question but that the instrument as a whole is a single instrument, and the date at the beginning covers both portions of the instrument. The original order of probate creates a prima facie presumption that this was the fact. There is nothing in the instrument to indicate the contrary, and thereby overcome the presumption, and no evidence was offered to overcome it. Nor does the contest filed contain any allegation to the effect that this portion of the will was executed at a time and as a part of a testamentary act different from the time and act at and by which the main body of the instrument was executed. This being the situation, the presumption arising from the original probate is not overcome, and it must be taken that both portions of the instrument were executed at the same time and as part of the same testamentary act, so that the one date covers both.

It follows that the order of the probate court revoking the probate of this portion of the will should be reversed; and it is so ordered.

(48 Cal. App. 255)

BAYSIDE LAND CO. v. PHILLIPS et al.
(Civ. 3042.)

(District Court of Appeal, First District, Division 2, California. Sept. 12, 1919.)

1. VENDOR AND PURCHASER §=104—BURDEN ON VENDOR TO SHOW REVIVAL OF CONTRACT.

In an action to quiet title, where defense was that defendant was entitled to possession under contract of sale, the burden was on the plaintiff, having conceded a waiver of the right of forfeiture of the contract for delay in pay-

ments, to show a revival of the terms of the contract by proof of a definite and specific notice of an intention to enforce it.

2. APPEAL AND ERROR §=1011(1)—REVIEW OF FINDINGS OF FACT ON CONFLICTING EVIDENCE.

Finding of trial court that vendor did not give notice of an intention to enforce a contract of sale after having waived forfeiture will not be interfered with, where the evidence as to such notice was evasive, indefinite, and conflicting.

3. APPEAL AND ERROR §=1071(6)—FAILURE TO FIND ON ALL ISSUES HARMLESS.

Where a finding on one issue is sufficient alone to support judgment, failure to find on other issues is immaterial.

Appeal from Superior Court, Orange County; W. H. Thomas, Judge.

Action by the Bayside Land Company against Mrs. Eva Phillips and Mrs. F. M. Harmer. Judgment for defendants, and plaintiff appeals. Affirmed.

Bordwell & Mathews, of Los Angeles, for appellant.

Evans, Abbott & Pearce, of Los Angeles, for respondents.

NOURSE, J. Action to quiet title to real property, in which defendants claim an interest by reason of a written contract, entered into between the parties hereto, by which plaintiff agreed to sell and defendants agreed to buy said property. The trial court rendered judgment in favor of defendants, from which plaintiff appeals.

Said contract was found by the court to have been executed on or about August 28, 1913. The provisions material to this appeal are as follows:

"Said lot being sold for the sum of seven hundred (\$700) dollars gold coin of the United States, and the said parties of the second part, in consideration of the premises, agree to pay to the said party of the first part the said sum of seven hundred (\$700) dollars, as follows, to wit: The sum of seventy (\$70) dollars, cash, receipt whereof is hereby acknowledged; the further sum of ten (\$10) or more dollars on or before the 28th day of each and every month hereafter until the full amount of principal with interest on deferred payments has been fully paid; all to bear interest from date until paid at the rate of six (6) per cent. per annum, payable and compounded semiannually. And the said parties of the second part agree to pay all state and county taxes, and assessments of whatsoever nature, which may become due on the premises above described. It is further agreed that time is of the essence of this contract, and in the event of a failure to comply with the terms hereof, by the said parties of the second part, said party of the first part shall be released from all obligations in law or equity to convey said property, and the said parties of the second part shall forfeit all right there-to."

Appellant contends that defendants' interest in said contract, and in the land therein involved, terminated on the 27th day of November, 1915, by reason of the exercise of the forfeiture clause therein contained. Defendants, on the other hand, deny plaintiff's right to exercise such forfeiture by reason of the waiver of that provision of the agreement.

It appears from the record that on November 27, 1915, the total amount paid on said contract was \$177.43, principal and interest; that on said date there was a total delinquency of \$231.15, made up as follows: Nineteen principal payments, amounting to \$190; accumulated interest, amounting to \$35.18; delinquent taxes, covering a period of two years, amounting to \$5.97. It also appears that the last payment on the contract, amounting to \$7.50, was made July 30, 1915; that some time subsequent to that date (the time is not otherwise fixed by any evidence) Mrs. Harmer, one of the defendants, attempted to make a further payment of \$5, but that plaintiff refused to accept it, stating that the contract had been canceled November 27, 1915; that on March 20, 1916, defendants offered plaintiff a check for \$290, the full amount then delinquent, but that plaintiff refused to accept the same.

[1, 2] Appellant concedes that—

"Defendants did not make payments punctually, and plaintiff for nearly two years indulged them in this, and accepted payments from time to time of less than the whole amount due at the time of such payments."

Plaintiff likewise concedes that such conduct operated as a waiver of that clause of the agreement making time the essence thereof, and created "such a temporary suspension of the right of forfeiture as could only be restored by giving definite and specific notice of an intention to enforce it." *Stevinson v. Joy*, 164 Cal. 279, 285, 128 Pac. 751; *Myers v. Williams*, 173 Cal. 301, 304, 159 Pac. 982; *Burmester v. Horn*, 35 Cal. App. 549, 552, 170 Pac. 674; *Boone v. Templeman*, 158 Cal. 290, 297, 110 Pac. 947, 139 Am. St. Rep. 126. Plaintiff, however, insists that such notice was given to defendants, and that the provision making time the essence of the contract was thereby revived. Defendants deny the receipt of such notice, and contend that the contract was still in force March 20, 1916, when plaintiff refused to accept the amount due thereunder. The trial court found that the "plaintiff corporation has never given notice of cancellation or voidance of said contract."

Having conceded the waiver of the right of forfeiture, the burden was on the appellant to show a revival of the terms of the contract by proof of a definite and specific notice of the intention to enforce it. As to this the evidence was evasive, indefinite, and conflicting, and the trial court was justified in making the finding above noted.

[3] Having thus waived the right of forfeiture and failed to prove the revival of that right, the failure of the court to find on other issues becomes immaterial on this appeal. *Hertel v. Emireck*, 174 Pac. 30; *Smith v. Smith*, 173 Cal. 725, 161 Pac. 495. A finding favorable to appellant on each of these issues would not support a judgment in its favor in view of the general finding of want of notice. A finding on this issue alone, taken with the concessions of appellant, is sufficient to support the judgment.

The judgment is affirmed.

We concur: LANGDON, P. J.; BRITTAIN, J.

(42 Cal. App. 223)

BARBER v. SUPERIOR COURT OF CALIFORNIA IN AND FOR SAN DIEGO COUNTY et al. (Civ. 2998.)

(District Court of Appeal, Second District, Division 1, California. Sept. 8, 1919. Rehearing Denied by Supreme Court Nov. 6, 1919.)

1. EQUITY — 89(1)—GRANT OF COMPLETE RELIEF.

Where equity has acquired jurisdiction for one purpose, it will retain that jurisdiction to the final adjustment of all differences between the parties arising from the cause of action presented.

2. COURTS — 475(2, 3) — EXECUTORS AND ADMINISTRATORS — 516(4)—EQUITY JURISDICTION OF ACCOUNTING BY ADMINISTRATOR.

Until a decree settling an administrator's account and distributing the estate is made final by expiration of time for appeal, the court of probate has exclusive jurisdiction over all matters of accounting, but after that time has expired, if the decree was fraudulently obtained, equity has jurisdiction of an action to set it aside, and in order to afford complete relief may require an accounting by the administrator in such action, unless the usual chancery powers are curtailed by some peculiar limitation in the nature of the case.

3. EXECUTORS AND ADMINISTRATORS — 516 (4)—NECESSARY PARTIES IN PROCEEDING IN EQUITY FOR ACCOUNTING.

Where, in an administratrix's suit in equity against a former administrator of the estate, the decree of settlement and distribution is set aside for fraud, an accounting by the administrator may be made in such suit, instead of in the probate court, though new claimants, not before the court, might assert claims, since, in view of Code Civ. Proc. §§ 369, 1586, the administratrix represents all possible claimants and is the only necessary plaintiff, and payment to plaintiff of the amount found due will protect the administrator.

Petition by E. M. Barber against the Superior Court of San Diego County and O. N. Andrews, Judge of said Court, for writ of prohibition to prevent setting aside of a de-

cree of settlement of account and distribution in probate, to which petition respondents demurred. Writ denied, and proceeding dismissed.

Thomas, Beedy & Lanagan, of San Francisco, and Patterson Sprigg, of San Diego, for petitioner.

Bischoff & Thompson, of Escondido, for respondents.

CONREY, P. J. The petitioner applied for a writ of prohibition commanding respondents to refrain from certain threatened proceedings in an action numbered 26366 and entitled "Ostergard, Administratrix, et al. v. E. M. Barber and United States Fidelity & Guaranty Company." An alternative writ was issued. Respondents' return is in the form of a demurrer, which rests upon the ground that the facts alleged are not sufficient to entitle petitioner to the demanded relief.

Barber was administrator of the estate of James Ostergard, deceased. His final account and petition for settlement and distribution of that estate were filed on the 10th day of September, 1914, in the superior court of San Diego county. On the 29th day of that month the account was approved by order of court, and a decree of final distribution followed in due course. On the 6th day of July, 1916, the letters of administration of Barber were revoked. On the 8th day of July, 1916, Ingina Ostergard was appointed administratrix of said estate.

Thereafter Ingina Ostergard, as administratrix, together with Victoria Jensen, Mary Larsen, and Ingina Ostergard, claiming to be the only heirs at law of James Ostergard, deceased, and claiming to be the only persons interested in his estate, commenced said action No. 26366. In that action facts were alleged showing that said final account of Barber as administrator was false and fraudulent, and that in fact he failed to account for a large amount of the assets of the estate, and falsely credited himself with sundry sums for which in fact he was not entitled to receive credit; that the time within which an appeal might have been taken, or any application for relief made, as against said order and decree in the probate proceeding, had expired before the alleged fraudulent acts of Barber were discovered by the plaintiffs. Plaintiffs demanded that said order and decree be vacated; that a true account be made; and prayed for such other and further relief as is agreeable to equity.

The petition herein shows that on the 22d day of March, 1919, in said action No. 26366, findings of fact were entered, and conclusions of law thereon, which were in favor of the plaintiffs; that the court proposes, not only to set aside said order and decree in the probate proceeding, but also has made an order fixing a certain date for an accounting to be made by said Barber, before the court in said action No. 26366.

By his petition herein said E. M. Barber seeks to prevent respondent from proceeding with such proposed accounting, in that action. His contention is that the settlement of such an account is within the exclusive jurisdiction of the superior court as a probate court, exercisable solely by a proceeding in the matter of the estate of James Ostergard, deceased, and that, therefore, the court in the equity case having set aside the order and decree formerly made, its sole further jurisdiction will be limited to the power to decree that a further accounting be made in the probate proceeding. This contention presents the only question now before us.

[1] 1. It is an established rule that—

"Where equity has acquired jurisdiction for one purpose, it will retain that jurisdiction to the final adjustment of all differences between the parties arising from the cause of action presented. It is, indeed, the duty of a court of equity, when all the parties to the controversy are before it, to adjust the rights of all and leave nothing open for further litigation." *Swan v. Talbot*, 152 Cal. 142, 94 Pac. 238, 17 L. R. A. (N. S.) 1066.

[2] 2. Let it be assumed that until the decree settling the final account of Barber as administrator and distributing the estate had been made, and until that decree had become final by expiration of the time within which an appeal therefrom might have been taken, the court in probate had exclusive jurisdiction over all matters of accounting by the administrator. But when that time had expired, and no opportunity remained by appeal or motion to obtain any relief against such decree, the powers of a court of equity were at once available, if the decree had been fraudulently obtained; and those powers became active, instead of latent, for the very reason that then the ordinary course of procedure within the limits of probate jurisdiction could not be used to afford the demanded relief. At the time when action No. 26366 was instituted, the court acquired jurisdiction over the subject-matter thereof. Unless there is some peculiar limitation in the nature of the case, whereby the usual chancery powers are curtailed, we are certain that an accounting may be made in that action, and a decree entered granting complete relief between the parties before the court.

[3] 3. Petitioner contends that there is a reason why the accounting must be had in the probate court, in this, that the proposed decree will necessarily reopen the administration of the estate, by setting aside the decree of settlement of account and final distribution; that a new decree, based upon a new report, notice, and hearing, will be required in that proceeding; that, perchance, additional claimants to some interest in the estate will be unearthed; that such additional claimants being not before the court in the action in which it is now proposed to take an account—

ing, Mr. Barber will thus be exposed to two several attacks upon his administration where only one should be required. Counsel for petitioner say:

"If the present case proceeds to a judgment, Mr. Barber will have to pay to the plaintiffs the amount found due from him on an accounting. This will not protect him, because the probate court has not determined to whom the estate of James Ostergard is to go."

This contention is not sound. Barber can satisfy any decree entered against him by paying the required sum into the hands of the administratrix, who is a plaintiff in the action, and as such administratrix will be responsible for the money so received. The court in its findings has declared, presumably upon sufficient evidence, that the plaintiffs are the only heirs at law, persons, and parties interested in the estate. With all his years of acquaintance with this estate and its affairs, petitioner does not anywhere suggest a claim that this finding is untrue. He rests upon the bare possibility that some new claimant might appear when the administration of the estate is about to be closed, and so raises this cloud, less substantial than ether, as a wall to limit the jurisdiction of a court of equity. If there be some remaining unknown claimant, he has been represented by the administratrix as plaintiff in action No. 26366. If section 369 of the Code of Civil Procedure applies to such an action—and we think that it does—she was the only necessary plaintiff in that action.

"An administrator may, in his own name, for the use and benefit of all parties interested in the estate, maintain actions on the bond of an executor, or of any former administrator of the same estate." Code Civ. Proc. § 1586.

There appears to be no good reason why the administrator may not, with like effect, under appropriate circumstances, maintain a suit for an accounting, against a former administrator.

For the foregoing reasons, an order has been entered denying the application for a peremptory writ, and directing that this proceeding be dismissed.

We concur: SHAW, J.; JAMES, J.

(43 Cal. App. 244)

STANDING v. MOROSCO. (Civ. 1879.)

(District Court of Appeal, Second District, Division 1, California. Sept. 8, 1919. Rehearing Denied by Supreme Court Nov. 6, 1919.)

1. FRAUDS, STATUTE OF §119(1), 126 — ESTOPPEL TO PLEAD.

Every person being advised of the requirement of Civ. Code, § 1624, subd. 1, as to con-

tracts not to be performed within a year, the mere omission to insist that a writing be made, or reliance only on the unfulfilled promise of the other party to put the agreement in writing, is not sufficient to protect the party insisting on fulfillment of the contract, but he must be misled by the other to his prejudice through representation, by words or conduct, of lack of intention to resort to plea of the statute.

2. FRAUDS, STATUTE OF §129(2) — INJURY AN ELEMENT OF ESTOPPEL TO PLEAD.

A party seeking to enforce a contract not to be performed within a year, and against whom the statute of frauds, Civ. Code, § 1624, is set up because the contract is not in writing, must show, in order to avail himself of the principle of part performance, not only that he was misled by the other party's implied or express representation that he would not rely on the statute, but also that plaintiff has altered his position, so that he will be made to suffer loss or unconscionable injury, if the plea of the statute is allowed to prevail.

3. MASTER AND SERVANT §8(1)—HIRING OF SERVANT FROM WEEK TO WEEK.

Where the compensation of an actor was to be paid at a weekly rate, the term of employment should be construed as being from week to week, even without reference to Civ. Code, § 2010, imposing such rule of construction on contracts for the employment of a "servant," defined by section 2009 to be one employed to render personal service otherwise than in the pursuit of an independent calling.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Servant.]

4. FRAUDS, STATUTE OF §129(2)—VOID CONTRACT NOT ENFORCEABLE ON GROUND OF ESTOPPEL.

Actor, suing manager on contract of employment for a year, void under Civ. Code, § 1624, subd. 1, because not to be performed within a year and not in writing, on the facts alleged in the complaint, held not entitled to enforce such contract against the manager on any ground of estoppel through detriment to him (the actor) by removal of himself and family from New York to Los Angeles.

Appeal from Superior Court, Los Angeles County; Curtis D. Wilbur, Judge.

Action by Herbert Standing against Oliver Morosco. From judgment of dismissal, plaintiff appeals. Affirmed.

Paul W. Schenck and Joseph Citron, both of Los Angeles, for appellant.

Scarborough & Bowen, of Los Angeles, for respondent.

JAMES, J. The demurrer of defendant on general and special grounds was sustained to the third amended complaint of the plaintiff, and leave to further amend was denied. Judgment of dismissal followed, from which plaintiff appealed.

[1-3] The cause of action attempted to be alleged was one for damages sustained by the

plaintiff through the refusal of the defendant to use and pay for the services of the plaintiff after having employed him as an actor to appear in plays produced by the defendant in his theater at Los Angeles. Plaintiff alleged that the engagement was for a period of one year. It is respondent's contention that the complaint in its allegations showed a case falling within the statute of frauds, and that plaintiff could not recover because the term of employment was not fixed in any writing. An agreement which is not to be performed within one year from the making thereof, in order to be valid, must be expressed in writing. Section 1624, Civ. Code, subd. 1. In order to avoid the effect of the statute, it is appellant's position that there was such part performance of the contract shown as to raise an estoppel against respondent, preventing him from questioning the validity of the contract or its enforceability. The rule referred to is an equitable one, which holds it to be a fraud under some circumstances to permit a party to make the defense that a contract is void or unenforceable because not in writing. Every person is advised of the plain requirement of the statute, and the mere omission to insist that a writing be made, or reliance only upon the unfulfilled promise of the other to put the agreement in writing, is not sufficient to protect the party insisting upon the fulfillment of the alleged contractual obligation. He must be misled by the other to his prejudice; not only must sufficient facts appear to show a representation (by words or conduct) on the part of the defendant that he did not intend to resort to a plea of the statute, but the other party must have so altered his position as that he would be made to suffer loss or unconscionable injury. If no such injury or loss is shown, the reason for the rule of estoppel fails and the excepted case is not established. See *Browne on Statute of Frauds* (5th Ed.) § 457; *Glass v. Hulbert*, 102 Mass. 24, 3 Am. Rep. 418—both cited in *Seymour v. Oelrichs*, 156 Cal. 782, 106 Pac. 88, 134 Am. St. Rep. 154.

The complaint of plaintiff shows: That in December, 1912, plaintiff was employed as an actor in the city of New York by defendant at the weekly salary of \$200, and that he had been engaged for a certain play. (How long this play was to run, or for what period of time plaintiff was under contract at \$200 per week, is not alleged.) It is alleged that defendant promised and agreed that, if plaintiff would reduce his salary to \$150 per week and remove to Los Angeles, defendant would employ him for a period of one year; that defendant promised to execute a contract in writing employing plaintiff for one year; that plaintiff accepted the agreement, relying wholly upon the representations made, and "refused to accept other employment which had been tendered him,

and otherwise injuriously changed his position and removed to the city of Los Angeles." (What the compensation or term of service would have been under the alleged employment offered, or how plaintiff's position was "injuriously changed," does not appear.) There is the further allegation that plaintiff's wife remained in New York, "as was agreed," and disposed of plaintiff's home and household furniture, and that two months after plaintiff came to Los Angeles his wife came also, and that the transportation was furnished to her by defendant; that on the 15th day of March, after plaintiff had been employed in Los Angeles by defendant for 2½ months at \$150 per week, defendant discharged plaintiff and refused to accept his offered services, and refused to "complete the execution of the said contract of employment which the said defendant promised and agreed at various times to deliver to the plaintiff, and repudiated his promises and representations made to this plaintiff." It is further alleged that defendant knew that a detrimental change of position and situation on the part of plaintiff would be necessary in the event plaintiff relied on defendant's said promises and representations; that the said promises and representations of the defendant were made with the knowledge and with the intent that they should be relied on by plaintiff and the change in his position thereby induced. A written memorandum, alleged to have been signed by defendant in New York, was set forth. It was in the following words:

"Mr. Standing:

"I will pay you one hundred and fifty (\$150.00) dollars per week in Los Angeles for the length of your engagement there, under the terms of the usual theatrical contract.

"As you have reduced your salary with me, I will be very glad to pay the transportation and sleeper of Mrs. Standing two mo's hence to Los Angeles.

"This will hold good only when we execute regular contract. [Signed] O. M.

"Yours very truly, [Signed] O. Morosco."

The memorandum contains no words fixing the term of service. The compensation was to be paid at a weekly rate; hence the term should be construed as being from week to week. This without reference to section 2010, Civil Code, which imposes that rule of construction upon contracts for the employment of a "servant." A servant is defined in the preceding section to be one employed to render personal service "otherwise than in the pursuit of an independent calling," and one who remains entirely under the direction and control of his master. It is not alleged what "the terms of the usual theatrical contract" were; they may have related wholly to matters of detail. And so the writing does not help the complaint, except to show that the defendant agreed to execute "the usual theatrical contract." This promise would be of

no more potency when expressed in writing than by parol.

[4] We cannot conclude that the case alleged is one showing that plaintiff is entitled to enforce his contract, which is admittedly within the statute of frauds. That he suffered detriment because of any action taken by him, and in reliance upon the promises of defendant, the facts alleged do not show. Neither monetary loss, nor great personal inconvenience can be presumed to have resulted to him. His property in New York may have been disposed of at a profit; the other employment tendered him may have been undesirable, of short duration, or covered by small prospective compensation. The change of residence from New York to Los Angeles may have been an agreeable one. The contract that plaintiff relinquished under which he was receiving \$200 per week, may have been one for weekly employment only. Assuming against the pleader, as we must, all facts reasonably consistent with the facts alleged, but adverse to the plaintiff, it cannot be said the complaint makes out a case entitling the plaintiff to the relief sought.

The judgment appealed from is affirmed.

We concur: CONREY, P. J.; SHAW, J.

(43 Cal. App. 261)

PRATT v. PRATT. (Civ. 2012.)

District Court of Appeal, Third District, California. Sept. 15, 1919.)

1. EXECUTORS AND ADMINISTRATORS §305—PAYMENT OVER OF MONEY TO ONLY HEIR.

In an action brought after the lapse of over 80 years to establish a claim against the estate of an administrator for money collected, but not accounted for in the administration, evidence held to justify the presumption that if any money was due to the legal heir represented by such administrator, it was paid over.

2. EXECUTORS AND ADMINISTRATORS §305—PRESUMPTION OF PAYMENT TO HEIRS AFTER LAPSE OF TIME.

The presumption arising from the lapse of time that the administrator of a brother's estate had paid his father, the only heir, is not affected by noncompliance with Code Civ. Proc. §§ 1443, 1622, 1636, and 1665, requiring inventory and other steps in the administration.

3. EXECUTORS AND ADMINISTRATORS §309—PRESUMPTION OF TRUE SETTLEMENT AFTER A LAPSE OF TIME.

It is not illegal for an administrator, collecting money belonging to a decedent who was not indebted, to settle the estate with the heir without the formality of the ordinary administration of estates, and in a proceeding for accounting many years after it will be deemed not improbable he followed the shorter way.

4. EQUITY §72(1) — WHAT CONSTITUTES LACHES.

Laches, unlike the statute of limitations, is not a mere matter of time, but involves or implies some other circumstances rendering inequitable the enforcement of a claim, such as change of relations of the parties or condition of the property.

5. EXECUTORS AND ADMINISTRATORS §473, 474(1)—RIGHT OF HEIR TO COMPEL SETTLEMENT WITHIN STATUTORY TIME.

On the administrator's failure to take the statutory steps in the administration, the heir may ask the aid of the court to compel him to settle the estate within the statutory time.

6. TRIAL §82—SPECIFIC OBJECTION TO EVIDENCE.

The certificate of authenticity and conformity to law contemplated by Civ. Code, § 1189, is not required to be attached to an acknowledgment to afford prima facie evidence of proper acknowledgment of an instrument executed in a foreign country, but in its absence other proof of compliance with the foreign law may be offered as provided by Code Civ. Proc. §§ 1901 or 1902, and if not acknowledged according to the foreign law such specific objection should be made to put one to such proof upon its introduction in evidence.

7. EXECUTORS AND ADMINISTRATORS §306—EVIDENCE OF PAYMENT OF HEIR'S CLAIM AFTER LAPSE OF TIME.

In an action against the estate of a deceased administrator for accounting, evidence that the only parties that could have positive knowledge of the facts were dead, in connection with the circumstance that slight evidence was offered on both sides, held to justify the court's finding that, owing to the great lapse of time, evidence of nonpayment to the heir was not available.

8. APPEAL AND ERROR §949—EXECUTORS AND ADMINISTRATORS §470—LAPSE OF TIME BARRING ACTION AGAINST ADMINISTRATOR IN DISCRETION OF JUDGE.

The length of time that will bar an action against a deceased administrator's estate on a claim based on nonpayment to heir depends upon the peculiar circumstances of the case, and a large discretion is confided to the trial judge, whose determination is binding on the appellate court, unless manifestly an injustice has been done.

Appeal from Superior Court, Stanislaus County; L. W. Fulkerth, Judge.

Action by William H. Pratt, as administrator of the estate of George Pratt, deceased, against Jennie S. Pratt, as administratrix of the estate of Samuel Pratt, deceased. Judgment for defendant, and plaintiff appeals. Affirmed.

Hawkins & Hawkins, of Modesto, for appellant.

J. M. Walthall, of Modesto, for respondent.

BURNETT, J. George Pratt died on the 12th day of June, 1876. On the first day of

July following, his brother, Samuel Pratt, was appointed the administrator of his estate by the probate court of the county of Stanislaus. Samuel Pratt thereupon qualified as such administrator, and immediately collected from two certain banks the sum of \$850, which the said George Pratt, deceased, had deposited therein, but he took no further steps in the administration of, nor did he account to, said estate for the moneys he received. On the 14th day of January, 1915, the said Samuel Pratt died, and on the 5th day of February, 1915, letters of administration of his estate were issued to respondent. On the 25th day of October, 1915, plaintiff was appointed administrator of the estate of said George Pratt, deceased, and he thereupon presented a claim against the estate of Samuel Pratt in favor of the estate of George Pratt for said money, with compound interest, the total amount of the claim being over \$11,000. It was rejected by the said administratrix, and suit was immediately brought thereon. The said George Pratt left as his sole heir at law, his father, Samuel Pratt, Sr., who was and always remained a resident of England. He also left several brothers and sisters in that country and one brother, the plaintiff herein, who, after the death of George, the exact time not being shown, came to California. There is no positive evidence that said Samuel Pratt ever made any accounting or paid any money to his father, the only showing as to any money transactions between him and the other members of the family consisting of his sending a few small sums of money to his sisters in 1913 and 1914.

The grounds for the trial court's judgment in favor of the defendant are disclosed by the following findings:

"The court finds that the said Samuel Pratt collected certain sums of money belonging to the estate of George Pratt, deceased, to wit, said sum of \$850. That he never accounted to the said estate therefor, but that he received and held a power of attorney from his father, Samuel Pratt, Sr., who was the sole heir of said George Pratt, deceased, to collect said money and pay the same to his father, and the court finds that the presumption is that said Samuel Pratt accounted to said father for said money collected, and from said presumption the court finds that said money was paid by Samuel Pratt to his father, Samuel Pratt, Sr. That the said Samuel Pratt, Sr., deceased, did not die for 23 years after the death of said George Pratt, deceased, and that during said time had knowledge of the death of said George Pratt, deceased, and the appointment of said Samuel Pratt as administrator of his estate during all of said years. That almost immediately after the death of said George Pratt, deceased, the said father executed and forwarded to the said Samuel Pratt said power of attorney. That during no time during said time of said 38 years did said plaintiff make any demand upon said Samuel Pratt for an accounting as administrator of the estate of George

Pratt, deceased. That no demand was made upon said Samuel Pratt for an accounting as such administrator during his lifetime. That there is on file in the estate of said George Pratt, deceased, no demand or request for an accounting by the said plaintiff, or any one else, filed during the lifetime of said Samuel Pratt.

"That after the said letters were issued to the said Samuel Pratt, he took no further steps to settle said estate, and that no further steps have been taken in said estate, and that none were taken any time prior to the 14th day of January, 1915, at which date the said Samuel Pratt died, and that no inventory and appraisalment were ever filed in said estate from the time of the appointment of the said Samuel Pratt as such administrator until his death, and that no claims have been filed against said estate.

"That the evidence is insufficient to show that no money out of the money of said estate of George Pratt, deceased, was paid out for sickness or burial. That evidence cannot be obtained by reason of the long lapse of time between the death of said George Pratt, deceased, and the institution of this action to establish any allegation in the pleadings, for the reason that the said Samuel Pratt, the person having full knowledge of the matters, and all other persons from whom information can be had, are dead. That the evidence is insufficient to establish what disposition was made of any moneys or property belonging to said estate of George Pratt, deceased, which might have or did come into the hands of said Samuel Pratt as administrator of said estate. That the evidence is insufficient on account of the great lapse of time since the death of said George Pratt, deceased, and the appointment of Samuel Pratt as his administrator, and the death of all those possessed of the knowledge of such fact, to establish the allegation in the complaint that the money alleged to have been collected by said Samuel Pratt for or on account of the estate of George Pratt, deceased, was never paid to any of the heirs of the said George Pratt, nor expended for the benefit of the estate of George Pratt, nor paid to any other person in interest for the estate of George Pratt or otherwise, or that it was never paid out to any one else, or that it was used for the benefit of said Samuel Pratt.

"The court, therefore, finds from the foregoing facts that said Samuel Pratt accounted to and paid over to said Samuel Pratt, Sr., the father of said George Pratt, deceased, and the sole heir of said George Pratt, deceased, all sums of money to which he, the said Samuel Pratt, Sr., would have become entitled to, or was entitled to from said estate."

As conclusions of law the court made the additional findings:

"That said action is barred on account of the laches of the plaintiff, and each and all of the heirs of Samuel Pratt, Sr., in demanding an accounting of the said Samuel Pratt as administrator of the estate of George Pratt, deceased.

"That the said claim of the plaintiff as administrator of the estate of George Pratt, deceased, against the estate of Samuel Pratt, deceased, is a stale claim, and not enforceable against the estate of Samuel Pratt, deceased.

"That on account of the great lapse of time

since the appointment of said Samuel Pratt as administrator of the estate of George Pratt, deceased, the said Samuel Pratt is presumed to have duly accounted to the heirs of said George Pratt and to have paid their distributive shares in said estate."

It thus appears that four considerations entered into the decision of the lower court, namely, the failure of proof on the part of plaintiff, the presumption of payment by Samuel Pratt to his father, the staleness of the claim, and the laches of said plaintiff and the other heirs of Samuel Pratt, Sr.

[1] As to the first, it may be said that the record herein furnishes a striking demonstration of the difficulty of proving a fact after the lapse of so many years. And in considering this phase of the case, it must be deemed a fair inference that the parties presented all the evidence that was available. We cannot say that there is an entire absence of evidence of the failure of Samuel Pratt to properly account with his father. However, it is meager, and, in view of the exclusive province of the trial judge, acting in place of a jury to determine the probative force of the testimony, we think no appellate court would be justified in holding that a fair consideration of the evidence should have led the lower court necessarily to the conclusion that Samuel Pratt had not paid his father all that the latter was entitled to. In regarding the point we must remember that, while it was shown, and the court found that Samuel Pratt had collected \$850, there is no evidence whatsoever as to the expense of the last illness of George Pratt or of his funeral, or of the administrator's, or the attorney's fee in the administration of the estate. Respondent claims \$350 to be a reasonable amount for these items. Ordinarily, such expenses would be equal to that amount. Of course, it is impossible to say positively how much, if anything, was paid out for any or all these matters, and in the absence of any evidence whatever as to this consideration, the trial court would necessarily be in doubt as to the amount left in the hands of Samuel Pratt to be paid over to his father.

But, assuming that the burden of proof was upon respondent to show how much, if anything, was paid for these purposes, and in the absence of any showing to that effect, the court was bound to charge the estate of Samuel Pratt, deceased, with the full amount, which was collected, the inquiry then arises whether the evidence was such that the court should have found that it was not paid to Samuel Pratt, Sr.

The testimony on this point in behalf of appellant was brief, and we may herein set it out. John Radley testified:

That he had known Samuel Pratt since 1876. That they were working together in June, 1876. "Samuel Pratt's brother, George Pratt, got hurt, and Samuel Pratt got a message to come

up, and he went. He returned the next day. He then told me that his brother was hurt very bad, and he didn't think he would live very long. Samuel Pratt was running the header for Mr. Wardrobe, and he said he came back to keep his job, and he said that he had hired a man to take care of his brother. His brother soon hereafter died."

After stating that Samuel told him that he collected over \$700 from the Stockton and Merced banks belonging to his brother, George, the witness proceeded:

"I once asked him if he had sent the money to his father, and he told me no, but he was going to. We had several conversations in regard to it. The last time I asked him about it he said he had put that money to interest so it would draw more money, and he would send it later on to his father. He told me he knew where he could buy 160 acres of land, and he asked my opinion. Afterwards he bought the land."

He also stated that Samuel Pratt never told him anything as to whether his father had made a demand for the money. Plaintiff offered in evidence a mortgage on certain lands in Stanislaus county, dated November 8, 1876, made by James Berry to Samuel Pratt to secure the sum of \$1,850 and a satisfaction thereof on October 24, 1879. A deed from one Emeline Daggett to Samuel Pratt, reciting a consideration of \$1,000 and dated October 12, 1878, was also introduced in evidence.

George Squire then testified:

"I knew Samuel Pratt for 10 years, from 1873 to 1883. He told me that George Pratt asked him to collect certain moneys, \$950 or \$960, and send it to his father. The money was in the savings bank at Stockton and Merced. What I know about the matter was what I learned from being his nearest neighbor and what he told me himself. I know he had the money. He bought with it three quarter sections of the town of Oakdale. One of the quarters was purchased from me."

The trial court might well hesitate to find from the foregoing that Samuel Pratt violated his trust and withheld from his father any money to which he was entitled. The incidents concerning which the witnesses testified were held in the uncertain grasp of memory, reaching back nearly 40 years, and this circumstance was, of course, significant in the determination of their credibility. That after such a period of time they could state with accuracy what was said and done concerning a matter in which they had no personal interest might well challenge credulity. It is well to remember in this connection that the substitution or elimination of a single word of the conversation, or the addition of a slight incident, might present the consideration in an entirely erroneous light. Moreover, it is admitted that Samuel Pratt did not conceal from these witnesses the fact that he had money in his pos-

session belonging to his father, and he expressed his intention of sending it to him. This, at least, tends in some degree under the circumstances to negative the theory of a dishonest purpose. In fact, the only incident detailed by the witnesses lending any support to the claim that Samuel Pratt failed to settle with his father was the purchase of land to which they testified. But as to this, in the first place, it may be said there is nothing to show that he did not have money of his own. That he had some is quite apparent, indeed, from the amount invested. That he also purchased the land with his own money would be presumed, were it not for the said testimony of George Squire that Samuel Pratt "bought with the money three quarter sections in the town of Oakdale." But this testimony is quite unsatisfactory in the absence of any further explanation, and it is more significant for its omissions than for what was stated. When the land was bought does not appear, the deed not being offered in evidence, nor how much was paid for it, nor how long it was retained by Samuel Pratt. Furthermore, the statement of the witness undoubtedly involved his mere opinion from what was told him by said Pratt and his neighbors. Again, his credibility was for the trial judge, and we cannot say that he was not justified in attaching little, if any, importance to this testimony.

But according it full credit, would the lower court be required to find from this circumstance that the money was not paid to Samuel Pratt, Sr.? We think not. A more just and reasonable inference would be that the son was moved by an honest and filial purpose to increase his father's possessions, that he was successful in his endeavor, and that in due time he transferred the money with its increase to its rightful owner. We repeat, the record contains some evidence, though slight, as we view it, of the dereliction of Samuel Pratt, Jr., in the premises, but not of sufficient probative force for us to hold that the lower court was bound to find that there was no payment. How would the case then stand, and, particularly, what presumption should be indulged? Clearly, we think, that Samuel Pratt, Jr., performed his official duty, and that he acted honestly and in good faith. A contrary presumption would impute to him, not only a violation of the obligations of his trust but an utter indifference to the compelling impulses that usually characterize such relation of kinship, and, more than that, the actual commission of a crime. This is not to be permitted, especially in view of the great number of years that had elapsed. The whole record, we are persuaded, justifies the presumption and the conclusion that, if any money was due, it was paid.

Many cases of similar import are found in the books, and some of them determine that the presumption of settlement should be in-

dulged where it is not overcome by satisfactory evidence to the contrary. In *Jones v. Jones*, 91 Ind. 378, the right to a settlement had existed for about 20 years, and the court said:

"This was a stale demand. In the absence of evidence to the contrary, the presumption would be it had been paid. Even in cases of chancery jurisdiction, to which the statute of limitation is not a bar, a court of equity will presume that a stale demand has been paid. *Parker v. Ash*, 1 Vern. 256; *Sturt v. Mellish*, 2 Atk. 610; *Higgins v. Crawford*, 2 Versey, Jr., 571; *Smith v. Calloway*, 7 Blackf. 86; *Stehman v. Crull*, 26 Ind. 436."

[2] Nor do we think this presumption is affected by the provisions of the statute in relation to the administration of estates. It is true that the Code of Civil Procedure provides that an administrator must make and return to the court a true inventory and appraisement of the estate (section 1443); when required by the court or upon application of any person interested he must render an account (section 1622); upon the hearing of the accounts, the heirs may contest all matters included therein (section 1636); and final distribution of the estate can be had only upon final settlement of the accounts of the administrator, at which time the court ascertains who are the persons entitled to the estate (section 1665).

In view of the failure of Samuel Pratt, Jr., to comply with these various provisions of the statute it is contended that he had no right or authority to pay out any money to his father, and hence the presumption would be that he acted accordingly. But it must be remembered that the only parties interested in the regularity of the proceedings are the administrator himself, the creditors and the heirs, and each case must be considered in the light of its own peculiar facts. Herein there was no real estate, and we must take it for granted that there were no creditors, unless perhaps on account of the last illness and funeral expenses of the brother; that there was no controversy as to the heirs; that a relation of trust and confidence existed between the administrator and his father; that the son believed and had reason to believe that no question would ever arise as to the integrity of his conduct; that he knew how much his father was entitled to, and believed that he could, with safety, settle with him without incurring any further expenses of administration.

[3] It can hardly be said that it was his duty in any event to pursue the course indicated by said provisions of the Code. That would have been the more regular procedure, and it would have afforded him greater security, but if the facts existed as we have supposed, there was nothing unreasonable or illegal in his settling with his father without the formality of the ordinary administra-

tion of estates, and we deem it not improbable that he followed the shorter way. His determination was, of course, subject to review by the court at the instance of any interested party, but we must suppose that he felt amply protected, and that the heir was satisfied.

In the Estate of Willey, 140 Cal. 238, 78 Pac. 998, the executors, in an account rendered by them, sought to have themselves credited with certain advance payments made by them to certain beneficiaries named in the will, without obtaining an order of court, and it was held that the trial court properly retired those items from the account to be considered when the petition for distribution was heard. Therein was involved the construction of the terms of a will, and a controversy existed between the interested parties, which the court was called upon to review in the regular course of the administration of the estate. The executors could not by their action preclude the court from determining the controversy at the proper time and, manifestly, as it was stated:

"When an executor undertakes to construe the provisions of a will or to make payments thereunder in anticipation of the decree of distribution he does so at his peril."

While the facts herein distinguish this case from that, still it may be conceded that, if said Samuel Pratt made a settlement with his father without an order of court, he did so "at his peril," and that he could not thereby forestall an accounting in court, yet under the circumstances of this case we deem it not an unreasonable inference that he did make such settlement, believing that he was justified in so doing, and we think it cannot be said that thereby he violated his duty or transgressed any provision of the law.

[4] The findings as to the staleness of the claim and the laches of plaintiff may be considered together, as they are closely related. Appellant is clearly right in the contention that laches, unlike the statute of limitations, is not a mere matter of time. It involves and implies some other circumstance, or circumstances that would render inequitable the enforcement of the claim. This may be a change in the relations of the parties or the condition of the property that is deemed a justification for the denial of any relief. It may be added, though, that the great lapse of time, especially if the claimant has knowledge of the existence of his right, is often held sufficient to create the presumption or implication of another fact of an equitable nature, and thus to justify a decision against the claimant. As to the character of this defense and the reasons for its recognition and enforcement, it is sufficient to refer to the carefully considered opinion written by Justice Hart and adopted by the Supreme Court in the case of *Miller v. Ash*, 156 Cal. 544, 105 Pac. 600.

To illustrate, however, the peculiar views of various courts concerning situations similar to the one before us, we may cite some instances of the application of the doctrine of "staleness" and "laches."

In *Perkins v. Cartmell*, 4 Har. 270, 42 Am. Dec. 753, a legacy was involved for which no demand had been made for 30 years, and the court said:

"This suit is barred by lapse of time independently of the statute of limitations upon the presumption of payment and satisfaction, which presumption is not rebutted. The defense founded upon mere lapse of time and the staleness of the claim, in cases where no statute of limitation directly governs the case, is said by Judge Story (2 Com. on Eq. Jur. § 1520, p. 904) to be a defense peculiar to courts of equity. Upon general principles of their own, independently of the statutes of limitation, they have always discountenanced laches and neglect, and refused their aid to stale demands where the party has slept upon his right, or acquiesced for a great length of time. After a considerable lapse of time, they refuse to interfere, from considerations of public policy, and the difficulty of doing entire justice when the original transactions have become obscure by time and the evidence may be lost."

There was something like 20 years' delay in demanding an accounting in the case of *Osborne v. O'Reilly*, 43 N. J. Eq. 647, 12 Atl. 377, and the court said:

"This great delay might have justified the court in dismissing the complainant's bill without looking at the merits. It certainly requires of the court to take care that the dangers of injustice, which always attend the investigation of facts long since transpired, are not overlooked, and that, before disturbing the status acquiesced in by both parties for so many years, very convincing evidence of the propriety of a change shall be adduced."

In *Le Roy v. Bayard*, 3 Bradf. Sur. (N. Y.) 228, it was held that the lapse of 29 years since the administration of the estate commenced is sufficient to excuse a formal inventory and account.

In *Calhoun's Appeal*, 39 Pa. 218, the court determined that since the devisee and her heirs knew for 25 years of the mismanagement of the estate, but required no accounting nor sought any relief, they were not entitled to the aid of a court of equity, after having so slept on their rights, the court saying, however:

"Had there been ignorance of facts or legal disabilities to account for the extraordinary neglect of legal remedies on the part of the appellants, their inaction might have been excused, but nothing is shown or suggested by way of excuse."

In *Gatewood v. Gatewood Adm'x*, 70 S. W. 284, 10 years after the death of an administrator, suit was brought against his estate for a sum claimed to have been retained by him belonging to plaintiff, the claim being 30 years

old, and it was held that the claim was stale and not enforceable in equity.

In *Hill v. Hill*, 70 N. J. Eq. 107, 62 Atl. 385, the court of chancery held that the lapse of 17 years was sufficient to bar an application for an accounting of an administrator. The court declared that—

The complainants were "chargeable with notice that they were entitled to a prompt accounting, which is precisely the remedy which they are here asking. Not only do they not allege their ignorance in these matters, but it is quite impossible to believe that they were so far indifferent to their pecuniary rights as not to be informed that the time had arrived when they were entitled to receive from their father's estate more than they did actually receive, unless the same was absorbed in the payment of debts. * * * The complainants, then, are chargeable with resting on their rights for about 17 years without the least excuse whatever. In the meantime it is fair, I think, to infer that the vouchers and papers relating to the estate, which must have been in the hands of their uncle, John, have been lost or mislaid, and are not now available to the answering defendant."

In *Re Henry's Estate*, 198 Pa. 382, 48 Atl. 274, it was held that an application for an accounting of an administrator was barred by the lapse of 18 years, the court saying that the case was "made much stronger by reason of the death of the person whose liability to account is now asserted." Therein the court cites with approval the case of *Gress' Appeal*, 14 Pa. 463, wherein an account was refused after the lapse of 18 years, not because of either presumption of payment or settlement, but because it resulted "altogether from the unwarrantable negligence of the party to call for an account, without offering any sufficient reason accounting for the delay."

In *Phillips v. Piney Coal Co.*, 53 W. Va. 543, 44 S. E. 774, 97 Am. St. Rep. 1040, a delay of 10 years was held sufficient to bar an action to reform a deed, and the court declared that a party who seeks to avoid the charge of laches in such case "should set forth in his bill specifically what were the impediments to an earlier prosecution of his claim; how he came to be so long ignorant of his rights, and the means used by the respondent to fraudulently keep him in ignorance; and how and when he first came to a knowledge of the matters alleged in his bill; otherwise the chancellor may justly refuse to consider his case, on his own showing, without inquiring whether there is a demurrer or formal plea of the statute of limitations contained in the answer."

In *Preston v. Preston*, 95 U. S. 200, 24 L. Ed. 494, the suit was brought 25 years after the right occurred, and the court said:

"The delay of one to this extent in prosecuting his rights under a contract is, except under special circumstances not existing here, such

laches as disentitled him to the aid of a court of equity."

In *Pusey v. Gardner*, 21 W. Va. 469, it was held that a court of equity will not set aside a deed, made by a daughter to her father immediately before her marriage, conveying her remainder in land, in which the father had a life estate, upon the ground of undue influence after an interval of 35 years and after the death of the father, though the claim of the daughter is not barred by the statute of limitations, where the case is not a clear one and there are no circumstances which sufficiently account for the delay. Therein was quoted the following statement from *Kerr on Fraud and Mistake*, § 305:

"Lapse of time, when it does not operate as a positive statutory bar, operates in equity as an evidence of assent, acquiescence or waiver."

Other cases to the same effect are available, but they need not be cited.

Appellant finds comfort in certain other decisions, which he claims to be essentially in conflict with the cases upon which respondent relies. But it can hardly be said that they teach another doctrine, although some of them present a different view of the burden of proof. One of them is the carefully considered case of *Depue v. Miller*, 65 W. Va. 120, 64 S. E. 740, 23 L. R. A. (N. S.) 775, wherein the West Virginia Supreme Court of Appeals declared it to be a sound doctrine that—

"Mere forbearance to compel rendition of a just debt or other right, the existence of which is clear beyond doubt, does not prejudice the party from whom it is due, and it is not inequitable to enforce rendition thereof after long delay; but if the length of time be long enough in itself, or with the aid of circumstances and conduct to satisfy the chancellor that the plaintiff had abandoned his right before he brought suit to enforce it, his demand will be regarded as stale and lost by laches."

However, the court held that the claim therein was fully proven by documentary evidence under circumstances not in any way operating to the prejudice of the defendants and tending to negative the inference of intent on the part of plaintiff to abandon or relinquish his right, and concluded that the delay in the assertion of the right for a period of less than 20 years would not bar relief.

In *Glen v. Kimbrough*, 58 N. C. 173, the action was held not to be barred by the lapse of 34 years, but the decision was based upon the ground that there was no representative of the estate against which the action could be brought. The court, however, recognized the rule to be that after the lapse of a long period of time a presumption will arise "of payment or satisfaction or abandonment; * * * but this presumption is one of fact, and is rebuttable, and where it appears it

has not been settled, or where it appears there was no one with the legal power to make a settlement, the presumption is rebutted."

In the *Estate of Fischer*, 189 Pa. 179, 42 Atl. 8, the main question was as to the validity of a certain release, and it was justly held that the lapse of 17 years did not bar the claimant from seeking to avoid the effect of said release on the ground that she imperfectly understood English, did not comprehend the meaning of the terms employed, and was induced to execute it by reason of certain threats which were made. It was in view of these circumstances that the court said:

"There is nothing therefore left to sustain the plea of laches but mere lapse of time; and that is clearly insufficient."

In *Wilson v. McCarty*, 55 Md. 277, it was held that the orphans' court had jurisdiction to compel a surviving executor to return assets of the estate or recover them where they could be recovered even where an account called final had been allowed and some 14 years had elapsed since such account. The court said this could be done within a reasonable time and "what is reasonable time depends upon the peculiar circumstances of each case, and the character of the correction to be made."

In *Werborn v. Austin*, 82 Ala. 498, 8 South. 280, the court recognized the presumption of payment from the lapse of 20 years in the case of a trust, but held that it was overcome by evidence to the contrary.

In *Branch v. Hanrick*, 70 Tex. 731, 8 S. W. 539, suit was brought August 11, 1885, against one who had been appointed administrator of an estate in 1867. The action was by one claiming a distributive share of the estate, who sought to compel an accounting by the administrator. The latter contended that by virtue of a certain statute of Texas the administration of the estate was conclusively presumed to have been closed, but the Supreme Court held that said statute had been repealed, and that it was proper to show that such settlement had not been made.

The important question in *Re Sanderson*, 74 Cal. 199, 15 Pac. 753, was whether the executor had been negligent as to the collection of a certain note, he having made no excuse for his failure. The matter was covered by section 1615 of the Code of Civil Procedure, providing that—

"No executor or administrator is accountable for any debts due to the decedent, if it appears that they remain uncollected without his fault."

The Supreme Court properly held that the statute of limitations did not run against the continuing trust of the executor, and that in case the debt was not collected the statute

imposed upon him the burden of showing that it was without his fault.

In *Bemmerly v. Woodward*, 124 Cal. 568, 57 Pac. 561, the action was brought for an accounting about 11 years after the last account had been rendered. It is plain, though, that no final accounting could have been enforced against Woodward during the disability of the minors, the will containing this provision:

"Whenever one of my children becomes of age or it shall be entitled to his or her share of the estate then remaining in the hands of my executors, and they are hereby directed and authorized to deliver up such child's portion by a fair division made of the lands then belonging to the estate."

It seems that the youngest minor reached his majority only about 1 year before the suit was brought. So, the case is hardly in point here. It is true that the court said:

"To show an honest execution of the trust it was incumbent upon Woodward to show what he did with the money. In the absence of such showing, I think we must conclude that he did not use them for the estate."

That was a proper rule to apply under the peculiar circumstances of the case. Besides, the evidence and pleadings of the parties were such that the lower court could hardly have concluded otherwise than in favor of plaintiff, the serious question on appeal being as to the sufficiency of the finding of Woodward's neglect to invest the trust money and as to the amount of interest that should be charged against him.

[5] But appellant claims that the lower court without warrant assumed or found certain circumstances to exist which are essential to the support of the conclusion that plaintiff and the other heirs were chargeable with laches. One of these, namely, in relation to the fact that no inventory was filed nor other step taken in the administration of the estate, we have already noticed. We may add that it was undoubtedly the right of the heir to invoke the aid of the court to compel the administrator to settle the estate within the statutory time.

[6] Again, it is claimed that the evidence does not show that the heirs had knowledge of the death of George Pratt and of the condition of his estate. The only heir, as we have seen, for 23 years was his father, and power of attorney from him to Samuel Pratt, Jr., dated July 11, 1876, was received in evidence, in which he referred to "my late son George Pratt, deceased." It is true that an objection was made by appellant to the introduction of this instrument on the ground that—

"The deed and certificate are not in conformity with our statute, and that the execution is insufficient, and that the acknowledgment is not in the form required to prove the signature of a signer to a document, and that it is not duly

authenticated as required by the laws of the state of California, and it does not show that it has ever been acted upon as genuine, and its custody has not been explained, and it does not appear that it has ever been treated as a genuine document."

The power of attorney purported to be executed in England and acknowledged before Cad. E. Palmer, a notary public of Barnstaple in the county of Devon, and had the seal of his office attached. This notary certified that Samuel Pratt appeared before him "and acknowledged the said letter of attorney to be his act." To this with the seal of his office was annexed the certificate of the United States consul at Bristol, England, "that the foregoing signature and seal are the true and genuine signature and seal of Cadwaloder Edwards Palmer, a notary public, residing at Barnstaple, in the county of Devon, England." Section 1189 of our Civil Code specifies the general form of the certificate of acknowledgment, but adds:

"Provided, however, that any acknowledgment taken without this state in accordance with the laws of the place where the acknowledgment is made, shall be sufficient in this state; and provided further, that the certificate of the clerk of a court of record of the county or district where such acknowledgment is taken, that the officer certifying to the same is authorized by law so to do, and that the signature of said officer to such certificate is his true and genuine signature, and that such acknowledgment is taken in accordance with the laws of the place where the same is made, shall be prima facie evidence of the facts stated in the certificate of said clerk."

Since the instrument was executed in England it was therefore necessary that it be acknowledged according to the law of that country. But if it was not so acknowledged, or there was any claim to that effect, such specific objection should have been made. The only objection in that respect was that it was not acknowledged as required by the laws of this state. We may add that the certificate contemplated by said proviso is not required to be attached to the acknowledgment. If attached, it affords prima facie evidence of the proper acknowledgment of the instrument, but, in its absence, other evidence of compliance with the requirement of the foreign law may be offered as provided by sections 1901 or 1902 of the Code of Civil Procedure. Appellant should have made the specific objection to put the respondent to such proof.

But, regardless of this instrument, it is

not to be supposed that the father for over 20 years was ignorant of the death of his son. The presumption that "things have happened according to the ordinary habits of life" would justify the inference that he made inquiry and ascertained from his son, Samuel, that George had passed away. As to William, the plaintiff, the evidence shows that he lived for some years in the county of Stanislaus, wherein the latter was appointed administrator of the estate of his brother, George, and it would be quite unreasonable to assume that he was ignorant of the situation. If he had not known of the death of George or of the father, of course, he would have so testified when he was on the stand. The fact that he was not interrogated concerning it is quite sufficient, under the peculiar circumstances of the case, to lead to the conclusion that he had such knowledge. We may add that his failure to excuse his delay of 15 years after the death of his father and nearly a year after the death of his brother, Samuel, before instituting this action is equally significant.

[7] It is also claimed that there is no sufficient support for the finding that, owing to the great lapse of time, evidence could not be secured as to the payment or nonpayment of the claim. It is true that counsel on both sides seemed somewhat reluctant to question the witnesses, the examination having been apparently very brief; but the evidence showed without doubt that the only parties who could have positive knowledge of the fact were dead, and this, considered with the circumstance that such slight evidence was offered on both sides, would appear to justify the court's conclusion that the evidence was not available.

[8] Speaking generally, we think it must be said that there is no hard and fast rule as to the length of time that would bar such an action as this, that much depends upon the peculiar circumstances of the case; that a large discretion is confided to the trial judge, and the disposition of an appellate court is and should be to respect that discretion and not to interfere with his conclusion unless manifestly an injustice has been done. When we recall all the circumstances to which we have adverted, we cannot say that the decision was wrong. The responsibility for determining the question rested with the court below, and we think we are bound by the findings. The judgment is, therefore, affirmed.

We concur: CHIPMAN, P. J.; HART, J.

(43 Cal. App. 307)

In re KING'S GUARDIANSHIP. (Civ. 2910.)

(District Court of Appeal, First District, Division 2, California. Sept. 18, 1919.)

1. INSANE PERSONS ¶33(2)—AFFIRMANCE OF JUDGMENT ON CONFLICTING EVIDENCE.

Where the evidence was conflicting, and enough appeared to support the findings that the alleged incompetent was not incompetent and that no fraud had been practiced upon her by the son, with whom she was living, the judgment refusing to appoint guardian for her will be affirmed.

2. APPEAL AND ERROR ¶333 — DISMISSAL WHEN CASE RENDERED MOOT.

Where the person for whom a guardian is sought to be appointed dies pending appeal from judgment refusing to appoint, the ordinary course would be to dismiss the appeal as moot.

3. APPEAL AND ERROR ¶803—DISMISSAL OF SAME EFFECT AS AFFIRMANCE.

The effect of dismissal of appeal from judgment refusing to appoint guardian for an alleged incompetent person, because she has died pending appeal, would be the same as an affirmance of the judgment.

Appeal from Superior Court, Fresno County; H. Z. Austin, Judge.

In the matter of the guardianship of the person and estate of Phebe R. King, incompetent. From a judgment refusing to appoint a guardian for the alleged incompetent, there is an appeal. Affirmed.

N. Lindsay South and Everts & Ewing, all of Fresno, for appellant.

Harris & Harris, of Fresno, and C. W. Trabing, of Kingsburg, for respondent.

BRITAIN, J. [1] While Phebe R. King, aged 83, was living with one of her sons, other children petitioned for the appointment of a guardian, alleging she was incompetent and subject to fraud, which they further alleged was being practiced upon her. The petition was denied. The appeal was based wholly on the claimed insufficiency of the evidence to support the findings that she was not incompetent and that no fraud had been practiced. The evidence was conflicting, and enough appeared to support the findings. In such a case the judgment will be affirmed. Matter of Daniels, 140 Cal. 335-337, 73 Pac. 1053.

[2, 3] When the matter was called for argument, a letter from counsel for the appellants was presented. It contained a statement that Mrs. King had died pending the appeal, and asked that the matter be submitted. If the statement in the letter was sufficient as a suggestion of death, the ordinary course would be to dismiss the appeal.

The effect of such a dismissal would be the same as an affirmance of the judgment.

The judgment is affirmed.

We concur: LANGDON, P. J.; NOURSE, J.

(43 Cal. App. 162)

COMMERCIAL SECURITY CO. v. MODES-TO DRUG CO. (Civ. 1956.)

(District Court of Appeal, Third District, California. Sept. 5, 1919.)

1. CORPORATIONS ¶414(2)—NOTES BY PRESIDENT, WITHOUT APPROVAL OF DIRECTORS, ENFORCEABLE.

Where president and general manager of corporation entered into contract, the sole purpose of which was to increase the volume of business of the corporation, which received the benefits of contract in consideration of which notes were given, and M., who with the president owned all but one share of stock, was informed of the contract on the day following, and made no protest, *held*, notes were enforceable against corporation by innocent purchaser for value before maturity, though there was no compliance with by-law requiring contracts to be approved by board of directors before president could sign.

2. CORPORATIONS ¶405—POWER OF PRESIDENT OF COMMERCIAL CORPORATION.

Where a corporation is organized for commercial purposes, its president or general manager, given immediate direction or control of its affairs, is its agent empowered, unless expressly restricted to the performance of certain specific acts, to do anything which naturally and ordinarily has to be done to carry out its paramount purposes.

3. CORPORATIONS ¶400—CANNOT DENY LIABILITY ON GROUND THAT OFFICER HAD NO AUTHORITY.

Where officer of corporation is held out by such corporation to be possessed of power to perform all acts involved in its ordinary or usual business, the law will not permit third parties to suffer from such acts of such officer by plea of corporation that ostensible authority of such officer was not in fact conferred upon him.

4. CORPORATIONS ¶425(4) — ESTOPPED BY ACCEPTING BENEFITS OF AGREEMENT BY PRESIDENT.

Act of defendant corporation in accepting benefits of agreement made by its president and general manager amounted to a consent to all obligations thereof, and if it was not a ratification (Civ. Code, § 1589) defendant is nevertheless estopped from denying the binding force of the agreement.

5. CORPORATIONS ¶465 — CONSIDERATION FOR NOTE GIVEN BY PRESIDENT.

Where president and general manager of corporation entered into contract, sole purpose of which was to increase volume of business of corporation, which received benefits of contract in consideration of which notes were given, and

M., who with the president owned all but one share of stock, was informed of the contract on the day following, and made no protest, and later purchased stock of the president, agreed to pay the note, and so informed payee, it cannot be contended that the notes were not supported by a consideration.

6. BILLS AND NOTES §370—WANT OF CONSIDERATION DOES NOT AFFECT INNOCENT PURCHASER.

That notes were not supported by a consideration would be of no consequence, where plaintiff purchased them for value before maturity without knowledge of want of consideration; a written instrument itself being presumptive evidence of a consideration (Civ. Code, § 1614).

7. BILLS AND NOTES §370—ENFORCEMENT OF PAYMENT BY INNOCENT PURCHASER.

Where purchaser of promissory note has no knowledge of any infirmity in the paper on the score of consideration, or of facts which, when followed with reasonable diligence, would lead to a discovery of such infirmity, and no fraud in the transaction resulting in the execution of the note is shown or claimed, the purchaser, if he has exchanged value for the note, will be protected as an innocent purchaser for a consideration, and may enforce payment (Civ. Code, § 8122).

8. BILLS AND NOTES §342—CORPORATIONS §432(12) — WANT OF CONSIDERATION NOT SHOWN BY ABSENCE OF SEAL.

That seal of defendant corporation was not affixed to notes is not conclusive evidence of a want of authority for the execution of the notes, nor a circumstance sufficient to create a suspicion that the notes were not wanting in consideration, or that their consideration had failed at the time of their transfer to plaintiff.

9. CORPORATIONS §408 — NECESSITY FOR USE OF SEALS.

The seal of a corporation performs no further or greater function than to import prima facie verity of the due execution by the corporation of the written obligation.

10. EVIDENCE §22(2) — COMMON KNOWLEDGE OF ABSENCE OF SEAL TO CONTRACTS OF CORPORATION.

It is a matter of common knowledge that many contracts made by corporations and unattested by their seals are enforced.

11. CORPORATIONS §432(6) — PAROL EVIDENCE OF AUTHORITY TO MAKE CONTRACT.

The fact that an unsealed contract was duly authorized by a corporation may be shown by parol.

12. BILLS AND NOTES §345—PURCHASER'S KNOWLEDGE OF INFIRMITY.

That plaintiff took a bill of sale of notes, with a guaranty from the payee that they would be paid, in lieu of the customary indorsement, does not constitute a circumstance sufficiently significant to justify a suspicion that the notes were not all that they on their face purported to be.

13. BILLS AND NOTES §497(2)—BURDEN OF PROOF ON INNOCENT PURCHASER.

It is only where fraud or irregularity in the inception of a note is shown that burden is on purchaser to prove that he purchased before maturity, in good faith, for value, in the usual course of business; the rule not applying where there has been a valid consideration, which has failed.

Appeal from Superior Court, Stanislaus County; L. W. Fulkerth, Judge.

Action by the Commercial Security Company against the Modesto Drug Company. Judgment for defendant, and plaintiff appeals. Reversed and remanded.

Scott Rex, of Stockton, for appellant.

Hawkins & Hawkins, of Modesto, for respondent.

HART, J. Plaintiff, an Illinois corporation, brought the action against defendant, a California corporation, to recover judgment on two promissory notes, each for \$400, dated December 4, 1915, payable to the Partin Manufacturing Company, and alleged to have been duly indorsed and delivered by the payee to plaintiff prior to maturity. Judgment was in favor of defendant, from which judgment plaintiff prosecutes this appeal.

The Modesto Drug Company was engaged in the retail drug business in the city of Modesto. The capital stock of the corporation, with the exception of one share, was owned equally by J. T. Skow and D. W. Morris. Mr. Skow was a pharmacist, and was president of the defendant corporation. He was called as a witness for plaintiff, and testified that he was manager of the business, discharged the general duties pertaining to the conduct of the business, bought and sold goods, and had charge of the advertising. In the fall of 1915 Skow had some negotiations with a representative of the Partin Manufacturing Company, of Memphis, Tenn., and on the 4th of December, 1915, a contract, in the form of a letter addressed to the Partin Manufacturing Company, was signed "Modesto Drug Co., Purchaser, by J. T. Skow," and also contained the signature of the salesman of the Partin Company. Portions of said contract are as follows:

"Please ship to us at your earliest convenience by freight f. o. b. factory the following goods as described below:

"Capital prize, 2 passenger roadster. The purchaser is to deliver to the winner in this trade campaign the winner's choice of the following automobiles: Partin-Palmer, Monroe, Chevrolet. * * *

"Second prize, one lady's bracelet watch. * * * Third prize, one three piece French Ivory toilet set." Fourth and fifth prizes were named and ten dinner sets. Advertising matter to be furnished by the Partin Company was specified.

"(1) The undersigned purchaser warrants that his sales for the past 12 months were \$20,000. On this warranty of sales, Partin Manufacturing Company hereby agrees to increase the purchaser's sales and collections not less than \$12,500 in the next 12 months. Partin Manufacturing Company agrees to refund 6 cents on every dollar the purchaser falls short of the \$12,500 increase and agrees to send their bond to purchaser's bank in the sum of \$800 to guarantee this agreement, guaranteed by some surety company or bank satisfactory to company. Partin Manufacturing Company reserves the right to increase the number of premiums, without cost to the purchaser, if in their opinion it is necessary to bring about the above guaranteed increase. Partin Manufacturing Company agrees to send a bank certificate of deposit to purchaser's bank for \$400, to be held by purchaser's bank as a guaranty that Partin Manufacturing Company will deliver the automobile chosen by the winner in this campaign. Partin Manufacturing Company agrees to send a personal representative to assist in getting candidates and helping start this trade campaign."

There followed stipulations on the part of the purchaser as to the receipt of goods, making reports, etc. "The attached notes are executed and tendered in settlement of this order, and Partin Manufacturing Company is authorized to detach the same on acceptance of this order."

The notes in suit, attached to the above instrument, had been cut therefrom prior to the commencement of the action. The first note reads as follows:

"P. O. Modesto, Calif.

December 4, 1915.

"\$400.00.

"Five months after date for value received we promise to pay to the order of Partin Manufacturing Company, Incorporated, four hundred dollars — Union Savings Bank, Modesto, California.

Modesto Drug Co.,

"By J. T. Skow."

[Eight cents revenue stamps attached.]

The second note was identical with the first, except that it was payable six months after date. Witness Skow testified that the representative of the Partin Company explained to him the methods by which the defendant's business was to be increased, consisting of advertising, voting contests for prizes, etc.

The court found that the defendant did not execute or deliver to the Partin Manufacturing Company the notes in question, or any promissory notes; that J. T. Skow made and delivered the notes in suit, but was not authorized by the Modesto Drug Company so to do, and had no power or authority to execute them; that the Modesto Drug Company never at any time ratified the execution of said notes, "and is not estopped from denying the execution of said written instruments by J. T. Skow"; that the consideration for said promissory notes and the contract above referred to has failed; that the Partin Manufacturing Company did not ship at any time to the Modesto Drug Company any automobile, or any of the other articles mentioned

in said contract; "that the consideration for said obligation has fully failed"; that at the time plaintiff acquired said promissory notes "it had knowledge of facts sufficient to put it on guard, and to require it to make inquiry as to the authority of J. T. Skow to execute said written instruments, and as to the consideration given therefor."

Appellant contends that the notes were the notes of the defendant corporation; that, if they were executed without authority, the execution and delivery of the notes was ratified by defendant; and that appellant is a bona fide purchaser of the notes.

The by-laws of the defendant corporation were introduced in evidence. Article IV thereof provided:

"The directors shall have power * * * to incur indebtedness. * * * The terms and amount of such indebtedness shall be entered on the minutes of the board, and the note or obligation given for the same, signed officially by the president and secretary, shall be binding on the corporation. * * * The president * * * shall sign * * * all contracts and other instruments of writing which have been first approved by the board of directors."

On April 7, 1916, while the advertising and voting contest was still being carried on, Skow sold all his shares of the capital stock of the defendant corporation to Morris, who signed an instrument stating:

"I do hereby agree to pay all of the outstanding bills and accounts of the Modesto Drug Company, and to save and hold harmless the said J. T. Skow from all indebtedness now due or owing, including current bills, notes, and notes for advertising."

Witness Skow testified that the words "notes for advertising" in said instrument referred to the notes in suit. On the same day Morris wrote the Partin Manufacturing Company the following letter:

"I have purchased all the interest of J. T. Skow in the Modesto Drug Company, from which company you hold two notes. I have agreed with Mr. Skow to pay all notes due from the corporation, and he desires me to let you know of this fact, and I hereby notify you that I will pay said notes."

Skow testified that before he signed the notes he discussed the matter with Morris and that the latter said:

"Well, if you think it is a good thing, go ahead."

Morris denied having made this statement.

The deposition of Roland A. Crandall, president of the plaintiff corporation, was read in evidence. He deposed that, in the month of January, 1916, he purchased for the plaintiff, from the Partin Manufacturing Company, certain notes, including those in suit, paying therefor 92.71 per cent. of their face value.

D. W. Morris, called as a witness for the

defendant, testified that he and Skow owned, in an equal amount, all the shares of the stock of the defendant, except one share, which was in the name of a lawyer by the name of J. M. Walthall; that Skow, who was president of defendant, was a pharmacist by profession, and had at all times active management of the business of the corporation, buying the goods and making all contracts for and on behalf of the defendant; that he (Morris) spent practically all of his time in and about the store of the defendant, and acted with Skow in an advisory capacity with respect to the business. Morris denied the statement of Skow that the latter, before the making of the contract with the Partin Company, discussed with him the proposition involving said contract, but admitted that Skow did tell him of the making of said contract the next day after it was entered into and executed. He further testified that the board of directors of defendant never held a meeting for the purpose of authorizing Skow to sign the notes; that the Partin Manufacturing Company did not furnish to the winner of the contest an automobile, and that he (witness) gave the winner a check for \$545 in lieu thereof; that one of the prizes, an ivory set, was so inferior that witness replaced it with another set taken from the stock in the store; that some of the sets of dishes were sent to the defendant; that the certificate of deposit and bond mentioned in the contract were never furnished by the Partin Company. On cross-examination Morris testified that he thought there was some delay on the part of the Partin Company in getting the advertising scheme started, but—

"the matter was in his [Skow's] hands. He had signed the contract with them, and I paid very little attention to it. Q. In your conversation with Mr. Skow, when this subject was under discussion, did he state to you or inform you in any way of the extent of the financial obligation that the company had incurred or was supposed to have incurred—that is, the amount of it? A. Yes, sir. Q. And so you knew that there was outstanding what was or what might be a financial obligation to this Partin Manufacturing Company to the extent of \$800? A. Yes; he told me that at the time he signed the contract. * * * Q. He did give you to understand that payment would have to be made in the course of a few months? A. I suppose he did. He told me he had the time extended. He had had the contract changed. Q. Yes; the printed contract, he gave you to understand, had been changed at his instance? A. Yes. Q. Did he state to you or inform you at that time that the obligation was evidenced in the form of a note or notes? A. He told me that he had signed the notes."

Morris testified that he addressed the following letter to the Partin Manufacturing Company, at Memphis, Tenn., under date of January 12, 1916, and mailed the same on said date:

"Dear Sirs: We have not heard anything from you regarding the starting the contest. We wish to get action on it as soon as possible, as some of our competitors have heard of what we are going to do. We have a tentative list of candidates ready for you."

The said letter was signed, "Modesto Drug Co., by D. W. Morris." The witness said that the Partin Company forwarded to defendant some of the prizes they agreed to provide it with, but that in quality they did not measure up to the agreement. He also testified that the company had sent one of its employes (a woman) to Modesto to assist Skow in prosecuting the contest; that that party accompanied Skow through the country about Modesto and assisted him in "stirring up" an enthusiastic interest among the people in the contest; that later a man by the name of Prindville was sent to Modesto by the Partin Company to assist in making the contest a success, but that he remained in Modesto but a few hours. On the 25th day of April, 1916, a letter signed "Modesto Drug Co., by D. W. Morris," was addressed and mailed by Morris to the Partin Company, and in that letter Morris stated that "we have not had a word from you regarding the contest for a long time," and further said that—

"Mr. Skow, who is no longer connected with the Modesto Drug Company, and who has been actively engaged in the conduct of the campaign, informs us that he wrote you some three weeks ago that some action would be necessary to put some life into the campaign. The time is now getting short and some quick action is necessary. * * * Expecting to hear from you at once, we are," etc.

To that letter the Partin Company replied, by letter under date of May 14, 1916, and after therein acknowledging receipt of Morris' letter of April 25th and stating that "we note that you state that Mr. Skow is no longer connected with your firm," the letter proceeded, in part:

"We would be glad to have you send the names and addresses of your candidates who are in the campaign, and also let us know about how active each candidate is, and we will be glad to write them a special letter. We would be glad to have you do a little personal work with your candidates, and explain to them that the close of the campaign is drawing near and that some one must get busy and win this car. If you think that by offering a vacuum cleaner to the public at large—to the one estimating the nearest correct amount of the votes cast the last month in your campaign, would help the campaign, we will be glad to express you one of these vacuum cleaners immediately. In the meantime, we hope your campaign will show a great improvement, and we would like to hear from you by return mail."

On further cross-examination, Morris repeated that, at the time, he purchased Skow's stock in the defendant, he and Skow discussed between them the notes executed and de-

livered to the Partin Company by the defendant or Skow. "Q. And it was in view of the existence of those two outstanding notes," counsel for the plaintiff asked Morris, "that at that time you executed and delivered to Mr. Skow those two papers which have been offered in evidence here this morning by me, marked Plaintiff's Exhibits 1 and 2, which your counsel showed you here? A. Yes." (The exhibits, 1 and 2, referred to, were the agreement between Skow and Morris setting forth the consideration and conditions for the sale of the former's stock to the latter, and the letter written by Morris to the Partin Company, after said sale, informing said company that he had assumed liability for the payment of the notes in question.)

The above statement of the testimony and of the undisputed facts, to which may be added the further statement that it appears in the evidence that the increase of sales during the time the contest was in progress amounted to about \$2,500, is sufficient for the purposes of the consideration and decision of the points involved in this appeal.

The learned trial judge, in deciding the case, filed a written opinion, which has been incorporated in the record here. Therein he based the decision of the controversy upon the grounds: (1) That the notes were not those of the defendant; (2) that there was a failure of consideration for the notes; and in this particular connection it is argued both in the judge's opinion and in the respondent's brief that the plaintiff, at the time of purchasing the notes, had knowledge of facts sufficient to put it upon inquiry as to the consideration.

[1] The argument advanced in support of the proposition first above stated is that, since the notes were made and delivered by Skow without any formal action of the board of directors of the defendant authorizing the notes to be issued and delivered, or the contract upon which they were made and delivered to be executed, the notes cannot be held to be legal obligations of the defendant. The evidence shows—indeed, it is admitted—that at the time the transaction constituting the basis of this litigation took place Skow and Morris were practically the defendant—that is, the corporation itself. They owned all the stock but one single share, which, as is often so with so-called "close corporations," was put in the name of attorney Walthall, undoubtedly for the sole working purposes of the corporation. There can be absolutely no doubt that, when making the contract and the notes in question, Skow was not acting for himself individually, except in so far as he was interested in the defendant as a stockholder, but was acting as agent of the defendant in his capacity as its president and manager. The sole purpose of the contract was, obviously, to build up or increase the volume of the business of the defendant, and not to benefit a business in which he was

interested other than as a stockholder in the defendant corporation. As a matter of fact, and to all practical intents and purposes, Skow and Morris were partners in the business of the defendant, although in legal contemplation they were, under the name of the defendant, a corporation; and the situation, in its legal aspect, was in no way changed by the act of Morris in purchasing the stock of Skow, except in the fact that Morris thus himself practically became the corporation. The corporation was a mere instrumentality adopted originally by Skow and Morris, and perpetuated by the latter when he became the sole owner of all the stock therein, through which they could the more conveniently transact their business.

The defendant, as we have shown, received the benefits, whatever they were, flowing from the agreement in consideration of which the notes were given, and Morris was informed by Skow of the making of the agreement and of the terms thereof, according to his own testimony, the day following that upon which the agreement was made. He made no protest or objection against the agreement, or the making thereof by Skow, and thus he approved and ratified the act of Skow, the president and manager of the defendant, in making the agreement. Here, then, we have a case where a party, serving in the dual capacity of president and manager of what well may be termed a "one-man" corporation, has made an agreement for and in behalf and in the name of the corporation, undoubtedly believing in good faith that in so doing he was acting as the agent of said corporation, duly authorized to make such an agreement, and where said agreement or the act of making it has been tacitly, or by quiescence, acquiesced in by a party who, with said president and manager, owns practically all the stock of the corporation, after he has been put in possession by said manager of knowledge of the making of the agreement and of its terms and object, and where the corporation has received certain of the benefits flowing from said agreement.

The question may be asked: May a corporation, whose capital stock is entirely owned, practically, by two persons, one of whom, being in the active management of the business of such corporation, has made an agreement for the benefit of the corporation, and the other of whom has virtually indorsed or by conduct ratified it, refuse performance of its obligations under the agreement? Having received the benefits, or some of them, of an agreement obviously made for it and for its benefit (and ostensibly by it), with the consent and concurrence of the owners of substantially all its capital stock, will a corporation be permitted to dodge or escape liability for obligations arising upon such agreement by the plea that the contract was made without observance of the formal requisites or prerequisites prescribed by its charter or

by-laws with respect to the making of contracts? The answer to these questions may be found in the principles of equity and justice applicable to such a case as we have here. Indeed, it would be deemed a hard rule, or one of more than mere unsubstantial technical texture, if the courts could not consistently break through it and so hold that a corporation is bound by contract made under such circumstances as characterized the making of the contract in the present case.

But the books are replete with cases holding that, where it appears that a corporation is but the instrumentality through which an individual for convenience transacts a particular kind of business, "not only equity, looking through form to substance, but the law itself, would hold such a corporation bound [where contracts are made under its name under circumstances similar to those here] as the owner of the corporation might be bound, or, conversely, hold the owner bound by acts which bound his corporation." *Llewellyn Iron Works v. Abbott Kinney Co.*, 172 Cal. 210, 214, 155 Pac. 986, 987, and the many cases cited therein. It is hardly necessary to do more herein than to refer to the *Llewellyn-Abbott Case* and the many cases cited therein as supporting that proposition. It will suffice to say that in those cases it is held that, where an obligation is created by the duly authorized agent of a corporation for such corporation, where most, if not all, of its capital stock is held and owned by one person, and the obligation is one the making of which is within the corporate powers of the corporation, and the act of making it is therefore not ultra vires, the corporation will be held bound to and liable for the proper execution of the terms of the obligation, notwithstanding that it may be shown that the act of making the agreement was not in strict accord with the adopted rules or the by-laws of the corporation with respect to such matters.

[2, 3] But there is another rule, applicable to all corporations, and which we think has application to the present case, which is stated in *Stevens v. Selma Fruit Co., Inc.*, 18 Cal. App. 242, 250, 123 Pac. 212, 215, as follows:

"There is in the record before us no evidence from which it appears that any particular officer of the defendant was specifically authorized by the board of directors to execute promissory notes for and on its behalf. The very nature of commercial corporations, of which the defendant is a type, requires that the authority to transact their usual or ordinary business affairs shall be vested in some one or more persons. A corporation is an artificial person, and, where it is organized for commercial purposes, its president or general manager, or whoever may be given immediate direction or control of its affairs, is its agent, empowered, unless expressly restricted to the performance of certain specified acts, to do anything which naturally and ordinarily has to be done to carry out its paramount purposes; and where authority to

do some particular act, which is included in the ordinary affairs of such a corporation, is not specifically given to any particular officer, and the performance of which is not specifically inhibited to the person authorized to manage its affairs generally, the intention of the board of directors to confer upon the person or officer in whom is vested the immediate direction or control or management of the affairs of such corporation to perform such particular act will be inferred from the general authority so given. And where, as was clearly the case here, an officer of a corporation is held out by such corporation to be possessed of power to perform all acts involved in its ordinary or usual business, the law will not permit third parties to suffer from such acts of such officer by the plea of the corporation that the ostensible authority of such officer was not in fact conferred upon him. *McKiernan v. Lenzon*, 56 Cal. 61; *Phillips v. Campbell*, 43 N. Y. 271; *Seeley v. San Jose Independent Mill & Lumber Co.*, 59 Cal. 22, 24; *Bank of Healdsburg v. Bailhache*, 65 Cal. 327, 332, 4 Pac. 106; *Jennings v. Bank of California*, 79 Cal. 323, 328, 12 Am. St. Rep. 145, 5 L. R. A. 238, 21 Pac. 852; *Greig v. Riordan*, 99 Cal. 316, 323, 83 Pac. 913; *Bates v. Coronado Beach Co.*, 109 Cal. 160, 162, 41 Pac. 855; *Wells Fargo & Co. v. Enright*, 127 Cal. 669, 672, 49 L. R. A. 647, 60 Pac. 439; *Siebs v. Hendy Machine Works*, 86 Cal. 390, 392, 25 Pac. 14."

In *Brown v. Crown Gold Milling Co.*, 150 Cal. 876, 887, 89 Pac. 87, 91, it is said:

"The majority of the board having knowledge of the facts, it was not necessary, to conclude the company defendant in favor of plaintiff, that his employment should be ratified at a regular meeting of the board. It was sufficient that the majority of the board individually were advised of the terms of the employment of plaintiff by Mr. Doe, and took no measures to disaffirm as directors that employment. *Pixley v. Western Pacific R. R. Co.*, 33 Cal. 184, 186, 91 Am. Dec. 623; *Crowley v. Genesee Mining Co.*, 55 Cal. 273, 275; *Gribble v. Columbus Brewing Co.*, 100 Cal. 69, 72, 73, 84 Pac. 527; *Scott v. Superior Sunset Oil Co.*, 144 Cal. 140, 77 Pac. 817."

See, also, *Cyclops I. Works v. Chico Ice, etc., Co.*, 34 Cal. App. 10, 14 et seq., 166 Pac. 821.

In *Doerr v. Fandango Lumber Co.*, 81 Cal. App. 318, 325, 160 Pac. 406, 409, this court said:

"Indeed, the proposition that ratification of a contract, the making of which is unauthorized by one of the principals, may be effectuated by a recognition, howsoever informally, of the agreement and the obligations arising by virtue thereof, is elementary. A familiar and common application of this doctrine is to be found in those cases where an agent, in making a contract for his principal, transcends the scope of his authority as such, and the principal, after the contract has been made, although not at that time legally bound by its terms, does some act recognising the validity of the agreement—as, for instance, accepting some of the benefits or assuming some of the burdens thereof. In such case, quite obviously, the principal will be deem-

ed from his acquiescence in the contract to have ratified the unauthorized act of his agent, and will be held to its terms and conditions, notwithstanding that he has not in express language or in a formal manner ratified the contract. The case here comes within the principle thus referred to. The giving of the mortgage was not an *ultra vires* act, and there is no claim that it was. If the act involved the making of an invalid contract, it was, as shown, merely because of the manner in which it was attempted to perform the act or make the contract, and, like any other contract, it is capable of being ratified by conduct or a recognition in some manner of the obligation."

Morris himself testified, as seen, that Skow was the president of the corporation and the manager of it and its business, that he (Morris) knew nothing of the drug business, or of the profession of pharmacist, and that the entire management of the concern in all its aspects was in the hands of Skow, although he (Morris) was about the establishment much of the time and acted with Skow in an advisory capacity. Thus it is clear that the corporation was not only under the immediate control and management of Skow, but that he was held out as such to the public, with authority to transact for the corporation all the usual and ordinary business matters coming within its purposes and objects. Certainly it will not be denied that Skow possessed general authority to transact and carry out such business matters of the defendant as in his judgment would tend to increase the volume of the business of the corporation and thereby augment its income and profits.

[4] It is not material to inquire whether the acceptance of benefits arising from an obligation the making of which was in excess of the authority of the party receiving and accepting such benefits amounts to a ratification or has the effect merely of creating an estoppel whereby the acceptor will be precluded from setting up the plea of want of authority to make the obligation to relieve himself of the burden imposed upon him by the obligation. The legal effect of either ratification or estoppel in such a case is precisely the same. Our Civil Code (section 1589) declares in effect that in such case there is a ratification. But, be that as it may, if we were to be driven from the position in this case to which the facts firmly affix us, viz.: That the transaction culminating in the execution of the agreement and the notes concerned here represents practically the corporate act of the defendants, it being, admittedly, a transaction within the scope of its corporate powers—we would, nevertheless, find ourselves buttressed by unimpeachable reason in holding that the act of the defendant in accepting the benefits of the agreement amounted to a consent to all the obligations thereof, and if, therefore, there was not thereby in law a ratification of the transaction, the defendant is, by its act of accepting

the benefits of the obligation, estopped from denying the binding force thereof upon it. In other words, an estoppel by conduct, or in pais by reason of the conduct of the defendant in accepting the benefits of the agreement for which the notes were given, was raised against the right of the defendant to object to the enforcement of the notes on the ground that their execution and delivery had not been duly authorized by the defendant. *Curtin v. Salmon River, etc., Co.*, 141 Cal. 308, 312, 74 Pac. 851, 99 Am. St. Rep. 75, and cases cited therein; and, also, *Doerr v. Fandango Lumber Co.*, 31 Cal. App. 318, 324, et seq., 160 Pac. 406, supra; *McQuaide v. Enterprise Brewing Co.*, 14 Cal. App. 315, 318, 111 Pac. 927; *Standard Oil Co. v. Snye*, 164 Cal. 435, 448, 129 Pac. 589.

We should now pay brief attention to the conduct of Morris with respect to the transaction involved herein at and after the time he purchased the stock of Skow and thus practically became the sole owner of the corporation. We have shown that Morris admitted that Skow told him of the fact of entering into the agreement and of the terms thereof the day following that upon which the transaction was completed, and that Morris made no objection or protest of any kind against the transaction, being evidently accustomed to defer, as to such matters, to the judgment of Skow, who was the active manager of the defendant. We now again call attention to the conditions as set forth in their agreement, upon which the sale of Skow's stock to Morris was made. In that agreement, Morris expressly assumed liability for all the outstanding debts and obligations of the defendant, including the notes in question. Not only that, but he later addressed to the Partin Company a letter in which he stated that he had purchased Skow's stock and that he had assumed liability for the payment of the notes in suit. When that letter was written he was, as stated, the sole owner of practically all the stock of the defendant. Can it for a moment be doubted from all this that Morris expressly affirmed and confirmed, not alone for himself, but for his corporation, the agreement made by Skow, for the corporation, and all its terms? He not only expressly recognized the agreement as a valid and legal one in all respects, but likewise assumed the obligations created thereby; and it would amount to a mere play upon words to construe the expressions contained in his letter to the Partin Company as evidencing an intention to recognize and confirm the agreement as anything other than what it purports to be, viz.: The agreement of the defendant, made for and on its behalf for the sole benefit of its business.

[5-7] The foregoing is a sufficient reply to the contention that the notes in suit were not supported by a consideration, although, so far as the plaintiff is concerned, it would be a matter of no consequence whether there

was in point of fact a consideration supporting the notes, if it purchased the notes for value without knowledge of such want of consideration at the time of such purchase. A written instrument is itself presumptive evidence of a consideration (Civil Code, § 1614), and where there is not in the possession of a purchaser of a promissory note knowledge of any infirmity in the paper on the score of consideration, or of facts, which, when followed with reasonable diligence, would lead to the discovery of such infirmity, and no fraud in the transaction resulting in the execution of the note is shown or claimed, the purchaser, if he has exchanged value for the note, will be protected as an innocent purchaser for a consideration, and so may enforce payment thereof. Civil Code, § 3122; Kunz v. Cal. Trona Co., 169 Cal. 348, 146 Pac. 883; Pac. Portland Cement Co. v. Reincke, 30 Cal. App. 501, 158 Pac. 1041; Henry v. Sutro, 28 Cal. App. 698, 153 Pac. 972; Jones v. Evans, 6 Cal. App. 88, 91 Pac. 532; Eames v. Crosier, 101 Cal. 260, 35 Pac. 873.

But there is really no claim made that the notes in question were not executed and delivered to the Partin Company for a sufficient consideration. It is the contention, though, and the court so found, that there was a failure of consideration, and that, when the plaintiff purchased the notes, it had knowledge of facts sufficient to put it on inquiry as to the consideration, and thus have had disclosed to it, not only that the consideration for the notes had failed, but that the obligations were not those of the defendant corporation. The facts referred to are that the notes in question did not bear the corporate seal of the defendant, that Skow did not sign the contract by or under his official designation, and that the plaintiff, instead of taking the notes by the usual or customary indorsement in the case of the transfer of title to negotiable instruments required a bill of sale of them, with a guaranty that they would be paid. The fact of the absence of the seal, it is contended, was sufficient to inspire in the plaintiff distrust as to the legal integrity of the obligations, and the circumstance last mentioned, it is said, negatives the theory that the plaintiff took the notes in good faith. These propositions, for reasons to be given, are not important to the decision of this case, but they are vigorously pressed, and we will briefly notice them.

[8] We attach no significance to the fact that to the notes the seal of the defendant was not affixed. The fact is neither conclusive evidence of a want of authority for the execution of the notes for the corporation, nor a circumstance sufficient to create even a suspicion that the notes were not wanting in a consideration, or that their consideration had failed at the time of their transfer to the plaintiff.

[9-11] It is now the rule, generally if not universally, recognized and followed through-

out the American states as well as in England, that corporations of all kinds may be bound by their contracts, not under their seals. The rule in former times was (as the cases show) that a corporation could not express its will, or enter into a contract, except through an instrument under seal, executed by a duly constituted agent. Thompson on Corporations (2d Ed.) § 1920. The modern and by far the more sensible rule is, however, that the seal of a corporation itself performs no further or greater function than to import prima facie verity of the due execution by the corporation of written obligations—that is, it merely stands as prima facie evidence that the contracts made by corporations were executed by their authority—and no longer is a seal held to be indispensable to the execution of valid contracts by corporations. It is a matter of common knowledge that many contracts made by corporations and unattested by their seals are enforced. The books are full of such cases. The fact that such a contract was duly authorized by a corporation may be shown by parol. There is, therefore, nothing in the fact that a contract purporting to be that of a corporation is not authenticated or attested by its seal which would necessarily justify even a suspicion that it was not executed by authority of the corporation.

[12] Nor, in our opinion, does the fact that the plaintiff took a bill of sale of the notes, with a guaranty from the Partin Company that they would be paid, in lieu of the customary indorsement in such a case, constitute a circumstance sufficiently significant to justify a suspicion that the notes were not all that they on their face purported to be. We therefore do not concur in the view of the trial judge that that fact negatives the theory that the plaintiff took the notes "in due course of business, before maturity, for value, and without notice." The plaintiff, it appears, is in the business of buying negotiable paper, and it may be that it is its uniform custom and policy to require a bill of sale of notes purchased by it, with a guaranty that the obligations are valid and will be paid. Indeed, one might acquire the ownership of such obligations without knowledge of whether the makers thereof were solvent and able to meet them, and in such case it would only be good business judgment to demand a guaranty, or some protection, against loss in case they proved worthless obligations for any reason. We do not know what actuated the plaintiff in thus fortifying itself against loss in the transaction, but we think it clear that that circumstance itself was not such as to indicate that the plaintiff was not an innocent purchaser of the notes for value.

But, as above stated, the matter just considered we do not deem of any particular consequence, so far as the decision here is concerned. The proposition that the notes were not those of the defendant we disposed

of in the outset of this discussion, and nothing further need be said of it, although we may well add to what we have already said on that question that, even if the plaintiff had made an inquiry into the question of the validity of the notes, the result would only have been to discover that Skow was the president and the manager of the defendant; that, acting as such, he made the agreement and the notes for defendant, and for the sole benefit of its business, and that the agreement, and the obligations arising thereupon against the defendant, were approved by Morris, who, with Skow, owned practically the entire capital stock of the defendant; that the defendant's business increased to some extent in volume as a result of the action of the Partin Company under the agreement. Knowledge of these facts by the plaintiff, when it bought the notes, would not, of course, have made it any the less an innocent purchaser for value.

With regard to the matter of the alleged failure of consideration, as to which it is claimed that the plaintiff, when it bought the notes, had knowledge of facts sufficient to put it upon inquiry to ascertain whether the consideration had then failed, it is to be said that there is no evidence in the record showing or tending to show that there was such failure.

The evidence, without conflict, shows that the plaintiff purchased and became the owner of the notes before their maturity, and before the contract between the defendant and the Partin Company had been completed. In other words, the plaintiff bought the notes before the purpose of the agreement was accomplished, and while the steps essential to the accomplishment of that purpose were still in progress. If, then, there was a failure of consideration for the notes, it was, of course, in the failure of the Partin Company to comply with the terms of the contract between it and the defendant, and therefore such failure of consideration occurred, if at all, long after the plaintiff became the owner of the notes. The correspondence between Morris and the Partin Company, in which the former complained to the latter of its inertness in the matter of prosecuting the prize contest, took place subsequently to the time at which the plaintiff bought the notes. In brief, as above stated, the contract, in consideration of which the notes were issued, was still in process of execution on the part of the Partin Company at the time the plaintiff purchased the notes, and there was not then, nor could there have been, either a total or even partial failure of consideration. Of this fact it may be that the plaintiff was aware at the time it bought the notes; but if it was without knowledge of the fact, and for any reason had prosecuted an investigation to determine the legal status of the notes, it would thus have readily learned that fact, and still have learned no valid reason why it should not

have purchased the notes and acquired title thereto by the transfer free from any infirmity, so far as consideration was concerned.

The cases cited by respondent, of which there are many, we have examined and found to be very different from this case as to the facts. For instance, in the case of *Burns v. Bauer*, 174 Pac. 346, fraud was charged, proved, and found as characterizing the very transaction eventuating in the execution and delivery of the note sued on therein; and not only was that true, but the court found upon ample evidence that the plaintiff, a lawyer, who was the assignee of the note, was familiar with facts extrinsic to the note itself, which were of a most suspicious character, and which, if followed up with reasonable diligence, would have disclosed that the note was procured by the corporation to which it was given through false and fraudulent representations. In fact, it was found that the attorney for the plaintiff was the secretary of the corporation in whose favor the note was executed at the time the note was procured, and it was further found that plaintiff, while making inquiry as to the ability of the maker to pay the note (and it was also found by the court that the maker was amply able to pay it), made no inquiry as to whether said note was valid.

[19] And, in this connection, we may add, though we conceive it to be of no special importance in view of the views of the transaction involved herein we have expressed, that it is only where fraud or illegality in the inception of a promissory note is shown that the burden is upon the purchaser of such an obligation to prove that he purchased the note before maturity, in good faith, for value, in the usual course of business. The rule, indeed, applies to a case only where there has been an illegal consideration, and not where there has been a valid consideration, and it has failed. This is clearly shown by the reason upon which the rule proceeds, as it is formulated by the authorities, viz.:

"The presumption is (in case of fraud or duress, etc., in the procurement of the note) that he who has been guilty will part with the note for the purpose of enabling some third party to recover upon it for his benefit; and such presumption operates against the holder, and it devolves upon him to show that he gave value for it. So where the note was given for a distinctly illegal consideration." *Parsons on Notes and Bills*, 188, 189; *Graham v. Larimer*, 83 Cal. 173, 178, 23 Pac. 286; *Jordan v. Grover*, 99 Cal. 194, 195, 33 Pac. 889; *Bailey v. Bidwell*, 13 Mees. & W. 73; 82 English Law and Equity, 134.

It is, of course, clear that this case does not come within the above-considered rule. Here, as the evidence indisputably shows, and, indeed, as is in effect conceded to be the fact, the notes involved were not procured by fraud or duress, or without a valid consideration. It is also clear, as we have pointed out, that

the plaintiff acquired ownership of the notes for value, before their maturity, and before there could have been a failure of the consideration for which they were given.

We conclude, upon the record before us, that to deny the right of plaintiff to recover upon these notes would mean a failure of justice.

The judgment is therefore reversed, and the cause remanded.

We concur: CHIPMAN, P. J.; BURNETT, J.

(14 Or. 80)

GAMMA ALPHA BLDG. ASS'N v. CITY OF EUGENE.

(Supreme Court of Oregon. Nov. 4, 1919.)

1. MUNICIPAL CORPORATIONS ⇨460—ASSESSMENTS INCLUDING ENGINEER'S CHARGES VALID.

Where an ordinance authorizing the opening of a street authorized engineer's charges to be included as a part of the improvement, engineering expenses could be imposed by assessment, although the engineer was not specially employed for the particular improvement and was paid a regular salary by the city from the general fund.

2. MUNICIPAL CORPORATIONS ⇨414(3)—IMPROVEMENT CONTRACT INCLUDING FUTURE REPAIRS DOES NOT INVALIDATE ASSESSMENT.

A contract for paving, which contained provision "that the pavement shall be free from any defects due to faulty workmanship or materials, and that for a period of five years from its completion the city contractor will at his own expense repair and make good any defects arising from such faulty materials," etc., was not invalid as being a contract for repairs not chargeable to private property.

3. MUNICIPAL CORPORATIONS ⇨284(4)—CONTRACT FOR PAVING NOT UNLAWFUL DELEGATION OF POWERS TO ENGINEER.

Where a civil engineer, upon request of city officials, has prepared plans and specifications for a contemplated improvement, and the officials enter into a contract for the construction thereof, there is not an unlawful delegation to the engineer of the right to decide what are necessary details; the action of the city officials in entering into the contract making the plans and specifications of the engineer their own.

4. MUNICIPAL CORPORATIONS ⇨488, 489(3)—PETITIONER FOR IMPROVEMENT ESTOPPED TO ATTACK ASSESSMENT.

Where an abutting property owner petitions the city council to pave a street, the action of the council in contracting for and making the improvement is conclusive, and the petitioner cannot complain that the cost of the improvement exceeds the benefits.

5. MUNICIPAL CORPORATIONS ⇨469(4)—PAVING ASSESSMENT ON PROPERTY FRONTING ON TWO STREETS.

One owning property on a corner abutting upon one street 90 feet and on another 240 feet cannot maintain that his property does not front upon the street on the long side of his property, and that he is not liable for the burden imposed by paving of such street under a charter providing that each lot or part of lot abutting a street or alley, graded, improved, or repaired shall be liable for the full cost of making the same upon the half of the street or alley in front or abutting upon it, but that, when the land adjacent to such street shall not have been laid off into lots or blocks, then the cost of the improving such street shall be assessed to the owner or owners of such land within 160 feet of such improved street.

6. MUNICIPAL CORPORATIONS ⇨330(3)—ASSESSMENTS FOR IMPROVEMENTS NOT OBJECTIONABLE BECAUSE CONTRACT PROVIDED FOR EIGHT-HOUR DAY.

In view of Laws 1913, p. 11, expressly forbidding a municipality either directly or through a contractor to require more than eight hours per day or forty-eight hours per week from any employé, one assessed for an improvement cannot maintain that city had no right to limit the employment of laborers for more than eight hours per day in its contract for the improvement.

7. EASEMENTS ⇨42—NOT INTERFERING WITH RIGHT OF OWNER TO USE SOIL.

The conveyance of an easement in land does not pass the title or interfere with the right of the owner of the soil to occupy it for any purpose not inconsistent with the easement.

8. WATERS AND WATER COURSES ⇨154(1)—RIGHT OF OWNER TO IMPROVE EASEMENTS APPURTENANT TO MILLRACE.

Where owner of millrace had an easement in property along the side of the race in that it had the right to widen the same when necessary, abutting owner, who undertakes to improve and occupy the land abutting on the millrace, is not a trespasser, unless his occupation or improvement is such as interferes with the operations of the owner of the millrace.

9. MUNICIPAL CORPORATIONS ⇨269(3)—RETAINING WALL IMPROVEMENT BUILT ON PROPERTY SUBJECT TO EASEMENT.

A contract of a city for the paving of a street was not invalid by reason of the required construction of a retaining wall at the end of the street abutting upon a millrace, although the owner of the millrace had an easement on the property where the retaining wall was built, in that it had a right to widen and deepen its millrace.

10. MUNICIPAL CORPORATIONS ⇨282(1)—DEPARTURE FROM CONTRACT FOR IMPROVEMENTS.

Where a city was authorized to pave a street which ran to the banks of a millrace, the construction of a retaining wall at the end of the street abutting on the millrace was not a departure from the purpose of the improvement, although made for the whole width of the street

for the purpose of also supporting a fill for sidewalks that might be constructed.

Appeal from Circuit Court, Lane County; J. W. Hamilton, Judge.

Suit by the Gamma Alpha Building Association against the City of Eugene. Judgment for plaintiff, and defendant appeals. Reversed, and suit dismissed.

This is a suit to remove a cloud from the title to real estate. It is founded upon the action of the municipal authorities of the city of Eugene in paving that portion of Alder street in Eugene from its intersection with Eleventh avenue, north to the millrace. The plaintiff claims to be the owner of a piece of land with a frontage of 90 feet on Eleventh avenue, and about 240 feet abutting on Alder street. The validity of the assessment for such street improvement is attacked by the complaint upon several grounds, which will be specifically mentioned in the opinion of the court. The defendant's answer, after denying the allegations of the complaint, sets up several affirmative defenses, the first of which is that, at all the times mentioned in the complaint, the property claimed by the plaintiff was and still is owned by W. E. Brown, as disclosed by the deed records of Lane county. The answer then recites the various proceedings, by ordinance and otherwise, of the municipal authorities in making the improvement, the further fact that plaintiff and W. E. Brown had knowledge of all the proceedings and urged the awarding of the contract and the construction of the work according to the plans and specifications, and that, after the levying of the assessment therefor, W. E. Brown made application to be allowed to pay such assessment in 10 annual installments, under the terms of what is generally known as the Bancroft Bonding Act (L. O. L. § 3245), and in such application agreed as follows:

"In consideration thereof, and in pursuance of the provisions of said act aforesaid, I hereby expressly waive all or any irregularity or defect, jurisdictional or otherwise, in the proceedings to improve said street, or lay said sewer, and in the apportionment and assessment of the cost thereof on the property affected thereby."

It is then alleged that because plaintiff permitted and allowed Brown, holding the record title, to manage, control, and exercise dominion over the land, in regard to this improvement, the plaintiff should be estopped from contesting the validity of the assessment. Any further development of the pleadings which may be necessary to the consideration of the case will be found in the opinion. Upon the trial, there was a decree for the plaintiff, declaring the assessment void and enjoining its collection. Defendant appeals.

O. H. Foster, of Eugene, for appellant.
L. M. Travis, of Eugene (A. K. Meck, of Dayton, Ohio, on the brief), for respondent.

BENSON, J. (after stating the facts as above). The plaintiff's attack upon the validity of the assessment is first based upon the fact that it includes a charge of 5 per cent. of the contract price of the work for engineering expenses. The initial ordinance in the proceeding contains this clause:

"And there shall be included as a part of said improvement, engineer's charges not to exceed five (5%) per cent. of the contract price and when said cost shall be assessed the same shall be a lien upon the property so benefited, etc."

[1] It appears from the testimony that the engineer was not specially employed for this particular job, but was a regularly employed and salaried official of the city, whose compensation was not dependent upon the collection of the assessments for this particular improvement. Plaintiff and defendant both cite and rely upon the cases of *Smith v. Portland*, 25 Or. 297, 35 Pac. 665, and *Giles v. Roseburg*, 82 Or. 67, 160 Pac. 543. In neither of these cases is the compensation of a regular, salaried official involved. In the former, an overseer was specially employed to oversee the construction of a sewer, and neither in the charter nor in the ordinance was there any provision for such a charge; hence it was held that such expense could not properly be charged against the property benefited. In the latter case the engineer did not receive a regular salary, but was paid a stated daily compensation for the services rendered, and received his remuneration in the warrants drawn upon the general fund, and not from funds arising from the assessment for the particular work upon which he was employed. In this case, like the first, there was nothing, either in the charter or the ordinance under which the improvement was made, authorizing such expense to be charged against the property. The latter case, therefore, holds, as did the former, that, in the absence of authorization by ordinance, such expense could not be imposed by assessment. In the case at bar, however, the ordinance expressly authorizes it, and it is therefore a valid charge unless it be excluded by reason of the fact that the engineer receives a regular monthly salary, which we may fairly infer is paid from the general fund. If this were a new question with this court, it might be necessary to consider the authorities in other jurisdictions; but the matter is conclusively settled in the case of *Ireland v. City of Portland*, 91 Or. 471, 179 Pac. 286, wherein it is held that such a provision in an ordinance is valid, even where the city official is paid a regular salary.

[2] Plaintiff further contends that the assessment was invalid, because the contract

for the improvement contains the following clause:

"The contract further agrees that the pavement shall be free from any defects due to faulty workmanship or materials and that for a period of five years from its completion, the said contractor will, at his own expense, repair and make good any defects arising from such faulty materials or workmanship and due to the proper use of such pavement as a roadway."

It is insisted that this is a contract for repairs which should not be charged to private property. This contention is not sustained by the language of the clause quoted and is completely answered in the case of *Allen v. Portland*, 35 Or. 420, 58 Pac. 509.

[3] The next objection is that the council exceeded its powers in delegating to the city engineer the right to decide what are necessary details of the improvement, such as inlets, retaining walls, etc. This point is not well taken. The officers of a city employ a civil engineer for the very purpose of relying upon his special training and skill, to advise them as to the necessary details of a contemplated improvement, and when, upon their request, he has prepared plans and specifications for the same, and they enter into a contract for the construction thereof, they thereby adopt and approve them and make them their own.

[4] It is then argued that the cost of the improvement exceeds the benefits, and that this invalidates the assessment. The complaint does not charge fraud; the evidence discloses that plaintiff's property abuts upon the pavement for a distance of 240 feet, in addition to which plaintiff petitioned the city council to make the improvement. Under these circumstances, the action of the council in the premises is conclusive. *Colby v. City of Medford*, 85 Or. 485, 167 Pac. 487.

[5] The next ground of attack upon the assessment is plaintiff's theory that its property does not front upon Alder street and is therefore not liable to the burden. This theory is based upon the language of the charter, section 71 of which reads thus:

"Each lot or part of lot abutting a street or alley graded, improved or repaired, shall be liable for the full cost of making the same upon the half of the street or alley in front of and abutting upon it; * * * but when the land adjacent to said street shall not have been laid off into lots and blocks, then the cost of improving such streets shall be assessed to the owner or owners of the land lying within one-hundred and sixty feet of such improved street."

The evidence discloses the plaintiff's land has not been laid off into lots, although it has a frontage of 90 feet on Eleventh street and about 240 feet on Alder street, being a corner tract. The contiguous land west of plaintiff's tract is subdivided into lots and blocks. We cannot see how the plaintiff's interpretation of section 71 can be justified. The property being a corner, at the intersec-

tion of two streets is intended, by the statute, to bear its portion of the improvement of both streets, and this would be equally true, if plaintiff's tract extended westerly 160 feet instead of 90. Plaintiff relies upon the case of *Rooney v. Toledo*, 9 Ohio Cir. Ct. R. 267, to support its theory. That case differs from the one at bar, in that the statute under which that decision was rendered provided for assessing the property, not by the benefits accruing, but by front foot, and the court held that, upon paving the side street, the frontage of the corner lot should be limited to that portion of its length which would equal the length of its end or front on the intersecting street. Here, the statute declares that the burden shall be borne for one-half of the paving by the property in front of and abutting upon it. In *City of Springfield v. Green*, 120 Ill. 269, 11 N. E. 261, the ordinance directed that—

The tax shall be "levied, assessed and collected upon and from the real estate, lots and parts of lots, and tracts of land abutting upon the line of said streets so ordered to be paved in proportion to the frontage thereof upon the streets, or parts of streets, and alleys ordered to be paved, as aforesaid."

The appellant there contended that, since the side of his property adjoined the improvement, it was not liable to assessment. The court, in its opinion, concluded thus:

"The whole of the ordinance considered, we have no doubt that the word (abutting) was intended to apply to lots whose sides as well as ends were bounded by the line of the streets to be improved, and that, where the streets in front and at the side were both to be paved, it was the intention of the council that the corner lot should bear one-half of the expense of the improvement in front of the side as well as of the end of the lot. Any other construction of the ordinance would leave no provisions whatever for paying for the pavement of those parts of the streets directed to be improved which lie in front of the sides of lots located on the line of said streets."

We can see no escape from the logic of this deduction, and hold that in this respect plaintiff's property was properly assessed.

[6] It is further urged that the city had no right to limit the employment of laborers for more than eight hours per day, in its contract for the paving. It is enough to say that chapter 1, Laws of 1913, expressly forbids a municipality either directly, or through a contractor, to require more than eight hours per day, or forty-eight hours per week, from any employé, and in inserting such a clause in the contract the defendant was simply obeying a compulsory statute.

[7-8] The serious contention of the parties upon this appeal arises in regard to what plaintiff styles a "bridge abutment," and which is termed by the defendant a "retaining wall." The evidence quite clearly establishes the fact that it is a retaining wall.

A certain millrace, flowing in a westerly direction, crosses Alder street at a right angle. The street paving was extended to the water's edge at this millrace, and at that point a concrete retaining wall was constructed across the street to support a fill behind it, upon which the paving was laid. The complaint pleads a decree of this court in the case of *Patterson v. Chambers Power Co.*, 81 Or. 328, 159 Pac. 568, and *Eugene v. Chambers Power Co.*, 81 Or. 352, 159 Pac. 576. In those cases, the one issue pertained to the right of the defendant to widen the same millrace that crosses Alder street as above stated. Plaintiff insists that, under the decree in those cases, the defendant became a trespasser, and exceeded its power, when it constructed the retaining wall and did some paving within the limits wherein the decree authorized the owners of the canal to widen the same. Turning to the opinion of this court in the case of *Patterson v. Chambers Power Co.*, upon which the decree in the *Eugene Case* is founded, we find that the rights of the Chambers Power Company and its successors are traced to a certain warranty deed, containing a clause which reads as follows:

"Together with the water power upon said premises with the right of way over Shaw's land claim to bring all the water that may be required to run the mills thereon, and all other mills or machinery that may at any time or times be placed upon the above-described premises of whatever kind or nature; also the right to dig the present raceway as wide and deep as may be necessary, and to bank the dirt and stone on either side; also to include sufficient dirt and stone lying adjacent to the dams for the purpose of keeping them in repair."

The decree of this court permits the owners of the millrace to widen it so as to bring it up to 50 feet in width. Such decree has not yet been utilized by the owners, and the width of the canal remains as before, while the adjacent landowners are still using their land to the water's edge. As was very properly said by this court in that case:

"The conveyance of an easement over land does not pass the title or interfere with the right of the owner of the soil to occupy it for any purpose not inconsistent with the easement. Washburn, *Easements* (3d Ed.) 8, 9; Goddard, *Easements*, 4. It follows, therefore, that the plaintiffs, who are successors of Shaw, had a perfect right to occupy and improve their land adjoining the ditch, so long as such occupation or improvement did not interfere with the operations of defendants. Defendants were never in a position to bring ejectment or trespass against them until they were in a position to show that the use of the adjoining land was necessary, and that the growth of manufacturing business upon the 23-acre tract made it essential for them to widen the ditch to procure additional power."

It follows that the city had a perfect right to extend its paving, and construct its retain-

ing wall, where it did. It may be that at some future time the owners of the millrace may require the destruction of a portion of this improvement; but that possibility cannot concern the present paving, for the city is not required to keep hands off of its street until some uncertain time when the owners of the viaduct may see fit to enlarge their plant.

[16] It is also urged that the city built more of the retaining wall than was necessary to support the paving. The evidence discloses that, while the portion of the street which is paved is only 24 feet wide, the retaining wall is the full width of the street. The city engineer testified that this was done with a view of making a permanent improvement of it, and to enable the fill to support sidewalks when they should be ordered. We think this to be a proper method of construction and not a departure from the purpose and proposed extent of the improvement.

The decree of the lower court is reversed, and one will be entered here dismissing the suit.

McBRIDE, C. J., and BURNETT and BENNETT, JJ., concur.

(25 N. M. 526)

STROUP et al. v. FRANK A. HUBBELL CO.
(No. 2877.)

(Supreme Court of New Mexico. Nov. 5, 1919.)

(Syllabus by the Court.)

EXCEPTIONS, BILL OF ~~EX~~40(1)—EXTENSION OF TIME FOR FILING.

Chapter 43, section 86, Laws 1917, held to prevent the extension of time to settle and sign bills of exception, unless a precept for the record on appeal or error shall have been filed in the clerk's office within the time prescribed.

Appeal from District Court, Bernalillo County; Raynolds, Judge.

Action by A. R. Stroup and another against the Frank A. Hubbell Company. Judgment for plaintiffs, and defendant appeals. On motion to strike the bill of exceptions. Motion sustained.

Marron & Wood, of Albuquerque, for appellant.

John F. Simms, of Albuquerque, for appellees.

PARKER, C. J. The appellant was granted an appeal to this court on February 11, 1919. Fifty-six days thereafter he obtained from the district court an extension of time in which to settle and sign the bill of exceptions. Under that extension order the bill of exceptions was settled and signed on May 14, 1919, and the day following a precept for the

record was filed by appellant. The appellees have moved to strike the bill of exceptions, on the ground that the trial court was without power to extend the time to settle and sign the same, because the appellant had not filed a precept for the record within 30 days after the taking of the appeal.

In *Security Insurance Co. v. Socorro*, 25 N. M. —, 179 Pac. 748, we construed section 36, chapter 43, Laws 1917, and held that such act prevented the extension of time to settle and sign bills of exception unless a precept for the record on appeal or error shall have been filed in the clerk's office within the time prescribed.

The motion, therefore, will be sustained, and the bill of exceptions stricken; and it is so ordered.

ROBERTS, J., concurs.

(25 N. M. 514)

STATE v. HAWKINS. (No. 2344.)

(Supreme Court of New Mexico. Oct. 24, 1919.)

(Syllabus by the Court.)

1. CRIMINAL LAW §1119(4)—ARGUMENT OF COUNSEL MUST APPEAR BY BILL OF EXCEPTIONS.

Alleged improper remarks of counsel in his argument to the jury, not made a part of the record on appeal by bill of exceptions, will not be considered.

2. WITNESSES §358 — ON CROSS-EXAMINATION AS TO REPUTATION MAY BE IMPEACHED.

Where a witness has testified as to the general reputation of the accused, it is competent to inquire of him, on cross-examination, as to whether he has heard reports of particular instances which are inconsistent with the reputation to which he has testified and the character which he has attributed to him.

Appeal from District Court, Union County; T. D. Lieb, Judge.

George Hawkins was convicted of assault with a deadly weapon with intent to kill, and he appeals. Affirmed.

M. B. Keator, of Tucumcari, and Toombs & Taylor, of Clayton, for appellant.

N. D. Meyer, Asst. Atty. Gen., for the State.

PARKER, C. J.—The appellant, George Hawkins, was found guilty of assault with a deadly weapon with intent to kill, in the district court for Union county, and from the sentence imposed upon him has perfected this appeal.

[1] 1. Objections are made by appellant's counsel to the alleged remarks of counsel for the state in his argument to the jury. The

Assistant Attorney General contends that the proposition cannot be considered on this appeal because the remarks, if made, were not incorporated in the record by way of bill of exceptions but appear in the transcript as part of the motion for a new trial. He is right in that contention. In *State v. Balles*, 24 N. M. 16, 172 Pac. 196, we said:

"Alleged remarks of the trial court * * * will not be considered when the same have not been authenticated by having been made a part of the record by bill of exceptions."

The doctrine there announced is analogous to that which applies in this case, being founded upon the same premise. The argument of counsel to which objection is made, not having been properly incorporated in the record on appeal, we will not consider the same.

[2] 2. S. B. Oliver, a witness for appellant, testified that the reputation of the appellant, for truth and veracity and as a law-abiding citizen, in the community in which he lived, was good, adding, "I have never heard any one speak to the contrary." The record of the cross-examination of the witness on this subject is as follows:

"Q. Did you ever hear about Mr. Broom losing a cow that was found under the haystack? Mr. Toombs: We object to that * * * as incompetent, irrelevant, and immaterial, and has no bearing on this case whatever. The Court: He may answer. Mr. Toombs: Exception. Q. Did you ever hear about that? A. Yes. Q. The neighbors talked about that a good deal, didn't they? A. No, sir; I never heard but one speak of it. Q. Who did he say was responsible for putting the cow under the haystack? Mr. Toombs: We object to that as leading, incompetent, irrelevant, and immaterial, and has no bearing on the issues of this case. The Court: He may answer. Mr. Toombs: And not proper cross-examination. Exception. A. Well, he said Mr. Hawkins, the man that was telling me, from what he had heard. Q. Then you have heard to the contrary about the good reputation of Mr. Hawkins? A. Well, in that one particular, I reckon I have."

Counsel for the appellant argue that the evidence was inadmissible because it tended to show that the accused had committed a crime distinct from that for which he was being tried.

There are three good answers to the objection of the appellant to the evidence. The objection was not sufficiently specific to raise the proposition argued here. In the second place, the witness said that he had never heard anything to the contrary of appellant's good reputation, and an examination of the witness as to the truth and accuracy of that statement was proper. But we place our decision of the proposition upon the ground that, where a witness has testified as to the

general reputation of the accused, it is competent to inquire of him, on cross-examination, as to whether he has heard reports of particular instances which are inconsistent with the reputation to which he has testified and the character which he has attributed to him. The subject is fully discussed in 2 Wigmore on Evid. § 988. The author says:

"The settled rule against impeachment by extrinsic testimony of particular acts of misconduct * * * is to be distinguished in its application from a kind of questioning which rests upon the principle that the witness' grounds of knowledge * * * may be inquired into. When witness A is called to support the character of B. (either as a witness or as the accused), by testifying to his good reputation, that reputation must signify the general and unqualified consensus of opinion in the community. * * * Such a witness virtually asserts either (a) that he has never heard any ill spoken of him or (b) that the sum of the expressed opinion of him is favorable. Now if it appears that this sustaining witness knows of bad rumors against the other, then, in the first instance, his assertion is entirely discredited, while, in the second instance, his assertion is deficient in good grounds, according to the greater or less prevalence of the rumors. On this principle, then, it is proper to probe the asserted reputation by learning whether such rumors have come to the witness' knowledge; for, if they have, it is apparent that the alleged reputation is more or less a fabrication of his own mind. It is to be noted that the inquiry is always directed to the witness' hearing of the disparaging rumor as negating the reputation. There must be no question as to the fact of the misconduct, or the rule against particular facts would be violated, and it is this distinction that the courts are always obliged to enforce. * * *"

The author then quotes from the cases of *R. v. Wood*, 5 Jur. 225, and *Moulton v. State*, 88 Ala. 119, 6 South. 759, 6 L. R. A. 301. In the latter case it was said:

"Opinions, therefore, and rumors, and reports, concerning the conduct or particular acts of the party under inquiry, are the source from which, in most instances, the witness derives whatever knowledge he may have on the subject of general reputation; and, as a test of his information, accuracy, and credibility, but not for the purpose of proving particular acts or facts, he may always be asked on cross-examination as to the opinions he has heard expressed by members of the community, and even by himself as one of them, touching the character of the defendant or deceased, as the case may be, and whether he has not heard one or more persons of the neighborhood impute particular acts or the commission of particular crimes to the party under investigation, or reports or rumors to that effect."

An abundance of cases support the text, some of them being: *Newell v. State*, 66 Tex. Cr. R. 177, 145 S. W. 939; *State v. Wilson*, 158 N. C. 599, 73 S. E. 812; *Baldwin v. State*, 138 Ga. 349, 75 S. E. 324; *State v. David-*

son, 172 Mo. App. 356, 157 S. W. 890; *McCreary v. Commonwealth*, 158 Ky. 612, 165 S. W. 981; *Jung Quey v. U. S.*, 222 Fed. 766, 138 C. C. A. 314; *Duhig v. State*, 78 Tex. Cr. R. 125, 180 S. W. 252; *Stout v. State*, 15 Ala. App. 206, 72 South. 762; *Smith v. State*, 112 Miss. 802, 73 South. 793; *Norris v. State* (Ala. App.) 75 South. 718; *State v. Sella*, 41 Nev. 113, 168 Pac. 278; *Patterson v. State* (Tex. Cr. App.) 202 S. W. 88; *Vaughan v. State*, 78 South. 378.

In the case of *State v. Killion*, 95 Kan. 371, 148 Pac. 643, the court said:

"Some complaint is made that witnesses who had testified as to the general reputation of the defendant, and that it was good, were allowed to be cross-examined as to whether or not they had heard that defendant had committed or been accused of particular acts or misconduct and of being in fights at certain times. Where witnesses have testified to the good character of the defendant, it is permissible to inquire of them whether they have not heard reports of particular instances which are inconsistent with the good reputation to which they have testified, and in that way seek to weaken or qualify the testimony which they have given. [Citing authorities.]"

For the reasons stated, the judgment of the trial court will be affirmed, and it is so ordered.

ROBERTS and RAYNOLDS, JJ., concur.

(20 Ariz. 576)

ROSS v. KAY COPPER CO. et al.
(No. 1710.)

(Supreme Court of Arizona. Nov. 13, 1919.)

1. APPEAL AND ERROR ⇨701(1)—ERRONEOUS INSTRUCTION NOT REVERSIBLE ERROR WHERE EVIDENCE NOT BROUGHT UP.

Assuming that an instruction is an incorrect statement of law and not overlooking the presumption of prejudice which generally follows an erroneous ruling of the trial court, it cannot be said, in the absence of the evidence from the record, that the instruction prejudicially affected the result, so that the instruction cannot be reviewed upon appeal unless prejudicial in any conceivable state of the evidence.

2. APPEAL AND ERROR ⇨1066—INSTRUCTION NOT WARRANTED BY PLEADINGS HARMLESS ERROR.

An instruction that the jury could not allow anything by way of attorney's fees in a personal injury action was erroneous and wholly uncalled for, where the pleadings made no reference to attorney's fees and the plaintiff claimed none, but could not have been prejudicial to plaintiff, appellant, and would not warrant reversal.

Appeal from Superior Court, Yavapai County; John J. Sweeney, Judge.

Action by Charles W. Ross against the Kay Copper Company, a corporation, and another. Judgment for defendants, and plaintiff appeals. Affirmed.

J. J. Cox and A. Y. Moore, both of Phoenix, and R. B. Westervelt, of Prescott, for appellant.

George J. Stoneman, of Phoenix, James L. Coleman, of Prescott, John A. Ellis, of Kingman, and Le Roy Anderson, of Prescott, for appellees.

BAKER, J. This action is based upon the Employers' Liability Law (Rev. St. 1913, para. 3153-3162), and was commenced by the plaintiff to recover damages for personal injuries which plaintiff alleged he sustained while in the service of the defendants and engaged in the operation of an internal combustion engine which was being used to run or operate certain machinery. It is stated in the complaint that while plaintiff was turning the flywheel on said engine for the purpose of causing an explosion in the cylinders, thereby starting the engine, a premature explosion occurred in the cylinders of the engine, causing the flywheel to revolve backwards, and striking the plaintiff, throwing him a distance of several feet, whereby he was painfully and permanently injured. The defendant answered, denying that the plaintiff was injured while operating the internal combustion engine, and alleged that the injuries were caused by the plaintiff falling over a cliff of rocks while he was engaged in robbing the nest of a swarm of bees which had settled in the rocks at a distance from the internal combustion engine.

Upon these issues trial was had before a jury, resulting in a verdict and judgment in favor of the defendants.

The plaintiff moved for a new trial, which was overruled, and thereafter this appeal was taken from the judgment and order overruling the motion.

[1] Plaintiff, in his first assignment of error, complains of the following instruction given by the court to the jury and asks that we review the same:

"You are further instructed that, as a matter of law in this action, the plaintiff can only recover where the injury was occasioned by an accident which was unavoidable, and arose from the inherent nature of the business in which plaintiff was engaged, and due solely to a condition or conditions of his employment in which he was then engaged. If you fail to find that the accident and injury was occasioned by any cause other than above, then, I charge you, you must find in favor of the defendants."

But the plaintiff has failed to bring here, by bill of exceptions or statement of facts, any of the evidence introduced upon the trial. Assuming that the instruction is an incorrect statement of the law, yet we cannot say, in the absence of the evidence, that it prejudi-

cially affected the result. It might be that the uncontradicted evidence established that the plaintiff sustained his injuries whilst he was away from his work of operating the internal combustion engine and engaged in robbing a bees' nest, and, if so, he clearly could not recover under the Employers' Liability Law. In such a state of the evidence, the instruction, although it might be erroneous, could not prejudicially affect the result, and was therefore a harmless error. In 4 C. J. 545, it is said:

"* * * Even where the instruction is erroneous as an abstract statement of law, it cannot be determined, without the evidence, whether or not it is prejudicial, * * *" citing *Ely v. Holloway*, 95 Kan. 8, 147 Pac. 1128; *Giles v. Ternes*, 93 Kan. 140, 143 Pac. 491; *Morgan v. Bankers' Trust Co.*, 63 Wash. 476, 115 Pac. 1047.

The only exception to the rule that an erroneous instruction will not be reviewed in the absence of the evidence is found in a case where an instruction given is erroneous and prejudicial in any conceivable state of the evidence. *People v. Levison*, 16 Cal. 98, 76 Am. Dec. 505; *Carpenter v. Ewing*, 76 Cal. 487, 18 Pac. 432; *Trinity & Brazos Valley Co. v. Lunsford* (Tex. Civ. App.) 160 S. W. 677. We have not overlooked the presumption of prejudice which generally follows an erroneous ruling of the trial court. This, however, is only a presumption, resting alone on the ruling itself, and may be overcome by something else occurring in the case. As we have said, the uncontradicted evidence might have tended to prove that the plaintiff was not injured while operating the internal combustion engine, but was injured at a distance therefrom, and whilst engaged in robbing the bees' nest. If such was the state of the evidence, the defendants would have been entitled to a verdict and judgment in their favor, as a matter of law, and the court upon that ground would have been compelled to sustain a motion made by the defendants for judgment in their favor notwithstanding the verdict had the verdict been against them; hence the final disposition of the case may have been correct however erroneous the instruction might be, which is here sought to be reviewed.

[2] The plaintiff, in his second assignment of error, complains of the following instruction, given by the court to the jury: "I instruct you that you cannot allow anything by way of attorney's fees." There is nothing in the pleadings in reference to attorney's fees. The plaintiff claimed none. In this state of the case, the instruction was wholly uncalled for, but it does not follow that it was prejudicial. In fact, it could not be, since the plaintiff made no claim whatever to attorney's fees. The rule is a general one, and often repeated, that, in order to warrant a reversal, the error complained of must

have been prejudicial to the appellant. 2 R. C. L. p. 230.

It necessarily must be said, from such a record as we have before us, that this court would not be justified in determining that there had been a miscarriage of justice.

The judgment of the lower court is affirmed.

CUNNINGHAM, C. J., and ROSS, J., concur.

(20 Ariz. 579)

HARRINGTON v. UNITED VERDE COPPER CO. (No. 1711.)

(Supreme Court of Arizona. Nov. 13, 1919.)

APPEAL AND ERROR \S 701(1)—INSTRUCTIONS NOT REVIEWABLE IN THE ABSENCE OF EVIDENCE.

Where appellant has failed to bring to the Supreme Court any of the evidence adduced at the trial, instructions complained of as erroneous and prejudicial cannot be reviewed, where the court can conceive of a state of the evidence in which they would not have been prejudicial even though erroneous.

Appeal from Superior Court, Yavapai County; John J. Sweeney, Judge.

Action by John Harrington against the United Verde Copper Company. Verdict and judgment for defendant, and plaintiff appeals. Affirmed.

Cox & Moore, of Phoenix, and R. B. Westervelt, of Prescott, for appellant.

Anderson & Ellis, of Prescott, for appellee.

BAKER, J. Action by the appellant to recover damages for personal injuries alleged to have been suffered by the appellant while engaged in the service of appellee in the hazardous business of mining. Appellee answered the complaint and alleged that the injuries received were due wholly and entirely to appellant's own fault. The verdict and judgment was for the appellee. The only assignment of error made is based upon certain instructions given by the court to the jury, which are claimed to have been erroneous and harmful; but the appellant has failed to bring here any of the evidence adduced at the trial, and we are unable to determine whether the instructions complained of were erroneous and prejudicial. We can conceive of a state of the evidence in which they would not have been prejudicial, although they might be erroneous. There being nothing before us for review, except the pleadings and the verdict and judgment, and no fundamental error appearing in these papers, we must conclude in favor of the regularity and validity of the judgment. We must not

be understood, however, as commending the instructions attacked.

The case is ruled by the decision this day handed down by this court, in the case of Charles W. Ross v. Kay Copper Company et al. (No. 1710) 184 Pac. 978, and not yet officially reported.

The judgment of the lower court is affirmed.

CUNNINGHAM, C. J., and ROSS, J., concur.

(106 Kan. 492)

MOORE v. THOMPSON et al. (No. 22219.)*

(Supreme Court of Kansas. Nov. 8, 1919.)

(Syllabus by the Court.)

1. PARTNERSHIP \S 30—SHARING OF PROFITS AND LOSSES AS AFFECTING CLAIM OF THIRD PERSON.

In the present case, where an arrangement was made between two persons for the purchase and sale of horses, each furnishing in different proportions money for the conduct of the business, and each contributing certain services in carrying it on, the profits and losses of which were to be equally divided between them, it is held to constitute a partnership relation as to a third person, who held a claim for the unpaid price of the horses purchased by the firm.

(Additional Syllabus by Editorial Staff.)

2. PARTNERSHIP \S 30—TEST AS TO SHARING OF PROFITS AND LOSSES.

One of the important tests in determining the existence of a partnership is the sharing of profits and losses, though such test is not conclusive, as there may be a sharing of profits with an agent or servant as partial compensation for services, which relationship will not constitute a partnership.

Appeal from District Court, Franklin County.

Action by J. S. Moore against Frank Thompson and N. N. Rogers, as alleged partners. Judgment for plaintiff, and defendant Thompson appeals. Affirmed.

S. D. Scott, of Olathe, for appellant.

Ralph E. Page, of Ottawa, for appellee.

JOHNSTON, C. J. In this proceeding J. S. Moore seeks a recovery for horses sold to an alleged partnership comprised of Frank Thompson and N. N. Rogers, who were engaged in the business of buying and selling horses and mules. Rogers in his answer asked for an accounting with Thompson and for the recovery of an unnamed amount. The court found that a partnership existed between Rogers and Thompson, and that Rogers was indebted to Thompson in the sum of \$1,779.43, and further found that the plain-

*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

*Rehearing denied December 13, 1919.

tiff, Moore, had been employed to buy horses for the firm, and during the time of his employment he had bought horses and turned them over to the firm in the sum of \$1,562.59, for which he had not received payment. It was further found that the partnership business had been closed and that there were no substantial profits. Moore was awarded judgment against the partnership for the sum of \$1,562.50. Rogers is not complaining of the judgment, but Thompson appeals, and his complaint is that the court erred in finding that a partnership existed between him and Rogers, and that as there was no partnership no liability existed against him in favor of the plaintiff.

It appears from the evidence in behalf of plaintiff that Thompson contracted to supply the United States government with 1,500 horses, and that he entered into a business arrangement with Rogers for the purchase of the horses under the contract. Rogers stated that he had \$2,500 or \$2,600 that could be and was used in the business, and the plan was that Rogers was to buy horses and mules, advancing the money at the time of purchase and sending the horses in for inspection and shipment to Thompson, who attended to the inspection and the sale and turning over of the horses to the government. He was then to return the money advanced by Rogers in payment of the horses and mules. The horses were to be purchased, collected, and taken over every week, settlements were to be made, and profits and losses of the business were to be shared equally between Thompson and Rogers. A large number of horses and mules were bought, and sold to the government under the arrangement. Later Thompson's contract with the government was canceled, and another was made with Rogers, and the business was continued as before.

[2] On one side, it is contended that the adventure lacks the elements of a partnership, and that Rogers was no more than an agent or employé of Thompson, whose compensation was measured by the profits earned in the business. On the other hand, it is contended that the position of Rogers was that of a principal, instead of an agent or employé, and that as such he participated in the profits and losses of the business, and that the arrangement between them had all the essential elements of a partnership. One of the important tests in determining the existence of a partnership is the sharing of profits and losses of the enterprise. This test is not conclusive, as there may be a sharing of profits with an agent or servant as partial compensation for services, and such relationship will not constitute a partnership. *Shepard v. Pratt*, 16 Kan. 209; *Beard v. Rowland*, 71 Kan. 873, 81 Pac. 188; *Wade v. Hornaday*, 92 Kan. 293, 140 Pac. 870.

[1] There is testimony tending to show that, under the agreement between the parties, Rogers was to act as a principal, and not an employé or agent, and also that he received the profits as profits, and not as wages. A participation in profits as profits is prima facie and very cogent evidence of a partnership. 20 R. C. L. 824. Here there was a community of interest, not only in the profits and losses, but also in the capital employed in carrying on the business. One partner may, and sometimes does, put up skill and service as against the money or property provided by the other. *Tenny v. Simpson*, 37 Kan. 579, 15 Pac. 512; *Simpson v. Tenney*, 41 Kan. 561, 21 Pac. 634.

It has been decided in *Railway Co. v. Hucklebridge*, 62 Kan. 506, 64 Pac. 58, that:

"An agreement between two persons, one to furnish money to purchase and ship cattle, the other to perform the labor of buying and shipping them, upon sale the profits to be shared and the losses to be borne equally, constitutes them partners as to one who has inflicted loss upon them by injuring the cattle, and a suit for damages for the injury must be brought in the name of both."

In addition to putting up his services in the purchase of horses, Rogers advanced some money for their purchase which was returned by Thompson after the horses had been disposed of to the government. The fact that Thompson had like arrangements with others, or that the relation with Rogers was of short duration, does not militate against the claim of partnership. It has been said that:

"It is not necessary that there should be a series of transactions, nor that the relationship between the parties should continue a long time, to constitute a partnership. It may exist for a single venture or undertaking. If there be a joint purchase with a view to a joint sale on joint account and a communion of profit and loss, it will ordinarily constitute a partnership transaction." *Jones v. Davies*, 60 Kan. 309, 56 Pac. 484, 72 Am. St. Rep. 854.

The fact that, when the contract between Thompson and the government was canceled and a like contract had been secured by Rogers, the business was carried on just as it had been when Thompson had the contract, shows the relationship between the parties. Altogether it appears that their contract and purpose was to combine their property, labor, and skill in a joint enterprise for their common benefit, each to share alike in the resulting profits and losses.

Under the evidence, and the findings of the trial court, we think they must be regarded as partners as to third persons, including the plaintiff, and therefore the judgment is affirmed.

All the Justices concurring.

605 Kan. 517)

ADVANCE-RUMELY THRESHER CO. v. NELSON et al. (No. 22310)*

(Supreme Court of Kansas. Nov. 8, 1919.)

*(Syllabus by the Court.)***1. SALES** \S 267—**EXPRESS WARRANTY EXCLUDES IMPLIED WARRANTY AS TO FITNESS.**

Where the written terms of a dealer's contract and order provided that a machine which was sold thereunder was expressly warranted to do good work when properly set up and adjusted, an issue cannot be raised on an alleged implied warranty touching the fitness of the machine for the use to which it was designed.

2. PLEADING \S 345(1) — **WHERE ANSWER STATES NO DEFENSES, JUDGMENT ON PLEADINGS PROPER.**

The allegations pleaded in an answer to a petition in an action for the agreed price of a silage cutter sold to defendants, who were dealers in farming machinery examined, and held to state no defense, and held, that plaintiff was entitled to judgment on the pleadings.

Appeal from District Court, McPherson County.

Action by the Advance-Rumely Thresher Company against J. M. Nelson and others, copartners, etc. Motion for judgment on the answer overruled, and plaintiff appeals. Reversed.

C. F. Freeman, of Topeka, for appellant.

Grattan & Grattan, of McPherson, for appellees.

DAWSON, J. The plaintiff sued the defendants for the contract price of a silage cutter. Its motion for judgment on defendants' answer being overruled, the correctness of that ruling is brought here for review.

Plaintiff's petition recited the pertinent facts touching the dealer's contract and order, the delivery of the silage cutter, and defendants' failure to pay. The written contract was attached to the petition. Among its recitals, it was provided:

"The within named goods are warranted to be made of good material and to do good work when properly set up and adjusted. If any parts prove defective, the seller will have the right to replace them, and no goods are to be condemned on account of such defect if properly made good.

"Purchaser agrees to examine all goods on arrival, and notify the seller of any shortage or defective parts, and give reasonable time to replace them, or the seller is not to be held responsible for any shortage or defective parts. * * *

"Any defective parts may be charged back to us, but in all such cases the broken or defective parts must be exhibited at settlement to the authorized agent of said company, who shall return them to the branch house, and all claims for defective parts must be made during the first season's use."

Defendants answered that they were retail dealers of implements; that the plaintiff's traveling salesman sold them the silage cutter by description and without a sample; that it was a condition precedent that the cutter should be salable or merchantable, and it was so warranted by plaintiff; that it was not salable or merchantable, and that defendants did not accept the goods, and no delivery has been made to defendants, and that they were not indebted to plaintiff under the contract; that defendants were ignorant of the silage cutter and its construction, and did trust to the plaintiff's judgment that the cutter was reasonably fit for the use and purpose of a silage cutter, and that the cutter was so poor and weak in construction in the foundation that supports the cutter that it is dangerous to life and property, and prospective buyers would not buy it, nor could the defendants safely sell it, and be exempt from damages when it was not reasonably safe for use; that by reason thereof the implied warranty (of its fitness for sale and use) was broken; and—

"that the defendants never accepted the goods under the contract, but made diligent and constant effort to sell the silage cutter, and were unable to do so from the fact of the weak and poor and insufficient foundation made as a foundation or support for the cutter, and all of which the defendants informed the Rumely Products Company of at once and repeatedly, through its traveling salesman who sold such goods, and on its failure to perform its contract the defendants demanded that they take back such goods, on its failure to perform its contract or to remedy the same, and on its failure and neglect to do so the defendants rescinded the supposed contract."

[1, 2] Did this answer plead a defense? Notwithstanding the cloud of words included in the answer, the execution of the written contract between plaintiff and defendants was not denied. Amidst repeated denials of the receipt or delivery of the silage cutter, there is a tacit and conclusive admission that it was delivered to defendants, and that they had exercised the prerogatives of ownership over it by "making diligent and constant effort to sell the silage cutter." Elsewhere they alleged that they demanded that the defendants "take back" the cutter. It was only after their repeated efforts to sell the machine that they declared that they "rescinded the contract." The allegations of rescission contain no recital that there was a return of the machine, or tender of return, but only a demand that plaintiff or its traveling salesman "take back such goods."

A scrutiny of the contract discloses no justification for the defendants' allegation that there were any implied warranties. The warranties were expressed, which precludes all inferences of implied warranties, and no breach of any express warranty was pleaded.

*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

*Rehearing denied December 13, 1919.

The machine was expressly warranted to be made of good material and "to do good work when properly set up and adjusted." The defendants did not allege that the machine had failed to work properly when set up and adjusted. The answer contained no allegation that the machine was ever given a fair trial. It was not pleaded that the machine was not made of good materials as warranted. It was sold by description, and the description was written in the contract. It was not alleged that the machine did not conform to the description in any particular. This case falls within the rule of *Ehrsam v. Brown*, 76 Kan. 206, 91 Pac. 179, 15 L. R. A. (N. S.) 877, which held that, where a known and described article is sold under a contract to be executed by delivery, there is no implied warranty that it shall answer the particular purposes of the buyer. This would be especially true where, as in this case, the fitness of the machine was made the subject of an express warranty. By the written contract the defendants bound themselves to inspect the machine upon its arrival and to notify the plaintiff of any defective parts and give plaintiff a reasonable time to replace them. Defendants did not allege compliance with these provisions. *Iron Co. v. Henneberry Co.*, 108 Kan. 647, 175 Pac. 986. Upon a painstaking examination of the answer, this court cannot discern that defendants pleaded any defense to plaintiff's action, and our conclusion is that plaintiff was entitled to judgment on the pleadings.

Reversed.

All the Justices concurring.

(105 Kan. 487)

SHANKLIN et al. v. MANVILLE.
(No. 22170.)

(Supreme Court of Kansas. Nov. 8, 1919.)

(Syllabus by the Court.)

ATTORNEY AND CLIENT — EFFECT OF PAYMENT TO JUDGMENT CREDITOR ON ATTORNEY'S LIEN.

A judgment debtor and creditor went together to the clerk of the court in which the judgment had been rendered. The debtor paid the costs to the clerk, producing also money to the amount of the judgment, which was taken and retained by the creditor, who executed a full release upon the record. Attorneys who had had a lien on the judgment for their fee in obtaining it sued the debtor therefor, and recovered. *Held* that, whether or not a judgment debtor may ordinarily relieve himself from all liability to a lien claimant by making payment in full to the clerk, that result did not follow in the present case, because it was not established that the clerk received the money, and because whether or not the clerk was in fault the judgment debtor was a party to the act

which prevented the application of a part of the money to the lien.

Appeal from District Court, Doniphan County.

Action by O. M. Shanklin and another against Mrs. Peter Manville. Judgment for plaintiffs, and defendant appeals. Affirmed.

J. J. Baker, of Troy, for appellant.

A. L. Perry, of Troy, for appellees.

MASON, J. O. M. Shanklin and John E. Heffley, as attorneys for Ernest Cook, obtained for him a judgment for \$400 against Mrs. Peter Manville, in the circuit court of Buchanan county, Mo. By the law of that state the attorneys had a lien upon the judgment for their fee of \$127.20. Mrs. Manville paid the judgment and Cook received the money. Shanklin and Heffley then sued Mrs. Manville, in the district court of Doniphan county, Kan., for the amount of their lien. They recovered a judgment, from which Mrs. Manville now appeals.

Under the Missouri statute it has been said that a payment of a judgment to the clerk of the court releases the debtor from all liability, including that to the claimant of a lien. *Lawson v. Telephone Co.*, 178 Mo. App. 124, 137, 164 S. W. 138. The appellant contends that in this case it was conclusively established that such a payment was made, and therefore that the lien of the attorneys was discharged. The evidence showed that Cook, the judgment creditor, went to the office of the clerk of the circuit court with William H. Manville, who represented the debtor, Mrs. Manville; that money sufficient to satisfy the judgment and costs was laid down on the counter by Manville; that the deputy clerk who was present retained the amount of the costs, giving a receipt for it; and that Cook received the remainder, and wrote upon the record a statement that the judgment had been satisfied. There was a dispute in the testimony as to whether the deputy clerk at any time had actual possession of the whole amount. He said that \$47.85 (the amount of the costs) was actually paid to him, that no other money came into his hands, and that he never had possession of the rest, so far as he knew; that it was counted out on the counter by Manville to Cook. Manville said he paid the entire sum to the deputy clerk, who, however, did not take the money in his hands. The trial court found generally for the attorneys claiming the lien, making no special findings. The conflict in the evidence must therefore be regarded as having been resolved against the appellant, who must be deemed to have failed to establish to the satisfaction of the trial court such a payment to the clerk as would relieve her from further liability.

The statement of the Missouri (Kansas

City) Court of Appeals already referred to, that a payment in full to the clerk discharges the judgment debtor from liability to a lien claimant, has been characterized by the St. Louis Court of Appeals as dictum. *Nicola v. Car & Foundry Co.*, 185 Mo. App. 285, 291, 292, 170 S. W. 366. It seems reasonable, however, to suppose that ordinarily a payment to the clerk would have the effect stated, on the theory that the debtor would thereby be relieved of all responsibility for the proper distribution of the money, and the creditor would be obliged to look solely to the clerk. Here, however, even assuming that the clerk was in fault, the debtor not only knew of the payment of the full amount, including that covered by the lien, to the creditor, but was a participant in it. In such a situation the reason back of the general rule would fail, rendering the rule inapplicable.

The petition in the present case alleged that the release executed by Cook was later set aside by the court which had rendered the judgment. The answer included a general denial and the abstract shows no evidence on this matter. The appellees' brief treats the allegation as admitted, and this assumption has not been challenged by the appellant. If such an order was made, it obviously strengthens the decision of the trial court.

The judgment is affirmed.

All the Justices concurring.

(105 Kan. 481)

CHAPLIN v. CHAPLIN et al. (No. 22195.)*

(Supreme Court of Kansas. Nov. 8, 1919.)

(Syllabus by the Court.)

WILLS §88(1) — WARRANTY DEED TESTAMENTARY IN CHARACTER AND INVALID.

The insertion in a warranty deed of a provision that it shall be void in case the grantee dies before the grantor indicates a purpose that the title shall pass only in the event the grantee shall survive the grantor, and renders the instrument testamentary in character and therefore inoperative for want of witnesses. The fact that it was executed shortly after the grantor had suffered a paralytic stroke, in consideration of the care and kindness of the grantee, his brother, and the probability that he would be a burden on him for some time to come, does not militate against this construction.

Appeal from District Court, Cheyenne County.

Action by Albert Chaplin against George Chaplin and Ella Rhoder. From a judgment in favor of Ella Rhoder, the Chaplins appeal. Affirmed.

E. E. Kite, of St. Francis, for appellants.
J. L. Finley, of St. Francis, and T. F. Garver, of Topeka, for appellee.

MASON, J. This case turns upon whether title to an interest in a tract of land was conveyed to George Chaplin by an instrument executed by John Chaplin; the appellants maintaining the affirmative, and the appellee the negative. The facts are established by findings which are not attacked.

The instrument in question was in the form of an ordinary warranty deed, save that after the clause warranting the title to be clear were inserted the words:

"Except in case party of the second part [the grantee] becomes deceased before party of the first part [the grantor] this deed shall be null and void."

The grantor (who died on April 14, 1916) had a stroke of paralysis on February 12th of that year, and on the 7th day of March following, being somewhat recovered, executed the purported deed, as found by the court, "in consideration of the care and kindness of his brother George (the grantee) on his behalf, and the probability that he would be a burden upon him for some time to come, and out of brotherly love and affection also."

The appellants invoke the rule that in construing a deed the first of two repugnant clauses must control. *Durand v. Higgins*, 67 Kan. 110, 124, 72 Pac. 567; *Brady v. Fuller*, 78 Kan. 448, 453, 96 Pac. 854. While in some circumstances there may still be a field for the operation of that rule, it cannot prevail against the practice in this jurisdiction of endeavoring to ascertain the actual intention of the grantor from a consideration of all parts of the deed. *Markham v. Waterman*, 105 Kan. 93, 95, 96, 181 Pac. 621. The appellants also cite cases (such as *Nolan v. Otney*, 75 Kan. 311, 89 Pac. 690, 9 L. R. A. [N. S.] 317) to the effect that the reservation of a life interest in the grantor does not render the instrument testamentary in character, since it permits the immediate vesting of the title; the enjoyment alone being postponed. We do not, however, regard the present case as analogous to those. Here the grantor does not undertake, either by words properly adapted to that purpose, or by language seeming to have been intended to have that effect, to pass the title to the grantee, reserving to himself the enjoyment of the property during his lifetime. His real purpose, as we gather it from the entire document, appears to have been to keep the property himself unless the grantee should survive him. His expression was that the deed should be void if the grantee should die first; that is, not merely that the deed should not be effective to transfer the right of possession until the grantor's death, but that nothing whatever should

*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

*Rehearing denied December 12, 1919.

pass under it unless the grantee should survive him. We consider this to be the meaning derivable from the face of the writing, and the circumstances under which it was executed tend to confirm rather than to overthrow this interpretation. As so construed, the instrument was testamentary in character and invalid for want of witnesses.

The judgment is affirmed.

All the Justices concurring.

(105 Kan. 430)

MORRISON v. MONTGOMERY.

(No. 22010.)*

(Supreme Court of Kansas. Nov. 8, 1919.)

(Syllabus by the Court.)

1. APPEAL AND ERROR §1214—PROCEDURE ON SECOND TRIAL AFTER REVERSAL AND RE-MAND.

Where there is a reversal of a judgment and the case is remanded for a new trial on all the issues, the parties are not confined to the line of proof in the new trial which was presented on the first trial, but are at liberty to prove a new state of facts which are within the issues formed by the pleadings.

2. EVIDENCE §207(2), 205(7)—ADMISSION BY COUNSEL AT FORMER TRIAL.

A distinct and formal admission of a fact in the course of a trial may be given in evidence in a subsequent trial, but an incidental statement of counsel by way of argument in his brief upon an appeal in relation to the execution of a mortgage is not conclusive upon him in the new trial thereafter had.

3. TRIAL §33—OFFER OF PROOF OF ADMISSIONS MADE AT PREVIOUS TRIAL.

The making of such a statement or admission will not avail a party, where he fails to offer it in evidence and does not bring it to the attention of the trial court until after a verdict has been returned and a motion for a new trial has been filed.

4. EVIDENCE §205(17)—ADMISSION OF MORTGAGOR NOT BINDING ON DEFENDANT NOT PARTY TO FORMER ACTION.

An admission of the mortgagor in an action to which the defendant in this proceeding was not a party, and who was not a party in the instant case, is not binding upon the defendant.

5. SUFFICIENCY OF EVIDENCE.

The evidence in the case is held to be sufficient to support the verdict of the jury.

Appeal from District Court, Rooks County.

Action by W. H. Morrison against Frank Montgomery. Judgment for defendant, and plaintiff appeals. Affirmed.

C. W. Smith, of Topeka, for appellant.

O. O. Osborn, of Stockton, A. M. Harvey, of Topeka, F. E. Young, of Stockton, Robert Stone, of Topeka, E. H. Gamble, of Kansas City, Mo., and Geo. T. McDermott and Thos. A. Lee, both of Topeka, for appellee.

JOHNSTON, C. J. W. H. Morrison brought this action to recover from Frank Montgomery one-half of a crop of wheat grown by Ernest Blazier on farms which he had rented of F. W. Sweeney. On September 22, 1913, Blazier executed a chattel mortgage to Morrison purporting to cover his share of the growing crop as security for an indebtedness of about \$700. In July, 1914, after the crop had been threshed, Blazier sold his share of the same to Montgomery. By the terms of the mortgage the lien was extended over two tracts, one of 50 acres and one of 100 acres; but it seems to have been conceded that 50 acres of the crop had not been planted when the mortgage was executed, and hence there is no contention over the crop grown on that tract. The plaintiff contended that the crop upon the 100-acre tract had been planted several days before the execution of the mortgage. In July, 1914, Morrison brought an action against Blazier and foreclosed his mortgage as against him, but Montgomery was not a party to that action. When plaintiff found that the wheat had been sold to Montgomery and was not delivered on demand, he undertook to obtain possession of it in this action of replevin, and the first trial resulted in a verdict and judgment for defendant. On an appeal that judgment was reversed for error in the instructions relating to the effect of a tender by Blazier to plaintiff of an undorsed check. Morrison v. Montgomery, 101 Kan. 670, 168 Pac. 674. The second trial resulted in a verdict and judgment in favor of Montgomery, and Morrison again appeals.

It is contended by the plaintiff that in the second trial the defendant was estopped to set up the invalidity of the mortgage on the crop grown on the 100-acre tract. In that trial two witnesses testified that the crop was not planted when the mortgage was executed, and based on this testimony a finding of the jury was made in favor of the defendant. Counsel for defendant, in their brief filed on the first appeal, spoke several times of the mortgage, saying in effect that 100 acres of the wheat was covered by the Blazier mortgage, and plaintiff insists that these statements concluded the defendant on the second trial as to the validity of the mortgage. In the new trial the plaintiff, in his statement to the jury, said that he thought it would be admitted that the wheat was sown on the 100-acre tract when the mortgage was executed, and that the mortgage created a lien on that part of the crop.

*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

*Rehearing denied December 13, 1919.

The defendant's statement to the jury followed in which he made no admission, saying:

"I am sorry I cannot give you a little more light upon this case; but being on the defense, we must necessarily wait until the case is made, before we know exactly what evidence we will, or what evidence we can, produce."

At the final trial evidence attacking the validity of the mortgage was presented and also as to whether the wheat had been planted when the mortgage was executed. It was received without objection by the plaintiff as if the planting of the crop prior to the signing of the mortgage was a vital issue in the case. Not only that, but plaintiff himself introduced testimony tending to show that the crop had been planted and therefore had a potential existence when the mortgage was given.

[1, 2] It must be held that the declarations or admissions of the defendant in his brief on the former appeal, whatever force they might have had under other circumstances, cannot avail the defendant in this appeal. When the former judgment was reversed and the case was remanded for a new trial, the parties were not confined to the line of proof offered on the first trial, but were at liberty to prove a new state of facts which were within the issues formed by the pleadings. *Cahn v. Tootle*, 58 Kan. 260, 48 Pac. 919. The answer of the defendant was a general denial, and under such a pleading in replevin the defendant was entitled to prove any defense which militated against a recovery by the plaintiff. *Dewey v. Bobblitt*, 79 Kan. 505, 100 Pac. 77. The declarations incidentally made by way of argument were no more than quasi admissions which might be offered in evidence, but were subject to explanation and correction. It has been held that an admission in an opening statement to the jury might be proved on a subsequent trial of the same cause, but it was also held that—

"An incidental remark of counsel as to the facts which he expected to prove and which did not amount to a distinct and formal admission would ordinarily not be binding upon such party," etc. *Telephone Co. v. Vandevort*, 67 Kan. 269, 72 Pac. 771.

A statement of facts in a pleading does not conclude a party where an amended petition is filed which supersedes the original one. The allegations in the former are not abso-

lutely binding upon the plaintiff, although they may be used as evidence against him. *Reemsnyder v. Reemsnyder*, 75 Kan. 565, 89 Pac. 1014.

An admission of a fact by an attorney formally and solemnly made for the purpose of obviating the offer of formal proof of some fact, or to facilitate the progress of the trial, may be given in evidence upon a subsequent trial, and in this connection it has been said:

"But perhaps more often, especially in reference to oral admissions, it is uncertain whether they were intended as general admissions, like admissions in a pleading, by which the party intends to stand at all times, or as a mere waiver of proof, for the purposes of facilitating the pending trial. Then the tribunal to determine what was the import and intent of the admission is the jury before which the case is then pending for hearing." *C. B. U. P. Rld. Co. v. Shoup*, 28 Kan. 394, 42 Am. Rep. 163.

[3, 4] Here the so-called admissions made by way of argument were not offered in evidence during the trial nor brought to the attention of the court until the motion for a new trial was filed. Although the statements of counsel might have been received in evidence, the attempt to bring them into the case, after having contested the issue through to an adverse verdict and without presenting them to the jury, came too late. It appears that Blazier made admissions which might be held binding as to him, but he is not a party to this action, and the defendant was not a party in the action in which the admissions were made. His admissions therefore can have no effect on the defendant.

Error was assigned on the failure to instruct the jury as to the effect of the admissions; but, as they were not mentioned in any pleading nor invoked by the evidence, there was no basis for an instruction on the subject.

[5] The sufficiency of the evidence is challenged, and, while that offered in behalf of the plaintiff on the main question may seem more reasonable and convincing to this court than that of the defendant, there is unquestionably sufficient evidence to sustain the view of the jury, whose function it was to settle the disputed questions of fact.

The judgment is affirmed.

All the Justices concurring.

(56 Mont. 232)

KIRK v. MONTANA TRANSFER CO. et al.
(No. 4034.)

(Supreme Court of Montana. Oct. 17, 1919.)

1. CORPORATIONS ⇨432(6) — EVIDENCE OF RATIFICATION OF SERVANT'S ACT.

For the purpose of showing ratification by defendant corporation of the act of its employé in taking a refrigerator, plaintiff could ask one of its officers whether it was still in its possession.

2. TRIAL ⇨56 — EXCLUSION OF CUMULATIVE EVIDENCE NOT ERROR.

Defendant having already established affirmatively that the contract in question was not on a credit basis, its subsequent offered evidence that plaintiff had never had any credit privilege with it was irrelevant.

3. APPEAL AND ERROR ⇨1066—ABSTRACT INSTRUCTIONS HARMLESS ERROR.

Giving of abstract instruction is harmless where the facts are simple and of such a nature that general principles may be easily applied.

4. TRIAL ⇨256(1)—NECESSITY OF REQUESTS TO SUPPLY DEFICIENCIES IN INSTRUCTIONS.

To supply deficiencies in instructions given or proposed by the court, a party dissatisfied therewith must propose instructions embodying principles applicable.

5. TRIAL ⇨280(8)—REQUESTS FOR INSTRUCTIONS COVERED BY THOSE GIVEN, PROPERLY REFUSED.

Proposed instructions, in action for injury to plaintiff by defendant's servant in attempting to take an article as security for the charges for moving part of plaintiff's furniture, that in case of either of enumerated circumstances verdict should be for defendant, held properly refused, the question of whether the servant was acting within the scope of his authority being for the jury, and they being told that there could be no recovery unless he was so acting.

6. CORPORATIONS ⇨423 — LIABILITY FOR AGENT'S WRONGFUL ACTS.

A corporation whose agent, in the discharge of duties intrusted to him by it, and within the apparent scope of his authority, does an act, whereby another suffers injury, is liable for the damages, though its agent may have failed in his duty to it or disobeyed instructions.

7. PRINCIPAL AND AGENT ⇨159(1)—AGENT'S TORT WITHIN COURSE OF EMPLOYMENT.

The tort of an agent is within the course of his employment where he, in performing it, is endeavoring to promote the principal's business.

8. MASTER AND SERVANT ⇨306 — RATIFICATION OF SERVANT'S ACT.

The master, with knowledge of the situation, accepting the benefits of a servant's conduct, by retaining an article which he took from another, thereby ratifies his acts.

9. APPEAL AND ERROR ⇨1004(1)—AWARD OF DAMAGES FOR PERSONAL INJURY SUSTAINED.

The court on appeal will not disturb a jury's award for personal injury unless it is such as to shock the conscience and understanding.

Appeal from District Court, Silver Bow County; J. J. Lynch, Judge.

Action by Eva Kirk against the Montana Transfer Company and another. From a judgment for plaintiff and from an order denying a new trial, the named defendant appeals. Affirmed.

Frank & Gaines, of Butte, for appellant.
James M. Hinkle, of Butte, for respondent.

HURLY, J. Plaintiff seeks to recover damages from the defendant corporation and Charles Van for certain injuries sustained by her by reason of an assault alleged to have been made upon her by Van, while said Van, acting as an agent and employé of the defendant corporation, was moving certain household goods of the plaintiff under a contract between plaintiff and defendant corporation.

A trial was had to a jury, and verdict was rendered for the plaintiff in the sum of \$750. Motion for a new trial was denied, and appeal was taken by defendant company from the judgment and the order denying such motion.

The facts are substantially as follows: The plaintiff engaged the defendant company to move certain household goods from one location in Butte to another. One load had been hauled at the price which had been originally agreed upon, but before the hauling of the second load the defendant company advised plaintiff that it would charge a higher price for moving the balance of the goods. After the second load was taken, the plaintiff telephoned to the office of the defendant company and notified the persons in charge that she did not care to have any more goods hauled. Following this conversation, the teamster, Van, with an assistant, called at the home of the plaintiff and was then informed by her that she had notified the company not to haul any more goods, and had made arrangements for the payment of the work already done, on the following day, after an opportunity to ascertain whether the goods had been properly handled in moving. Van then asserted that he had come to move the goods, and would not be put off from completing the work and receiving his pay therefor, and some words occurred between him and the plaintiff as to payment. Van then took hold of a refrigerator in the room and started to move it out, either in accordance with his statement that he was going to finish the job of moving, or for the

purpose of holding the refrigerator as security for the amount of the unpaid charges. The plaintiff resisted his moving the refrigerator, and was injured by its being thrown against her by Van. Van and his assistant carried the refrigerator out of the house to one of the wagons of the defendant company, taking it to the office or warehouse of the company, where it remained at the time of the trial, nearly seven months afterwards though written demand for its return had previously been made. It also appears that the company's foreman, who had general supervision of the work of teamsters, was present and witnessed the altercation and the removal of the refrigerator.

The answer admits that Van was an employé of the defendant company, admits the contract of moving, and admits that among the articles moved by the company was the refrigerator in question, and in addition contained a general denial.

It was the rule of defendant company that, when drivers were notified that work done by them should be paid for at completion, unless they collected therefor the amount would be deducted from their wages.

[1] Complaint is made of the ruling of the court in permitting plaintiff's counsel to interrogate one of the officers of the defendant corporation as to whether or not the refrigerator was still in its possession. Plaintiff's purpose in offering this testimony, was to show ratification of the act of the employé in taking the refrigerator, and we see no error in the ruling of the court.

[2] Defendant company's president and vice president testified in their direct examination to the effect that no credit had been extended to plaintiff in connection with the moving in question, and that the work was what was termed in the office a "C. O. D. job." The defendant later offered to prove that the plaintiff never had enjoyed any credit privileges with it. This offer of proof was objected to and the offered evidence excluded. The defendant already having established affirmatively that the particular contract was not upon a credit basis, we fail to see where this evidence would have any relevancy, and, even if relevant, the jury had already been apprised of the fact that no credit had been extended to the plaintiff.

[3] Objection was made to the giving of instructions 3, 4, and 6, upon the ground that such instructions were abstract statements of law and not applicable to the issues, and for the further reason that it was error not to make such instructions more concrete; also that such instructions did not embody certain rules applicable to the issue.

This court has criticised the giving of abstract, rather than concrete, instructions; but in this case, as said by Mr. Justice Holloway in *Mulrone v. Marshall*, 35 Mont. 238, 88 Pac. 797.

"While the instruction is open to the criticism that it merely states an abstract legal principle, since the facts in this case are few and simple, and of such a nature that general principles of law may be easily applied, we think the error in giving it was without prejudice."

[4] The court has likewise stated in numerous decisions that when parties are not satisfied with the instructions proposed or given by the court, it is their duty to propose instructions embodying principles applicable to the issues, thereby supplying the omissions or deficiencies in those proposed. *Hollenback v. Stone & Webster Eng. Corp.*, 46 Mont. 559, 129 Pac. 1058; *Frederick v. Hale*, 42 Mont. 153, 112 Pac. 70; *Gillies v. Clarks Fork Coal Min. Co.*, 32 Mont. 320, 80 Pac. 370.

[5] Error is also specified because of the court's refusal to give defendants' proposed instructions 3, 4, and 5. These were to the effect (3) that if the teamster, Van, committed the assault in attempting to collect money for which he was personally liable to the company, but had not been authorized to seize property for that purpose (4) that if Van, failing to collect, attempted to take security (5) or that if, in the absence of a direction from his employer, Van used force or seized property, then, in either or all of such events, a verdict should be returned for defendant company. But under an instruction given by the courts, the jury were advised that plaintiff could not recover unless Van was acting within the scope of his authority. There was no error in the court's refusal to give the instructions proposed. Whether he was so acting was a question for the jury. *Ritchie v. Waller*, 63 Conn. 155, 28 Atl. 29, 27 L. R. A. 161, 38 Am. St. Rep. 361; *Sharp v. Erie R. R. Co.*, 184 N. Y. 100, 76 N. E. 923, 6 Ann. Cas. 250; *Gibson v. Dupree*, 26 Colo. App. 324, 144 Pac. 1133. The instruction given sufficiently stated the rule.

[6] In *Gronrud v. Lossi et al.*, 48 Mont. 274, 136 Pac. 1069, Mr. Chief Justice Brantly stated:

"By the great weight of authority it is also the rule that when an agent of a corporation in the course of the discharge of duties intrusted to him by it, and within the apparent scope of his authority, does an act from which a third person suffers injury, the corporation also is liable for the damages flowing therefrom, even though the agent may have failed in his duty to the principal, or may have disobeyed his instruction."

See, also, 2 C. J. 948.

[7] Further:

"The tort of an agent is within the course of his employment where the agent, in performing it, is endeavoring to promote the principal's business." 2 C. J. 853, and cases cited; *Smith v. Munch*, 65 Minn. 256, 68 N. W. 19; *Gibson v. Dupree*, supra.

The company employed Van to move the goods and collect therefor. That in doing one or both of these duties he committed the assault has been determined by the verdict of the jury.

[8] In addition, the record shows that the defendant company, with knowledge of the situation, accepted the benefits of Van's conduct by retaining the refrigerator, and thereby ratified his acts. 2 C. J. 854; Jones v. Shannon, 55 Mont. 225, 175 Pac. 882.

[9] Complaint is made that the damages awarded were excessive. For the reasons stated in White v. Chicago, etc., Ry. Co., 49 Mont. 419, 143 Pac. 561, we do not feel that we should diminish the amount of the recovery.

We find no variance between the pleadings and the proof and no error in denying defendant's motion for a directed verdict nor the order denying the motion for a new trial.

The judgment and order appealed from are affirmed.

Affirmed.

BRANTLY, C. J., and HOLLOWAY, PAT-
TEN, and COOPER, JJ., concur.

(87 Colo. 94)

GUTHRIE v. GIBSON. (No. 9332.)

(Supreme Court of Colorado. Nov. 3, 1919.)

1. **BILLS AND NOTES** — 496(3) — **INDORSE-
MENT; PRESUMPTION OF TRANSFER BEFORE
MATURITY.**

While Negotiable Instruments Law declares that, where the date of transfer does not appear, it is deemed prima facie to have been effected before maturity, the statute is merely declaratory of the common law, which, while recognizing the presumption in case of an indorsement, treated it as of slight value.

2. **BILLS AND NOTES** — 496(3) — **INDORSE-
MENT; EVIDENCE REBUTTING PRESUMPTION
OF TRANSFER BEFORE MATURITY.**

Where plaintiff, who acquired title to premises incumbered by a deed of trust securing a note, shortly after maturity of the note paid to the trustee, or to the payee of the note, a corporation of which the trustee was president, the amount thereof, with interest, and the trustee executed a release, etc., and about 16 years after the release was recorded, and after failure of the corporate payee, defendant, who was in possession of the note, which bore an indorsement by the trustee, and which had never been delivered to plaintiff, appointed a substitute trustee, who sold the premises, defendant buying them in, and for a considerable number of years thereafter allowed plaintiff to pay the taxes, held, in view of the long lapse of time, defendant could not defeat an action to quiet title on the presumption that he was a bona

fide holder without notice, and that the indorsement was made before maturity of the note.

Appeal from District Court, Kit Carson County; J. E. Little, Judge.

Action by Clementina E. Guthrie against Charles E. Gibson. From a judgment for defendant, plaintiff appeals. Reversed, with instructions.

Allen & Webster, of Denver, and Godsman & Godsman, of Burlington, for plaintiff in error.

John F. Mail, of Denver, for defendant in error.

SCOTT, J. This is an action by the plaintiff in error, plaintiff below, to quiet title to the N. E. $\frac{1}{4}$ of section 32, township 8 S., range 43 W. of the 6th principal meridian. The complaint is in the usual form in such cases, and alleges ownership, possession, and title in the plaintiff, the claim of an adverse interest by the defendant, and a prayer that title be quieted in plaintiff. The answer is in the form of a general denial, with allegations of fact upon which defendant relies for title.

The undisputed facts are that George S. Winchell, who was the owner of the premises, executed a deed of trust to Henry J. Aldrich, as trustee, in June, 1889, to secure the payment of a note, payable to the Colorado Securities Company, in the sum of \$400, due June 1, 1894. This trust deed contained a provision that in case of the death, inability, or refusal of the trustee to act, the holder of the note might appoint a substitute trustee. By mesne conveyances the title to the premises became vested in the plaintiff in 1891, subject to the said indebtedness.

Some time shortly after the maturity of the note the plaintiff transmitted to Henry J. Aldrich, or to the Colorado Securities Company, the principal sum and interest due on the note. Whereupon, and on the 27th day of December, 1894, Henry J. Aldrich, as trustee, executed a release of said trust deed, reciting full payment of the note, and that such release was executed at the request of the Colorado Securities Company. This release was recorded January 17, 1895. Plaintiff paid the note in good faith, but did not receive it from either Aldrich or the Securities Company, believing, as she testifies, that the release was all that was necessary.

During this period it appears that Aldrich was the president of the Colorado Securities Company. The plaintiff did not hear that there was any adverse claim under the note and trust deed until about 15 years after she had made the payment and obtained the release, or about 6 years prior to the time she instituted this suit, and more than 10 years after the note had been barred by the statute of limitations. In 1911 the defendant Gibson,

purporting to be the holder of the note, executed a writing, appointing John F. Mail as substitute trustee, who proceeded to sell the premises under the trust deed to Gibson, and to thereafter execute to Gibson his trustee's deed under which the latter now claims.

The note purports to have been assigned to Gibson by Aldrich, but such assignment bears no date, and there is no evidence tending to show whether the assignment was made before or after the maturity of the note. The plaintiff has paid all taxes assessed against the property from the date of her purchase in 1891 to the date of the trial.

There is no evidence as to the time when Aldrich ceased to be the president of the Securities Company, or in active charge of its affairs. Witness Patterson testified that he was appointed receiver of the Securities Company in March, 1895, and that the assignment on the note was in Aldrich's handwriting, and existed at the time of his appointment as receiver. It does not appear when the name of Gibson, assignee, which was in a different handwriting from that of Aldrich, was inserted.

[1, 2] The contention of the defendant is that there is a legal presumption that the note was transferred before maturity, and for such reason he must be held to be an innocent purchaser for value. It is true that by our negotiable instrument statute that, where the date of transfer does not appear, it is deemed *prima facie* to have been affected before maturity. Section 4508, Rev. Stat. 1908. But this is merely the re-enactment of the common law, and it has been generally held that such presumption is of slight value.

It is not disputed, but, on the contrary, affirmatively appears, that Aldrich, who was the president of the Securities Company and the trustee under the trust deed, executed the release of the trust deed. It must therefore be assumed that in so doing he received the payment of the debt to his company, and executed his trust as trustee. It must be assumed, further, that he acted in both instances in the exercise of full power and authority, in the absence of anything appearing to the contrary. Then the payee of the note received full payment of its obligation, and the trustee fully performed and discharged his trust. It no longer existed.

Nor can the holder of the note under the circumstances of this case sustain a right to revive it under the plea of the legal presumption of innocent purchaser for value before maturity. If we are able to gather anything from the testimony of Patterson on the subject at all, it is that he acquired the note as receiver for the company. He does not know when Aldrich signed the indorsement, nor when Gibson's name was written therein. Aldrich seems to have been beyond the confines of the United States, and Gibson, the defendant, who better than any other person

ought to have known when he acquired the note did not testify at all.

The release of the trust deed was filed for record January 17, 1895, and the defendant purported to appoint a substitute trustee on June 20, 1911, or more than 16 years afterward. His claim was then too stale to invoke the presumption of an innocent purchaser for value. Notwithstanding that he acquired his alleged trust deed on the 31st day of July, 1911, he continued to permit the plaintiff to pay the taxes on the premises up to the time of trial in 1916, without even an offer to pay them himself. The presumption of the law was not intended to shield fraud or gross wrong against innocent persons, nor to forgive inexcusable or unexplained laches or neglect, such as is so patent in this case.

The rule as to the weakness of the legal presumption is stated by Mr. Daniel, in his work on Negotiable Instruments, to be:

"But the presumption as to the time of acquiring the instrument is not a strong one. The indorsement is almost invariably without a date, and without witnesses. The transfer by delivery merely leaves no footprint upon the paper by which the time can be traced. And the presumption in favor of the holder as to the time of transfer being without any written corroborative testimony, is of the slightest nature and open to be blown away by the slightest breath of suspicion." Section 784a, 5th Edition.

The reason for the rule is very clearly stated in *Snyder v. Ryley*, 6 Pa. 164, 47 Am. Dec. 452. It was there said:

"The principle which raises a presumption of consideration for the transfer raises a presumption, also, that it was made in the usual course of commercial business, and consequently before the day of payment; for, as Lord Ellenborough said, in *Tinson v. Francis*, 1 Camp. 19, 'after a bill or note is due, it comes disgraced to the indorsee, and it is his duty to make inquiries concerning it, if he takes it.' But the contract of indorsement, being without date and without witnesses is so peculiarly susceptible of fraudulent practice upon the drawer, by precluding, perhaps, a just defence on original grounds; that the presumption of fairness primarily applicable to it is not only of the slightest kind, but open to be blown away by the slightest breath of suspicion. How easy it may have been for the payee, in this instance, knowing, perhaps, that he could not recover in his own name, to slip the note into the hands of an indorsee at the end of three years, and how tempting to the latter would be the opportunity thus to receive payment of a desperate debt, may be readily conceived. There must be many such temptations in commercial affairs, and before a holder can fold his arms, and take his stand on the basis of the presumption, it surely ought to appear that there are no unusual circumstances connected with the transaction; for every thing which does not naturally fall in with the current of mercantile dealing is ground of suspicion."

The circumstances of that case which were held to overcome the presumption, and place the burden upon the holder, were stated by the court to be:

"But it is agreed on all hands that, when such a case has been actually made, the defendant may make the plaintiff show when and how he became the holder. Were there not circumstances to make out such a case in the instance before us? In the first place, the plaintiff's demand, if an honest, was a stale, one—a most suspicious circumstance in case of commercial credit, which is founded on peculiar and exact punctuality of payment. Though the defendant had publicly repudiated the note, it was not put in suit for three years from the day it became due; and if the plaintiff was the holder of it all that time, he ought at least to give some reason for his forbearance. In the next place, payment was not demanded at the bank of Northumberland, at which the note was made payable in the body of it—not only a circumstance of suspicion, but one which, if taken as a distinct and independent point of defense, would have embarrassed the plaintiff very seriously, and perhaps fatally. Again, it does not appear that the note was protested, as is usual in such cases, or notice of dishonor given to charge the indorser, which would have been a measure of prudence if he were not insolvent; and, if he were, that would be an additional circumstance. Finally, the plaintiff refused to let the defendant inspect his books, a fact hardly reconcilable to honesty of purpose and fair dealing. All or any of these circumstances, proved or conceded, would be sufficient to cast the burden of proving the time and consideration of the transfer on the other side, and let in the evidence of want of consideration between the original parties. It certainly was in the plaintiff's power to show the actual truth, and had he failed to satisfy the jury that he had taken the note for value, and in the regular course of mercantile business, he would have left them to find as if the cause was depending between drawer and indorser."

The case was approved in *Tams v. Way et al.*, 13 Pa. 222, wherein the court said:

"The note in question was near six years due, before the action was instituted upon it. This fact, of itself, raised a violent presumption that it was not indorsed in the due course of com-

mercial business. This, in connection with the other facts stated in the affidavit of defense, tended to show that it was indorsed when overdue."

The plaintiff in error assumed the issue of transfer before maturity and relies on it. The burden then under the circumstances of this case was upon him to establish the same by proof. After approving the rule as stated by Mr. Daniel, it was said by the Supreme Court of Missouri (*Henry v. Sneed*, 99 Mo. 423, 12 S. W. 666, 17 Am. St. Rep. 580):

"The bank thus assumed the affirmative of the issue itself had made. How did it support that issue? It should certainly have done so by proof of an equally affirmative character. This it signally failed to do. Thompson does not state that the notes were transferred to the bank prior to maturity. He does not pretend to give the dates when the transfer occurred. He says he has 'a letter that will tell,' but he does not produce it, and it is only by circuitous inference and a comparison of dates that the conclusion can be reached that the notes were negotiated while current. This sort of testimony does not meet the exigencies of the rule before mentioned. The bank was challenged by its self-raised issue to give the date when the transfer of the notes occurred, and it should have done so, in order to maintain its position of an innocent purchaser."

No case is cited that asserts a contrary rule to that stated by Mr. Daniel, and it is quite clear that the facts in the case at bar bring it within the rule.

Other assignments of error are urged, which present interesting questions, ably discussed by opposing counsel, but are not necessary or important to consider in this case, in view of what has been said.

The judgment is reversed, with instructions to enter judgment for the plaintiff in error, in accordance with the prayer of her complaint.

Judgment reversed with instructions.

GARRIGUES, C. J., and BAILEY, J., concur.

(21 Ariz. 1)

INDEPENDENT MEAT CO. OF JEROME v. CRANE CO. (No. 1722.)

(Supreme Court of Arizona. Nov. 28, 1919.)

1. MECHANICS' LIENS §32—LIEN DEPENDENT UPON MACHINERY BECOMING PART OF IMPROVEMENT.

To come within Civ. Code 1913, par. 3639, and entitle a materialman to claim and enforce a mechanic's lien against the owner for machinery furnished, it must appear that the same became a part of the construction, erection, or completion of the improvement, and became fixtures to the realty or machinery necessary in accomplishing the construction of the improvement.

2. MECHANICS' LIENS §212(2)—WAIVER BY RETENTION OF TITLE TO MACHINERY FURNISHED.

A clause reserving title to machinery in the party contracting to furnish it until paid for held to indicate no intention to release the property furnished from the statutory mechanic's lien after it became permanently affixed to the building.

3. MECHANICS' LIENS §209—WAIVER BY REQUIRING PAYMENT IN ADVANCE FOR OTHER MATERIALS.

Neither one contracting to furnish machinery and supplies for completing and equipping a plant, nor the party furnishing to such contractor the materials, would waive their right to claim a materialman's lien for the machinery and supplies furnished which were not paid for, by requiring payment in advance for other like machinery and supplies furnished for the same improvement by shipment O. O. D.

4. MECHANICS' LIENS §108—RIGHT OF MATERIALMAN FOR MATERIAL FURNISHED INSTALLED BY ANOTHER.

One furnishing machinery and supplies to one under contract to install them in a slaughterhouse, cold storage, and ice plant was a materialman, and had the right after they became fixtures and part of the realty to a lien therefor under Civ. Code 1913, par. 3639.

5. MECHANICS' LIENS §72—PARTY CONSTRUCTING IMPROVEMENT AS AGENT OF OWNER FOR PURPOSE OF LIEN.

In view of Civ. Code 1913, par. 3639, stating that a person having charge or control of the construction of the whole or part of the building shall be held to be the agent of the owner for the purpose of giving a materialman a lien, one contracting to sell and install machinery became the owner's agent, so that one of whom he bought materials had a right to a lien; the owner being protected under paragraph 3650, and by requiring the contractor to give bond.

6. APPEAL AND ERROR §970(3)—TRIAL §59(2)—ORDER OF INTRODUCING EVIDENCE DISCRETIONARY.

The order of introducing evidence at trial is largely, almost exclusively, in the sound legal discretion of the trial judge, and will not be ground for reversal, where the record does not show abuse of such discretion.

Appeal from Superior Court, Yavapai County; J. J. Sweeney, Judge.

Action by the Crane Company against the Independent Meat Company of Jerome and another. Decree for plaintiff, and the named defendant appeals. Affirmed.

The appellee, as plaintiff, commenced this action against the appellant and another party known as Horstmann & Plomert, to recover the value of certain machinery furnished said Horstmann & Plomert, to be used in and about a cold storage and ice manufacturing plant constructed for appellant, and to declare and fix a materialman's lien on the said plant, and a foreclosure of the said lien.

The cause was tried by the court, and judgment was rendered in favor of the plaintiff for the amount of its claim, a lien in its favor was found and fixed on the property described in the complaint, and a decree foreclosing such lien was rendered with the usual order of sale in its satisfaction. From which decree, finding, and order, the defendant Independent Meat Company appeals.

Anderson & Ellis, of Prescott, for appellant.

Mitchell & Linney and Clark & Clark, all of Prescott, for appellee.

CUNNINGHAM, C. J. (after stating the facts as above). The controverted question in this case is whether Crane Company is given the right under the statute to claim a lien for the machinery and supplies it furnished Horstmann & Plomert, and which they actually used in the improvement in question. The appellant states the question as follows:

"Was the contract between Horstmann & Plomert and the Independent Meat Company a contract for the sale of the machinery and supplies therein mentioned, or was it such a contract as made Horstmann & Plomert contractors within the meaning of paragraph 3639 (C. O. Arizona 1913)?"

Appellant says that—

"A construction of this contract determines the merits of this appeal. * * *

And it contends that upon a proper construction of the contract mentioned the appellee, Crane Company, cannot be considered as a party entitled to a lien under said paragraph 3639, for the reason that Crane Company furnished the machinery and supplies to Horstmann & Plomert on a contract of sale, and that Horstmann & Plomert resold the same to appellant Independent Meat Company; that under said contract Horstmann & Plomert were the sellers of the machinery and supplies to the Independent Meat Company, and not a contractor on the construction of appellant's plant, and as

such contractor the machinery and supplies were purchased by it from Crane Company for the owner of the improvement.

The machinery and supplies involved were furnished by Crane Company at the request of Horstmann & Plomert, were actually used in the plant, and were reasonably worth the amount claimed. Crane Company, in due time, served, filed, and recorded a notice of its claim of a lien under the provisions of the lien statutes, alleging in such notice that it furnished such machinery and supplies to Horstmann & Plomert as the contractor employed by the appellant Independent Meat Company "to install such ice making and refrigerating machinery and power plants." The said notice further alleges that the said machinery and supplies "were furnished under an oral understanding and agreement with the said Horstmann & Plomert that Crane Company would furnish materials as ordered and charge the reasonable value thereof; that, except as above stated, there were no terms, time given, or conditions agreed upon."

The answer denies that Horstmann & Plomert were contractors to furnish the machinery and supplies, but alleges that they were materialmen, and, as such, contracted to sell and install the said machinery and supplies in Independent Meat Company's building as it was being then constructed.

Upon this issue of fact, the trial was had, and judgment for Crane Company followed. The contract between Independent Meat Company and Horstmann & Plomert was in writing. We quote portions that are applicable to the questions raised in this lawsuit, omitting formal language of an advertising nature and the portions setting forth the specifications of the items to be furnished. The instrument is in the form of a communication addressed to Independent Meat Company, of Jerome, and says:

"We propose to furnish you one Frick Company's * * * double cylinder * * * ammonia compressor and appurtenances, for your slaughterhouse in Jerome, Arizona, etc. * * * All in accordance with the following specifications * * * (giving specifications for the machinery to be used in the slaughterhouse). * * *

"Horstmann & Plomert will furnish one skilled erecting engineer with tools to erect and put the machinery furnished under this contract into operation, who will remain for a period of three days after completion of the installation of each plant to make needed adjustments, etc., and to give instructions in the care and operation of the machinery. If the installations come up to contract in performance and otherwise purchaser will then accept the same as a fulfillment of the contract, subject only to the guaranty of workmanship and materials as hereinbefore contained; if they do not comply Horstmann & Plomert are to have a reasonable time within which to remedy defects or deficiencies, which shall corre-

spondingly postpone the time of payment. If Horstmann & Plomert fail to make the machinery comply as aforesaid, they are to remove it and refund all payments with interest thereon, which is to end the whole transaction and all liability of both parties under this contract. In any event, if the parties hereto fail to agree amicably, Horstmann & Plomert are to have the privilege, if they so elect, to remove the machinery and refund the payments with interest as full and final settlement of the whole transaction.

"Horstmann & Plomert will furnish to purchaser the services of a competent working construction foreman to take charge of the construction of the cold storage room, chill room and cold storage box, as referred to in these specifications, and of such other carpenter, construction, and installation work as purchaser may direct.

"* * * [Provision for the payment of the foreman's wages by the purchaser, which payments and wages are in addition to the contract price as mentioned.]

"Horstmann & Plomert will furnish all necessary working drawings and details for the construction of all refrigerating and chill rooms of cooling towers, also drawings showing general arrangement of both plants.

"Purchaser is to build all foundations, do all insulating, carpenter and woodwork of every description; make provisions for carrying off waste and drip, provide suitable openings into the buildings for the admission of the machinery, and openings in walls and partitions for pipe lines.

"Horstmann & Plomert guarantee workmanship and material for one year, natural wear, tear, and accident excepted, provided the machinery is properly operated in accordance with their instructions, and in case any damage be caused by any material or workmanship proving defective their liability to be limited to repairing such defects or furnishing duplicate parts, free of charge, f. o. b. Los Angeles, California.

"Purchaser agrees to and will make all cash advances for such disbursements as otherwise would have to be made by Horstmann & Plomert in connection with the delivery, erection and installation of the plant herein specified. Any sum so advanced shall be deducted from the second payment at the time it becomes due.

"The title to said machinery is not to pass to purchaser, but is to remain vested in Horstmann & Plomert until the purchase price is fully paid in cash, and purchaser is to keep the said machinery fully insured in the meantime in solvent insurance companies for the protection of the interest of Horstmann & Plomert therein, and the policies therefor to be delivered to them. All loss by fire and other casualties for which Horstmann & Plomert are not indemnified and paid under such policies of insurance, to be borne by the purchaser on and after the arrival of said machinery and apparatus, or any part thereof, at Clarkdale, Arizona.

"Horstmann & Plomert are not to be liable for any delays caused by fire, element, rebellion, riot, strikes, labor troubles, civil commotion, unusual delay in transportation, or any other matters beyond their control; nor

are they to be bound in any way by any *ex parte* test made by purchaser of any part of the machinery. * * *

"Purchaser agrees to and will pay Horstmann & Plomert for said machinery and apparatus the sum of forty-nine hundred dollars in U. S. gold coin as follows: [Providing for the payment of three installments.]

"All previous communications, provisions, agreements or contracts, verbal or written, not contained herein, are mutually abrogated and withdrawn, and no modification of this agreement shall be binding upon the parties, or either of them, unless such modification be in writing, duly accepted by purchaser and approved and accepted by Horstmann & Plomert.

"This order and contract is not binding until approved and accepted by Horstmann & Plomert at their office, Los Angeles, California."

The instrument is signed by parties and approved and accepted by Horstmann & Plomert at their office in Los Angeles.

The credit man for Crane Company saw and was given the opportunity to examine the foregoing instrument before the machinery and supplies were furnished by it to Horstmann & Plomert for the improvement. The machinery and supplies were furnished without question or doubt for the purpose and with the intention of performing the terms and conditions of that contract.

[1] In order that Crane Company come within the statute as a party entitled to claim and enforce a mechanic's lien against the owner of the improvement for the payment of its claim for the said machinery and supplies furnished in the circumstances for the purpose and with the intention apparent from the record, the fact must appear that the machinery and supplies furnished became a part of the construction, erection, or completion of the improvement. The statute relied upon as giving the lien is as follows (paragraph 3639, Civ. Code 1913):

"Every person, firm or corporation who may labor or furnish materials, machinery, fixtures or tools to be used in the construction, alteration, erection, repair or completion of any building or other structure or improvement whatever shall have a lien on such house, building, structure or improvements for the work or labor done or materials, machinery, fixtures or tools furnished, whether said work was done or articles furnished at the instance of the owner of the building, or improvement, or his agent. The lien herein provided shall extend to the lot or lots of land necessarily connected with the building, structure or improvement made or erected; and every contractor, subcontractor, architect, builder or other person having charge or control of the construction, alteration, or repair, either in whole or in part, of any building or other structure or improvement, shall be held to be the agent of the owner for the purposes of this chapter, and the owner shall be liable, under the terms thereof, for the reasonable value of labor or materials furnished to an agent."

The plaintiff's action is prosecuted on the theory that the machinery and supplies furnished by it, Crane Company, was, in fact, material furnished and used in the construction of the slaughterhouse improvement. No lien arises for machinery furnished for a designated plant unless the machinery becomes a part of the construction, erection, alteration, or repair of the building, and the articles furnished become fixtures to the realty, or the machinery is a necessary appliance in accomplishing the construction of the improvement.

"The sale of the machinery to the owner of the mill, and the mere placing it in the mill, do not give rise to a mechanic's lien for it. But it is immaterial, so far as concerns the attaching of the lien, whether the building for which the machinery is supplied is in process of erection or has already been completed. Whether machinery is a fixture for which a lien arises upon the premises is to be tested by the inquiry whether it is so attached to the realty as to become a fixture and the further inquiry whether the machinery is adapted to the purposes for which the building was intended to be used or is used." 2 Jones, Liena, § 1335.

"Whether an article is furnished for the construction, alteration, or repair of a building, and is so attached to it as to become a part of it, is a mixed question of law and fact. * * * Whether a thing is a fixture depends largely upon the intention with which it is affixed to the realty; whether it is attached as a permanent fixture to the realty or not." 2 Jones, Liena, § 1341, and cases cited.

No party to this transaction has denied that the machinery actually furnished by Crane Company to Horstmann & Plomert was intended for other than to become a permanent part of the slaughterhouse building, and, as such, a fixture unless a test use proved it defective or unsatisfactory to the contracting parties. The fact is the machinery was, upon test, entirely satisfactory, and remains a permanent fixture, and part of the structure as it was installed by Horstmann & Plomert.

[2] In the Horstmann & Plomert contract with appellant, the following stipulations appear:

"The title to said machinery is not to pass to purchaser, but is to remain vested in Horstmann & Plomert until the purchase price is fully paid in cash, and purchaser is to keep the said machinery fully insured in the meantime * * * for the protection of the interest of Horstmann & Plomert, * * * etc." And, "If Horstmann & Plomert fail to make the machinery comply as aforesaid, they are to remove it and refund all payments with interest."

The appellant, after quoting the above, says, in argument that—

"The foregoing, as well as the whole contract, shows that the machinery, by intention of the parties, and in fact, is not a fixture, but is per-

sonal property, which was sold by Horstmann & Plomert to Independent Meat Company."

2 Jones, Liens, § 1340, has the following comment to make on such clause in a contract:

"A provision in a contract for furnishing machinery that the same shall remain the property of the vendor until paid for does not prevent such machinery from becoming fixtures when attached as such to a mill, nor does it prevent the vendor from enforcing a lien for the same"—citing *Case Mfg. Co. v. Smith* (O. C.) 40 Fed. 339, 5 L. R. A. 231; *Cooper v. Cleghorn*, 50 Wis. 113, 6 N. W. 491; *Great Western Mfg. Co. v. Hunter*, 15 Neb. 32, 16 N. W. 759; *Warner Elev. Mfg. Co. v. Capitol Invest., etc., Ass'n*, 127 Mich. 323, 86 N. W. 828, 89 Am. St. Rep. 473.

In *Clark v. Moore*, 64 Ill. 273, reading page 280, the court commented as follows:

"In their effort to retain a lien on the machinery furnished by appellees, they took no collateral or independent security. It was but a futile effort to retain a superior lien on the property furnished over and above other lienholders. Had these parties taken a mortgage on these lots and the building, which the law would have adjudged void, would any one claim that they could not assert their lien? The lien attaches to and incumbers the property to improve which the material is furnished, and the efforts to acquire a more specific and exclusive lien thereon in no wise manifests an intention to release the property from all lien and to look to other security for payment, but it shows the very opposite intention—an intention to hold, if possible, the property furnished liable for the payment of their claim."

I am satisfied that the clause in this contract, wherein Horstmann & Plomert stipulated to retain the title to the machinery until it was paid for in cash, thereby intended to hold, if possible, the property furnished liable for the payment of their claim, and they no wise intended by such stipulation to release the property furnished from their statutory mechanic's lien.

Whether Horstmann & Plomert could have removed the machinery because it was not paid for is a moot question in this case, because no effort was made by any party to exercise the right given in the contract. The property remains as it was placed, and we must treat it as we find it. It was placed in the slaughterhouse as part of the plant, and intended to remain such part of the plant unless removed because of some stipulation of the contract under which it was furnished; and, no effort having been made to enforce the stipulation and remove the machinery, we must determine that the original intention prevails, and the machinery is affixed permanently to the building, as a part thereof.

[3] The defendant offered to show that a part of the machinery and supplies shipped by Crane Company to be used in the build-

ing were shipped "C. O. D." to Independent Meat Company, with bill of lading attached. The draft accompanying the shipment was paid in each instance by the consignee.

The contract contains the following:

"Purchaser agrees to and will make all cash advances for such disbursements as otherwise would have to be made by Horstmann & Plomert in connection with the delivery, erection, and installation of the plant herein specified. Any sum so advanced shall be deducted from the second payment at the time it becomes due."

To a certainty, if all of the machinery and supplies sold by Crane Company to Horstmann & Plomert, and which was used in the said building, had been shipped to Independent Meat Company with draft attached to bill of lading, and by the Independent Meat Company paid, Crane Company would have no grounds to base their claim upon. But, as we understand the record, the items paid C. O. D. by Independent Meat Company are not included in Crane Company's account. Neither Crane Company nor Horstmann & Plomert would waive their right to claim a lien for machinery and supplies furnished which were not paid, by requiring payment in advance for other like machinery and supplies furnished for the same improvement. Crane Company's failure to require payment "C. O. D." for all machinery and supplies seems to be the parent of this lawsuit.

[4] The foregoing reasons and authorities support the position satisfactorily that the machinery and supplies became, in law, a part of the slaughterhouse structure and plant, being fixtures furnished and installed as such; that the party who furnished such fixed machinery and supplies to the owner of the slaughterhouse improvement was, under the statute, a materialman, and, unless the reasonable value of same is paid, is entitled to fix and enforce a mechanic's lien given such parties by paragraph 3639, supra.

Under the clear terms of the contract, Horstmann & Plomert undertook to furnish the said machinery and supplies and install the same permanently in the building for a definite sum and price, including the reasonable value of the machinery and supplies, and the work of installation. In the meaning of the mechanic's lien law, Horstmann & Plomert agreed for a fixed sum and price to erect a portion of the appellant's slaughterhouse building, in so far as the proper installation of the machinery and supplies in question served to enter into such construction.

Under such agreement, Horstmann & Plomert necessarily had charge of and control over that part of such construction as had reference to the installation of the said machinery—that part of the construction which caused the machinery to become a permanent fixture and a part of the freehold. See *Dimmick v. Cook*, 115 Pa. 573, 8 Atl. 627; *Siegmund v.*

Kellogg-Mackay-Cameron Co., 38 Ind. App. 95, 77 N. E. 1096; Scannell v. Hub Brewing Co., 178 Mass. 288, 59 N. E. 628.

[5] Again referring to the lien statute, paragraph 3639, supra, we find there the declaration that—

"Every contractor, subcontractor, architect, builder or other person having charge or control of the construction, alteration, or repair, either in whole or in part, of any building or other structure or improvement, shall be held to be the agent of the owner for the purposes of this chapter, and the owner shall be liable, under the terms hereof, for the reasonable value of labor or materials furnished to an agent."

It seems too clear for argument that the written contract entered into by and between Horstmann & Plomert and Independent Meat Company gave and was designed to give Horstmann & Plomert charge and control of a part of the construction of the slaughterhouse. So construed, they thereby became, for the purposes of the mechanic's lien laws, the agent of the owner for the purposes of extending to the Crane Company a lien for the materials furnished such owner on the order of such owner's agent, Horstmann & Plomert.

The appellant cites *Gates Iron Works v. Cohen*, 7 Colo. App. 341, 43 Pac. 667, *Bryson v. McCone*, 121 Cal. 153, 53 Pac. 637, and *John A. Roebling Sons Co. v. Humboldt Electric Light & Power Co.*, 112 Cal. 288, 44 Pac. 568, as authority for holding that Horstmann & Plomert, under their contract with Independent Meat Company, were materialmen and not contractors, and as such Crane Company sold them the machinery in question on their credit as such materialmen. The *Roebling Sons Co. Case*, 112 Cal. 288, 44 Pac. 568, seems to so hold under the California statute as it then existed. But our statute is sufficiently broad in its terms to give the seller of material a lien on the real property in which the articles are used and become a part, whenever the articles are furnished for that purpose on the order of the owner or his agent, and for the purposes of the lien law, any person having charge or control of any part of the construction, alteration, or repair of any building or other structure or improvement becomes the agent of the owner of such improvement for the purpose of fixing a lien in favor of the seller furnishing the articles.

It is not a question of whether the party ordering the articles is a contractor, but under our statute an inquiry goes no further than to determine whether the party who ordered the articles is, in the mechanic's lien law the agent of the owner; if so, the owner is liable for the reasonable value if the articles so furnished became incorporated in the structure for which they were intended.

Paragraph 3650 provides for the procedure

and liabilities in case a "lien shall be filed or notice given under the provisions of this chapter, by any person other than a contractor." In such case, "it shall be the duty of the contractor to defend any action brought thereupon at his own expense; and during the pendency of such action the owner may withhold from the contractor the amount of money for which such lien shall be filed as aforesaid, and in case of judgment against the owner or his property, upon the lien, he shall be entitled to deduct from any amount due and to become due by him to the contractor as aforesaid, the amount of such judgments and costs, and if he shall have settled with the contractor in full, or if such an amount shall not be owing to the contractor, such owner shall nevertheless be entitled to recover back from the contractor and his bondsmen the amount so paid by him, for which the contractor was originally the party liable.

The owner is protected or he may provide for ample protection from liens for articles furnished those who are in charge of or in control of an improvement erected on his premises at his instance. The facts in evidence amply support the judgment.

[6] The other questions raised in appellant's assignments relate mainly to the order of introducing evidence at the trial. The order of proof is largely, almost exclusively, in the sound legal discretion of the trial judge. We see in this record no grounds for disturbing the judgment because of an abuse of such discretion. The other questions have been carefully examined, but we find no reversible error in the record.

Judgment affirmed.

ROSS and BAKER, JJ., concur.

(21 Ariz. 15)

ARIZONA-HERCULES COPPER CO: v. CRENSHAW. (No. 1701.)

(Supreme Court of Arizona. Nov. 28, 1919.)

1. MASTER AND SERVANT §87—EMPLOYERS' LIABILITY LAW GOVERNING HAZARDOUS OCCUPATIONS.

The Employers' Liability Law, for the protection of employes in hazardous occupations, should be remedially applied to bring within its beneficial operation all workers whose accidental injuries are the inherent result of occupational risks and hazards.

2. MASTER AND SERVANT §318(1)—"INDEPENDENT CONTRACTOR."

One under written contract to sink a shaft for a mining company at an agreed price per foot, specifying no definite number of feet nor time for completion, and obligating him to furnish all necessary labor and sink the shaft under instructions of company's foreman, held

not an "independent contractor," but a mere agent of the company for the purpose of procuring workmen.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Independent Contractor.]

3. EVIDENCE \Rightarrow 424 — PAROL EVIDENCE TO SHOW WHAT CONTRACT WAS.

Even though a contract showed on its face that the party in charge of the work was an independent contractor, still plaintiff seeking damages for the death of his intestate servant, not a party to the contract, under the Employers' Liability Law, was not precluded from proving by parol testimony that such party was not in fact an independent contractor, but the mere agent of the defendant corporation.

4. MASTER AND SERVANT \Rightarrow 332(3) — INDEPENDENT CONTRACTOR; QUESTION FOR JURY.

In an action under Employers' Liability Law for the death of plaintiff's intestate who was working for one under a written contract to dig a mine shaft for defendant, extrinsic evidence on the question as to whether the contractor was an independent contractor or a mere agent of defendant for the purpose of procuring workers, *held* sufficient to go to the jury.

5. APPEAL AND ERROR \Rightarrow 1064(1)—HARMLESS ERROR IN INSTRUCTION GIVING UNDUE PROMINENCE TO FACTS PROVEN WITHOUT CONTRADICTION.

An instruction violating the rule that certain facts and circumstances should not be given undue prominence is not prejudicial, where the facts singled out were proven by practically uncontradicted testimony.

6. MASTER AND SERVANT \Rightarrow 332(4) — INDEPENDENT CONTRACTORS; INSTRUCTION AS TO VALIDITY OF CONTRACT.

In an action under the Employers' Liability Law for the death of a worker in a mine shaft, defended on the ground that deceased was employed by an independent contractor, evidence involving the integrity of the contract *held* to warrant the court in reading as a part of its charge Employers' Liability Law (Civ. Code 1913, par. 3160), invalidating contracts to exempt employer from liability.

7. MASTER AND SERVANT \Rightarrow 330(2) — INDEPENDENT CONTRACTOR; ADMISSIBILITY OF INDEMNITY INSURANCE POLICY.

In an action for the death of a worker in mine shaft, defended on the ground that he was employed by an independent contractor, a policy of indemnity insurance issued to the defendant covering deceased was admissible as a circumstance to show the relation between defendant and the contractor.

Appeal from Superior Court, Maricopa County; F. H. Lyman, Judge.

Suit by John W. Crenshaw, as administrator of the estate of Manuel Segura, deceased, against the Arizona-Hercules Copper Company, a corporation. Verdict and judgment for plaintiff, and defendant appeals. Affirmed.

On the 18th day of February, 1918, the appellee, John W. Crenshaw, as administrator of the estate of Manuel Segura, sued the appellant, the Arizona-Hercules Copper Company, a corporation, in the superior court of Maricopa county, in damages, for personal injuries resulting in the death of his intestate. The suit was brought under the Employers' Liability Law of the state (Civ. Code, 1913, pars. 3153-3162), and upon the theory that the appellant was engaged in the hazardous occupation of mining, and that appellee's intestate was an employé of the appellant as a miner at the time of his death; that on the 18th day of September, 1916, the said intestate was killed by an unavoidable accident arising out of and occurring and happening in the course of the said employment and whilst he was engaged in work, labor, and service for the appellant; and that said accident was due to the condition and conditions of such occupation and employment, and occurred and happened without any fault upon the part of the said intestate. On April 2, 1918, the appellant filed its answer to the appellee's complaint, and, after admitting its corporate existence and that it was engaged in the hazardous occupation of mining, denied each and every allegation in the complaint contained, except those expressly admitted, and furthermore pleaded as separate and affirmative defenses, that if the deceased came to his death as in the complaint alleged, it was by reason of his own carelessness and neglect, and that the deceased had assumed the dangers, risks, and hazards of the business, and further pleaded that the deceased was in the employment of another.

The case was tried to a jury and resulted in a verdict and judgment for the appellee for the sum of \$5,000 damages. The appellant brings the case here on appeal, assigning a number of errors. Those deemed material or important are considered in the opinion.

W. L. Barnum and George J. Stoneman, both of Phoenix, for appellant.

Alexander & Christy, of Phoenix, for appellee.

BAKER, J. (after stating the facts as above). The appellant, in one of its assignments of error, complains of the ruling of the lower court in refusing to grant its motion, made at the closing of all the evidence in the case, to direct the jury to return a verdict in its favor, on the ground and for the reason that the evidence was insufficient to prove that the appellee's intestate was in the employment of the appellant at the time of his death, but that, on the contrary, the evidence showed that the said intestate was in the employment of one Henry Nolte, an independent contractor. This assignment presents the controlling question in the case for determi-

nation and necessarily requires of us an examination into the state of the evidence. As to the law, it is frequently said in the cases that—

“ * * * To draw the distinction between independent contractors is often difficult, and the rules which courts have undertaken to lay down on the subject are not always simple of application.”

But we do not think that the legal principles applicable to the facts of the present case are greatly involved or difficult to comprehend.

In the recent case of *Swansea Lease, Inc., v. Molloy*, 183 Pac. 740, the writer of the present opinion had occasion to examine the question, and many authorities from different jurisdictions are there cited. There is a vast amount of learning upon the subject, and the collation of authorities, as found in the notes attached to the following cases, furnish an abundance of authorities upon the subject. *Richmond v. Sitterding*, 101 Va. 354, 43 S. E. 562, 65 L. R. A. 445, 99 Am. St. Rep. 879; *Messmer v. Bell, etc., Co.*, 133 Ky. 19, 117 S. W. 846, 19 Ann. Cas. 1; *Cockran v. Rice*, 26 S. D. 393, 128 N. W. 583, Am. Cas. 1913B, 570; *Bodwell v. Webster*, 98 Neb. 664, 154 N. W. 229, Ann. Cas. 1918C, 625. In *Swansea Lease, Inc., v. Molloy*, *supra*, we said:

“The true test of a contractor would seem to be that he renders service in the course of an independent occupation, representing the will of his employer only as to the result of his work, and not as to the means by which it is accomplished. The one indispensable element to his character as an independent contractor is that he must have contracted to do a specified work, and have the right to control the mode and manner of doing it. [Quoting] *Shearman & Redfield on Negligence*, vol. 1 (6th Ed.) par. 164; [citing] *Hexamer v. Webb*, 101 N. Y. 377, 385, 4 N. E. 755, 54 Am. Rep. 703.”

Reverting to the record, we find from a brief review of the primary facts that the unfortunate man (Manuel Segura) came to his death in the manner following: Several miners, among whom was the deceased, were engaged in sinking a shaft on the appellant's mine. In the progress of the work, the men would be lowered to the bottom or raised to the mouth of the shaft by means of a heavy iron bucket with a ball, attached to a steel cable, one end of which was fastened to the ball of the bucket and then carried over a sheave wheel which was set into a gallow's frame directly over the mouth of the shaft; the other end of the cable was attached to and wound around a drum attached to a hoist which was operated by a gasoline engine. The men would ride the bucket in being lowered to their work or when being raised to the mouth of the shaft after quitting work. On the 18th day of September, 1916, the deceased and several other miners were upon the

bucket and were being lowered in the shaft to their work when the end of the cable became by some means detached from the ball of the bucket, at a point in the shaft about 200 feet from the bottom, and the bucket and the men were precipitated or thrown to the bottom of the shaft. Four of the men were killed by the accident, including the appellee's intestate. That the accident happened unmixed with any negligence or want of care upon the part of the deceased is not controverted or questioned by the evidence.

[1] It would be difficult to conceive, by any flight of the imagination, a case that would more completely fall within the letter and spirit of the Employers' Liability Law of this state than the case made by this uncontradicted evidence, providing, only, that the deceased was an employé of the appellant at the time of the accident. That law is a just and humane law. It was adopted pursuant to a constitutional mandate, and was enacted to carry out the legislative purpose that accidents sustained by those who do the work of an industry should be borne by the industry and paid out of the trade product, and not left to fall harshly upon the disabled worker, or his dependent widow and children. It supersedes, and entirely supplants, the historic concept of the common law, and all former statutes, that the right of recovery for industrial accidents can only arise from a breach of the master's duty as to care and safeguards. Hitherto the master could only be made to respond in damages when his servant was injured through his (master's) fault. The new concept is that the master must answer, regardless of his (master's) fault. This new and different scheme and basis of indemnity for industrial accidents should be remedially applied by the courts, with a view of bringing within the beneficial operation of the law all workers whose accidental injuries are the result of inherent occupational risks and hazards, rather than with the view of excluding from the operation and protection of the law workers who justly and fairly fall within its provisions. *Arizona Copper Co. v. Hammer*, 250 U. S. 400, 39 Sup. Ct. 553, 63 L. Ed. —; *In re Rheinwald*, 168 App. Div. 425, 153 N. Y. Supp. 598.

[2] The question is: Was the deceased, Manuel Segura, in fairness and fact, an employé of the appellant at the time of his death? The answer to the query depends upon what was the relation of Henry Nolte to the appellant. Was Nolte merely the agent of the appellant, or was he an independent contractor? The two questions are so correlated that the determination of one determines the other. Nolte put the deceased at work in the shaft; he hired him. This fact is conceded in the record. Nolte was engaged in sinking the shaft in which the deceased lost his life, under a written contract with the appellant; hence the importance of considering

the contract. It is not practical to set the contract out at length, and we shall deal only with the stipulations found therein which tend to throw light upon the question. Counsel for the appellant strenuously contend that the contract upon its face shows that Nolte was an independent contractor. In this contention, we think counsel are clearly mistaken. The contract was for sinking a three-compartment shaft, 15 feet 10 inches, by 8 feet 8 inches, in the clear, at the agreed price of \$35 per foot. The contract does not fix any definite number of feet that the shaft was to be sunk. No time is fixed within which the work was to be completed. Nolte was to furnish all necessary labor, and was to carry on the work of sinking the shaft under the instructions of the appellant's foreman. The fact that the contract does not fix the number of feet that the shaft was to be sunk left it optional with the appellant to close down the work at any time without breach of the contract. So, too, Nolte had the right to quit work at any time without breaching the contract. At most, the contract was in legal effect merely that the appellant would pay Nolte for such work as he might do in sinking the shaft at the rate of \$35 per foot. The work to be done was indefinite in amount, and subject to discharge and control by the appellant. Such a contract is not an independent contract, but is clearly dependent.

In the case of *Cockran v. Rice*, *supra*, the contract was to do plowing at the price of \$1.25 per acre, without stating any specified number of acres to be plowed, and the court, in declaring such a contract not to be independent, said:

"To constitute an 'independent contractor,' the contract itself must be one the performance of which will produce a certain understood and specified result—a contract which contemplates a definite beginning, continuance, and ending. A test of the relationship between the employer and the employé is the right of the employer under the contract to control the manner and continuance of the particular service and the final result. No single fact is more conclusive as to the effect of the contract of employment, perhaps, than the unrestricted right of the employer to end the particular service whenever he chooses, without regard to the final result of the work itself. Under the evidence in this case, there was no contract to plow any specified number of acres. Under the employment shown, Stevens could plow at a specified rate per acre and quit when he chose, or Rice could terminate such service at any time, without a breach of the contract to be performed. At most, the contract was merely to pay for such plowing as might be done by Stevens at the rate of \$1.25 per acre. Such contract did not constitute Stevens an independent contractor."

The stipulation in the contract that the work of sinking the shaft should be carried on under the instructions of the foreman of

the company is, in our opinion, inconsistent with the theory that the contract was independent. Whether this clause means that the company's foreman was to have the right to give orders to Nolte in reference to the methods and details of accomplishing the work is not entirely clear, but we think that we are justified in giving that construction to the clause.

Conceding, as we do, that a contract independent in its nature, and made and entered into in good faith, and without any intent or purpose to avoid the liability fixed by the Employers' Liability Law, may be a valid and binding contract, although it may have the legal effect to avoid the liability fixed by the statute, yet it must be conceded that the courts will narrowly watch such a contract, and if a reasonable construction can be placed upon it, or any of its terms, that will preserve the liability of the employer as fixed by the statute, the courts will not hesitate to so construe the contract. If the appellant through its foreman had the right by virtue of this stipulation, as we think it did have, to instruct Nolte in reference to the methods and details of the work, Nolte was not an independent contractor, for the decisive test is: Who has the right to direct what shall be done and when and how it shall be done? In other words, who has the right to control the work?

The provision that Nolte was to furnish all the necessary labor to accomplish the work, if it stood alone and was construed by itself, would indicate that Nolte was an independent contractor; but the relation of Nolte is to be determined from the contract as a whole—by its spirit and essence—and not by the wording or phraseology of a single sentence or paragraph. *Swansea Lease, Inc., v. Molloy*, *supra*. Considering the contract as a whole, we think the provision in reference to furnishing the necessary labor is reasonably susceptible of the construction that Nolte was the mere agent of the appellant for the purpose of procuring and furnishing laborers to do the work. It seems unreasonable to conclude that Nolte would have been willing to expend his money and occupy his time in procuring laborers to do the work under a contract which fixed no specified extent of the work and which contract might be terminated at any time by the appellant.

[3] Assuming however, but not conceding, that the contract in its face showed that Nolte was an independent contractor, still the appellee was not precluded from proving by parol testimony that Nolte in fact was not an independent contractor, but a mere agent of the appellant. The deceased, Segura, was not a party to the contract. The rule is that, as between a third party and either party to a contract, it may be proven by parol testimony that the contract is different from what it purports to be on its face. *Luckle v. Diamond*

Coal Co. (Cal.) 183 Pac. 178; *Watson v. Hecla Mining Co.*, 79 Wash. 383, 140 Pac. 817. It was therefore permissible for the appellee to show, by parol testimony, not only the circumstances under which the contract was made by the appellant and Nolte, but also the conduct of the parties while the work was being done under it, for the purpose of establishing the true relation of Nolte to the appellant.

[4] It appears from the evidence that Nolte was required to make, and did make, daily written reports to the appellant, as to the work being done in the shaft, showing the men employed therein, including the deceased; that he gave no bond or other security to the company for the faithful performance of the work, and that he had no means other than that earned from the company which he might use for the purpose of sinking the shaft, and that he was financially irresponsible, and that he did not obtain indemnity insurance against injury to the men working in the shaft; that the company carried the deceased, Segura, on its pay roll and paid him his wages; that the company deducted from his wages insurance and hospital dues; that the company procured indemnity insurance against liability for injuries to its employees, and paid premiums therefor, and made return of the compensation earned by its employees upon which the premiums were based as shown by its pay rolls, and the deceased was included in such return; and that the company reported to the insurance company the accident wherein the deceased was killed. It may be that neither one of these facts, standing alone, would be sufficient to determine the relation of Nolte to the appellant; but if they all be considered together, in connection with the incomplete contract and the control of the work by the company as therein indicated, a case is made out sufficient to go to the jury upon the relation of Nolte to the company, and the jury having necessarily found by their verdict that Nolte was the mere agent of the company in the construction of the shaft, and, consequently, that the deceased, Segura, was a servant or employee of the company, their conclusion in that respect is binding upon us. At most, the evidence is susceptible of two interpretations—one that Nolte was an independent contractor, and the other that he was a mere agent—and, this being so, the question was one for the jury and not for the court.

[5] The court in one instruction grouped a number of facts proven in the case and told the jury they might consider these facts, together with all the other facts and circumstances in the case, in determining whether appellee's intestate was an employee of the company. Complaint is made of this instruction, because it is said that it singles out certain facts and gives them undue prominence. We do not think there is any merit in this con-

tention. The general rule is that an instruction should not give undue prominence to facts by singling them out for special consideration, and ordinarily the instruction attacked would be held to be erroneous as violative of the rule; but on examination of the record we find the facts embraced in the instruction were all proven by practically uncontradicted testimony, and, this being so, we can see no valid reason why the jury should not be told that they might consider these facts with all the other facts and circumstances proven in the case. This the jury were told they might do. Had there been any serious dispute about the facts embraced in the instruction, our conclusion might be different. While we do not, under the circumstances, condemn this particular instruction, we do not approve of it as good practice. It would have been better had the instruction not been given. 38 Cyc. 1678; *Gordon v. Burris*, 153 Mo. 223, 54 S. W. 546; *Pilkins et al. v. Hans et al.*, 87 Neb. 7, 126 N. W. 864.

[6] The court, as a part of its charge to the jury, read paragraph 3160, Civil Code (1913), to the effect:

"That any contract, rule, regulation or device whatsoever, the purpose or intent of which shall be to enable any employer to exempt himself or itself from any liability created by this chapter, shall to that extent be void. * * *

This action of the court is attacked by one of the assignments of error for the reason that there was no evidence upon which to base such a charge. We differ with counsel for appellant on this point. There is evidence in the record that the contract between Nolte and the appellant on its face shows that it was executed on April 8, 1916. There is also evidence in the record that the notice stated that bids would be received for doing work up to 5 p. m., April 8, 1916. It further appears that the general manager of the appellant testified that the contract in question was not executed or entered into until after the time had expired for the reception of bids. It further appears that the certificate of the notary public who took the acknowledgment of the contract bears no date. Upon these facts and circumstances, the court might well have given the charge. The integrity of the contract was involved.

[7] Another assignment of error is based upon the ruling of the court, allowing the policy of indemnity insurance issued to the appellant by the Guardian Casualty & Guaranty Company, to be introduced in evidence. The policy was unquestionably admissible, as tending to show the real relation between the appellant and Nolte. True, it is not at all conclusive of that question, still it was a circumstance proper to be submitted to the consideration of the jury. In the case of *Laffery v. United States Gypsum Co.*, 83 Kan. 349, 111 Pac. 498, 45 L. R. A. (N. S.) 930, Ann. Cas. 1912A, 590, it is said:

(184 P.)

"Where it was a material question for the jury whether one acting as superintendent of a mine was so superintending it for the owner as its employé, or operating it for himself as an independent contractor, evidence that the owner held insurance indemnifying it against loss and damages from accidents to laborers in the mine, and of the terms of the policy, and of the correspondence between the owner and the insurance company and with the alleged contractor, was competent as tending to show the real relation between the person so superintending the operation of the mine and the mine owner."

See, also, note to *Walters v. Appalachian Power Co.*, 13 N. C. C. A. 115-119.

The other assignments of error have been carefully examined, but we do not find either one of them to be tenable, and consider that they are not of sufficient interest to require separate study and discussion.

The evidence authorized the verdict. The amount of damages awarded is exceedingly small considering that the deceased left a wife and two children. The instructions fairly presented the law to the jury.

No just reason appears for disturbing the recovery in the appellee's favor, and we therefore affirm the order and judgment of the lower court.

CUNNINGHAM, C. J., and ROSS, J.,
concur.

(21 Ariz. 28)

SMITH STAGE CO. et al. v. ECKERT.
(No. 1894.)

(Supreme Court of Arizona. Nov. 28, 1919.)

1. ACTION \S 47—JOINDER OF CAUSES OF ACTION FOR CONTRACT AND TORT.

Under Civ. Code 1913, par. 427, providing that actions ex contractu shall not be joined with actions ex delicto, a cause of action against a stage company by a passenger for injuries through its negligence cannot be joined with a cause of action on an indemnity policy.

2. ACTION \S 50(4)—JOINDER OF PARTIES HAVING DISTINCT LIABILITIES IMPROPER.

In a passenger's action against a stage company for injuries from its negligence, it is improper to join a company which issued an indemnity policy; their liabilities being separate and distinct.

3. INSURANCE \S 612(1)—IN ACTION ON INDEMNITY CONTRACTS, NECESSITY OF JUDGMENT AGAINST PRINCIPAL.

That an indemnity policy covering loss by reason of judgments against a stage company for injuries to passengers contains a clause inserted by order of the corporation commission providing that the policy was to inure to the benefit of any and all persons suffering loss or damage, and that suit might be brought thereon in any court having jurisdiction, does not make it unnecessary for the person injured

to first obtain judgment against the stage company before he can recover against the indemnity company on the policy.

4. CONTRACTS \S 162—SUCH CONSTRUCTION ADOPTED AS WILL HARMONIZE ENTIRE INSTRUMENT.

In construing a contract the court must adopt such construction as will harmonize all its parts, conflicting provisions to be reconciled by a reasonable interpretation in view of the entire instrument and the surrounding circumstances, a clause contributing most essentially to the contract being entitled to more consideration than one contributing less thereto.

Appeal from Superior Court, Gila County;
G. W. Shute, Judge.

Action by Walter Eckert against the Smith Stage Company and another. Judgment for plaintiff, and defendants appeal. Reversed, with directions.

L. L. Henry and Morris & Malott, all of
Globe, for appellants.

Hugh M. Foster, of Globe, for appellee.

ROSS, J. The appellee, who was the plaintiff below, brought his action against the appellant, the Smith Stage Company, a common carrier by automobile, to recover damages for injuries he claims were negligently inflicted or caused by the stage company while he was its passenger, and joined as codefendant the Western Indemnity Company, alleging that the Western Indemnity Company insured the Smith Stage Company, and all passengers which the said Smith Stage Company might undertake to transport, during the life of the policy, in their said automobiles, and particularly insured the Smith Stage Company and said passengers against injury while said transportation was being made in a certain Hudson car (being the car upon which plaintiff was hurt); that the said policy contained the following provision:

"In consideration of the premium at which this policy is written, and in further consideration of the acceptance by the Arizona Corporation Commission of this policy as a compliance with order No. —, it is understood and agreed that, regardless of any of the conditions of this policy, same shall inure to the benefit of any or all persons suffering loss or damage and suit may be brought thereon in any court of competent jurisdiction within the state by any person, firm, association, or corporation suffering any loss or damage. If final judgment is rendered against the assured by reason of any loss or claim covered by this policy, the company shall pay said judgment up to the limits expressed in the policy direct to the plaintiff securing said judgment or the legal holder thereof, upon the demand of said plaintiff or holder thereof, whether the assured be or be not financially responsible in the amount of the said judgment, and that this policy may not be canceled by either party, except that writ-

ten notice of the same shall have been previously given for at least ten days to said Corporation Commission prior to the cancellation of such policy. In all other respects the terms, limits, and conditions of this policy remain unchanged."

No other provision of the policy of insurance or indemnity is set out in the complaint, except that the liability is limited to \$5,000. The cause of action alleged against the Smith Stage Company is:

That on July 17, 1917, it, as a common carrier, agreed and undertook—for a consideration of 35 cents to be paid at the end of the journey—to safely transport plaintiff in one of its automobiles from Midland City to Globe, Ariz.; "that by its negligence the defendant failed to keep its said promise of safe transportation; that the said Smith Stage Company on said day so negligently drove said automobile at such an excessive rate of speed behind another automobile, and in the face of an approaching automobile, that it collided with the automobile in front of it, whereby the plaintiff was thrown from said automobile and his arm was permanently injured and its usefulness destroyed; that said the Smith Stage Company drove said automobile in excess of the statutory rate of speed allowed on said road at said place at said time; that said injuries to the plaintiff were the natural and readily foreseeable consequence of the negligence of the defendant, and the said negligence was the proximate and natural cause of said injuries; that said injury was received while the plaintiff was a passenger as aforesaid in the Hudson car while operated by the defendant the Smith Stage Company as a common carrier as aforesaid."

Following an allegation that the plaintiff was damaged in the sum of \$10,000 is a prayer that he recover against the stage company the sum of \$10,000 and the Western Indemnity Company the sum of \$5,000.

The defendant corporations moved an order of the court requiring plaintiff to state separately and in separate counts the cause of action on policy and the cause of action for negligence or breach of contract to carry; to strike certain portions of the complaint, which, if granted, would have left but one cause of action and one defendant, or, in the event said motions were denied, that the complaint be made more definite and certain, by requiring plaintiff to set forth whether the contract of carriage was express or implied, and if express, where, when, and by whom made, and that the alleged policy of insurance be set forth either in terms or effect, so that it could be determined if it covered the alleged injury to plaintiff. The defendants filed separate demurrers to the complaint alleging: (1) Defect of parties; (2) that several causes of action are improperly united; (3) that complaint is multifarious, in that it sets forth separate and distinct causes of action on several contracts against different defendants; (4) insufficient facts to constitute a

cause of action; and (5) misjoinder of parties defendant.

Both defendants pleaded the general issue. All motions and demurrers were overruled, and trial before a jury was had on general issue, which resulted in a verdict and judgment for plaintiff against both defendants for the sum of \$5,000. Both defendant companies appeal, and assign as errors the overruling of motions and demurrers, the admission in evidence, over objection, of insurance or indemnity policy, and the giving of certain instructions requested. The view taken of the demurrers will effectively dispose of the different motions, and we will therefore pass the assignments based upon the overruling of motions.

That the complaint states two causes of action, one against the stage company, and one against the indemnity company, is apparent. But it is said that both causes of action are upon contract; that against the stage company being for a breach of its agreement of safe carriage, and the one against the indemnity company upon its agreement of insurance or indemnity against loss or damage he might suffer while a passenger of the carrier company by its negligence. The indemnity company was not a party to the contract of carriage, and neither was the plaintiff a party to the contract of insurance or indemnity. The latter contract is between the stage company and the indemnity company, and to it we must look for the respective obligations and rights of the parties thereto, or any third party claiming rights thereunder. If any third person has any rights under the contract, whether it be indemnity against loss or liability, or insurance, it is not because of any contract of his, but because of a contract of another for his benefit. Two of the terms of the insurance or indemnity policy are as follows: The Western Indemnity Company agrees:

"(1) To indemnify the assured * * * against loss by reason of the liability imposed by law upon the assured for damages on account of bodily injuries including death resulting therefrom, accidentally suffered or alleged to have been suffered, while this policy is in force, by any person or persons (except employees) by reason of the ownership, maintenance, or use of any of the automobiles enumerated in item 5. * * * (c) No action shall lie against the company to recover under any of the agreements herein contained unless brought by the assured personally to recover money actually expended by him in satisfaction of claim or liability imposed by due process of law, resulting from injuries actually caused by reason of the ownership, maintenance, and use of said automobiles. * * *

We quote these two provisions of the policy at this time to show what kind of loss or damage the indemnity company bound itself to pay. In the first place, the loss or damage must be accidentally suffered; second, the

loss must be the result of bodily injuries or death; and, third, the accident and consequent injury must have been caused by the negligence of the stage company.

The law imposes no responsibility upon a common carrier for personal injuries unless the carrier is guilty of negligence. Under the common law, which controls in this jurisdiction, a common carrier is not an insurer of the safety of the passenger. So we see the liability of the indemnity company, under the terms of the policy, is limited to losses arising out of the torts of the assured stage company. It does not assume liability for losses that may be occasioned by the stage company's failure to keep or perform its contract of carriage. Therefore, if we construe the complaint as appellee would have us, as based upon a breach of contract of carriage, it is upon a cause of action without the terms and purview of the policy, and demurrable so far as the indemnity company is concerned. However, we are satisfied that the cause of action stated against the stage company is one sounding purely in tort, and that the loss or damage alleged falls within the terms of the obligation assumed by the indemnity company as expressed in the provision inserted in the policy at the request of the Corporation Commission; it being the provision set forth in the complaint.

[1] But, accepting this view of the complaint that it states a cause of action against the stage company for negligence and one against the indemnity company on contract, the causes being unrelated to each other, except as indicated, are they properly united? We think not. The statute (paragraph 427, Civil Code) provides: "Actions ex contractu shall not be joined with actions ex delicto." This is the common-law rule (1 O. J. 1065, § 209), and stands unaffected by any other provisions of our statute law. In *Continental Securities Co. v. Yuma National Bank*, 20 Ariz. —, 176 Pac. 572, we said:

"Where the Code classifies causes of action that may not be joined, such classification is binding upon the court."

[2] There is also a misjoinder of parties defendant. They are not jointly liable on the policy. The stage company's liability is one imposed by law for negligence. The indemnity company's liability is one arising out of contract. Their liabilities are separate and distinct. The stage company could not be sued on the policy, as it has assumed none of the obligations thereof; nor can the indemnity company be sued for the tort, as it was not a party to it. The two causes of action do not run against or affect both of the defendants, which we have held to be necessary before they can be joined as defendants. *Richard v. Warnekros*, 14 Ariz. 488, 131 Pac. 154; *Cont. Securities Co. v. Yuma National Bank*, supra.

It is manifest from an inspection of the

complaint that the action was brought upon the theory that the contract of the indemnity company was one for insurance. It is alleged that the indemnity company "particularly insured the said Smith Stage Company and said passengers against injury." If so, it is insurance against accidental bodily injury or death negligently caused by the carrier stage company in the operation of one of its automobiles, and solely the contract of the indemnity company. It is too clear for argument that a person insured against accident, in instituting suit on a policy to collect from insurer, need not join the owner of the vehicle in which or by which he was injured as a codefendant. Since the policy in this case names the particular kind of accident and the person by whom it must have been occasioned, the circumstances of the accident, as that it was negligent and committed by the stage company, would have to be set forth in the complaint, but only for the purpose of showing that the accident was one of the kind insured against. The stage company, however, is neither a necessary nor a proper party defendant in a suit upon the policy by the insured person, if it be an insurance policy.

[3] After much thought and investigation, we have concluded that the indemnity company's contract is not one of insurance, but one of conditional liability; the condition being that the injured person must first obtain a judgment against the assured stage company before he has any remedy against the indemnity company on the policy. The policy, before the provision relied upon by plaintiff was made a part thereof at the instance of the Corporation Commission, was the usual policy of indemnity against loss by the assured. By its terms no one could sue or recover thereon, except the assured, and he only after he had settled with the injured person his claim or judgment. The latter was not a beneficiary of the policy. But, granting that the policy is one of indemnity against liability, the rule is unchanged, except that some courts, in such cases, have held the liability on the policy an asset of the estate of the assured, and, as such, subject, by garnishment or other proper proceeding, to the payment of the injured person's judgment. In neither case may the injured sue directly upon the policy. *Allen v. Aetna Life Ins. Co.*, 76 C. C. A. 265, 145 Fed. 881, 7 L. R. A. (N. S.) 958, and notes; *Fuller's Accident and Employers' Liability Insurance*, 451-468; 1 *Joyce on Insurance*, §§ 27a, 27b. Mr. Fuller states, at page 464:

"It must first of all be borne in mind that these policies of insurance are secured to reimburse employers for damages sustained by reason of injuries to others for which they may be legally responsible. The policies are written, not for the sake of injured employees, but for the benefit of employers who have suffered

loss by reason of their common-law or statutory liability. The premiums are paid by the employers, and the employers are the beneficiaries thereof. The policies now most commonly in force are contracts of indemnity against loss, and not of insurance against liability. They are not subscribed to for the benefit of injured employes, and there is no privity between them and the employers. Therefore no action will lie under such policies until a loss has actually been suffered by the assured through the liquidation of a judgment of an injured employe, and then action can be brought only for the benefit of the assured."

The rules of interpretation employed by the courts in construing employers' indemnity are observed in the consideration of common carriers' indemnity against loss; they are governed by the same principles. 1 Joyce on Insurance, § 27e; *Patterson v. Adan*, 119 Minn. 308, 138 N. W. 281, 48 L. R. A. (N. S.) 184, and notes. It is seen, then, that under these forms of indemnity the injured employe or passenger and his rights receive very little consideration. It was only when the assured was financially able to respond in damages that he could be certain of collecting his judgment for injuries. If his judgment creditor were insolvent or a bankrupt, he could not sue on the policy, and, in some cases, has been denied the right to reach the proceeds of the policy by garnishment or otherwise. *Allen v. Aetna Life Ins. Co.*, supra.

When the policy in question was offered or proposed by the stage company and the indemnity company as their contract, the Corporation Commission, knowing as it did the little or no protection therein secured to a person injured, required the indemnity company to consent to the terms of the provision relied upon by the plaintiff, and the same accordingly was indorsed on the policy and became a part of the contract of indemnity. In that provision the indemnity company agrees that the policy shall inure to the benefit of any person, or all persons, suffering loss or damage, and such person or persons may bring suit thereon, and further agrees to pay, upon demand, any judgment that an injured person might obtain against the assured stage company, not to exceed the limits expressed in the policy, "whether the assured be or be not financially responsible in the amount of said judgment." In other words, under this provision of the policy, if the party claiming that he was injured establish in a suit against the carrier that he sustained loss or damage, he is not compelled to seek satisfaction of his loss or damage out of the assured, but can call directly upon the indemnity company to liquidate his judgment, and in default "suit may be brought" upon the policy. As we have seen, the agreement in the policy, as originally drawn, was that the indemnity company would indemnify the stage company—

"against loss by reason of the liability imposed upon the assured for damages on account of bodily injuries, including death, resulting therefrom, accidentally suffered or alleged to have been suffered while this policy is in force."

It also appears from what we have said that the words "loss and damage" mean a real loss—one, at least so far as the indemnity company is concerned, that has been put into judgment against the assured. The injured person must not only prove loss or damage, but he must prove that the loss or damage was caused by the negligence of the stage company. If he be injured ever so seriously without fault of the assured, there would be no responsibility, no loss or damage, within the contemplation of law. It will be noted that the provision inserted in policy by direction of the Corporation Commission was not intended to supplant all the terms and conditions of the original contract. Therein it is said:

"In all other respects the terms, limits and conditions of this policy remain unchanged."

One of the terms of the policy is that the injured person must first establish his claim by suit against the assured. His damages must be liquidated before he can enforce their payment from the stage company. The policy provides for immediate notice from the assured to the indemnity company of any accident, of any claim made for damages, and of any suit brought against it. The assured agrees to assist in defending suits brought against it by securing evidence, information, and the attendance of witnesses. To require these obligations on the part of the assured, or the injured person, for that matter, to be carried out, would not conflict with the provisions of the inserted clause, if it be held that the injured person may sue the indemnity company on the policy to recover his judgment against the assured, if he obtain one, and at the same time it will protect the indemnity company from possible collusion between the assured and the injured person, or from indifference upon the part of the assured. If the position of appellee is maintained, to the effect that the undertaking in the policy runs directly to the injured person, and is the joint and several obligation of the insured and insurer, it would follow that the injured person could sue the indemnity company thereon alone and without previous notice of the accident, or any claim of damages therefor, leaving the insurer to make his defense as best he could, without the aid of any party to the wrong out of which the cause of action arose.

[4] This unfair, not to say unreasonable, situation in which the indemnity company would be placed, we think, was not in contemplation of any of the parties to the contract. A more just and reasonable conclusion, it would seem, would be that it was within the contem-

plation of the contracting parties that the injured person must first establish his claim against the wrongdoer in his action for negligence and thereafter be assured of the fruits of his victory by being permitted to collect from the indemnity company. If it is held that the general expression in the inserted provision, that the policy "shall inure to the benefit of any or all persons suffering loss or damage and suit may be brought thereon * * * by any person, firm, association, or corporation suffering any such loss or damage," means that such suit may be brought on the policy only after such loss or damage has been established in an action against the assured, its terms are literally met, without in any way nullifying the other provisions of the contract that make it a condition precedent to the indemnity company's liability that the assured be first sued by the injured party and his loss or damage established. But if the injured person is permitted to sue the indemnity company on the policy before he has proved his loss or damage against the assured, one of the most important provisions of the contract is completely nullified. It is the duty of the court to adopt that construction of a contract that will harmonize all its parts. It is only by following the plaintiff's construction of the contract that the two provisions became inharmonious. We feel that we must follow the rule which states:

"Where two clauses are inconsistent and conflicting, they must be construed so as to give effect to the intention of the parties as collected from the whole instrument, and apparently conflicting provisions must be reconciled, if possible, by any reasonable interpretation; it being necessary for this purpose to consider the entire instrument and the surrounding circumstances. If one clause is at variance with another, the one contributing most essentially to the contract will be entitled to more consideration than that which contributes less, or, as has been said, the clause which essentially requires something to be done to effect the general purpose of the contract itself is entitled to greater consideration than the other." 13 C. J. 535, § 497.

We are therefore of the opinion that the policy in question "inured to the benefit" of plaintiff, and that he "may bring suit thereon" if the indemnity company, on demand after final judgment against the stage company, refuses to pay the same. In this view of the case it follows that the cause of action against the stage company was improperly united with the cause of action against the indemnity company, because they are separate and distinct causes of action against different defendants, and because the facts stated do not constitute a cause of action against the indemnity company, and because it resulted in a misjoinder of parties defend-

ant. Neither the policy nor the effect of it was properly pleaded, and it should not have been admitted in evidence against the indemnity company; and it was not competent evidence against the stage company, because the stage company was no party to it.

This leaves the instructions of which complaint is made, both those given and those refused, undisposed of. We have not examined them critically, and do not pass upon them, feeling that upon a retrial, if those given are not proper, they will not be asked, and, if asked refused, and that those requested will receive the same treatment.

For the reasons given, the judgment is reversed, and cause remanded, with directions to sustain demurrers as indicated and grant a new trial to the defendant the Smith Stage Company, with leave to the plaintiff to amend his complaint to conform herewith, if he may be so advised, and that the action against the indemnity company be dismissed.

CUNNINGHAM, C. J., and BAKER, J., concurs.

(21 Ariz. 41)

HARPER v. TIPPLE. (No. 1730.)

(Supreme Court of Arizona. Nov. 28, 1919.)

1. PARENT AND CHILD §2(3) — CUSTODY OF CHILD.

Father is entitled to minor child as against maternal grandmother, notwithstanding mother's dying request that grandmother have child, since mother was not vested with testamentary disposition of child during lifetime of father, and could not give child away without his consent.

2. PARENT AND CHILD §2(1), 3(1)—FATHER'S PROMISE NOT TO TAKE CHILD FROM GRANDMOTHER INVALID.

Father's promise not to separate his minor child from grandmother was void, as against public policy, for a father cannot make a valid and irrevocable contract, which relieves him from the legal obligation to maintain, support, and educate his minor child.

3. GUARDIAN AND WARD §10 — APPOINTMENT OF GUARDIAN IN DISCRETION OF COURT.

Statute relating to appointment of guardian for minor child vests in the appointing court or judge a very large discretion in the selection and appointment of a guardian; the paramount consideration being the welfare of the child rather than the technical legal right of the parent.

4. GUARDIAN AND WARD §10 — PARENT'S RIGHT TO CHILD EXCEPT WHERE DELINQUENT.

Court, in appointment of guardian, should not invade the natural right of the parent to the custody and care of an infant child, except upon a clear showing of delinquency on the part of the parent.

5. GUARDIAN AND WARD §13(4)—PRESUMPTION IN PROCEEDINGS FOR APPOINTMENT OF GUARDIAN.

In guardianship proceedings, involving father's claim to child as against parents of deceased mother, it will be presumed that father's second wife is a good woman, and will do all her duty demands that she should do to assist husband in nurture, care, teaching, and protection of the child.

6. APPEAL AND ERROR §1011(1)—REVIEW OF CONFLICTING EVIDENCE.

Where evidence is conflicting, or where different conclusions may be drawn therefrom, Supreme Court will not interfere with judgment of lower court.

7. GUARDIAN AND WARD §13(4) — PRESUMPTION OF FATHER'S COMPETENCY TO CARE FOR CHILD.

It will be presumed on guardianship proceeding that a father is competent to have the care and custody of his child, in the absence of any affirmative showing to the contrary.

8. PARENT AND CHILD §2(3)—ABUSE OF DISCRETION IN TAKING CHILD FROM FATHER.

Where father was an industrious man, of moral character and exemplary habits, had well-paying business, had pleasant home and family relatives, and had a deep affection for his infant child, court abused its discretion in taking child away from father and placing her in maternal grandparent's care, though father had remarried subsequent to death of child's mother, and had promised grandmother not to take child from her.

Appeal from Superior Court, Maricopa County; F. H. Lyman, Judge.

Application by Devello Tipple for appointment as guardian of the person and estate of Mary Elizabeth Harper, a minor, opposed by Monte Harper. From an order appointing applicant guardian, Monte Harper appeals. Reversed.

Devello Tipple, the maternal grandfather of Mary Elizabeth Harper, a minor child, applied to the superior court of Maricopa county for appointment as guardian of the person and estate of the minor, alleging in his petition, among other things, that the minor was the child of his daughter, Fannie Fern Harper, and her husband, Monte Harper, and that the child was about 5½ years of age; that about the 1st of May, 1915, the mother of the child, who was then suffering from tuberculosis, came to his home with her child and there remained until March 10, 1916, when she died, and that at the time of her death she gave the child to the petitioner and his wife to care for, raise, and nurture so long as they lived; that the father of the child, Monte Harper, was temporarily absent at the time of the death of his wife, the mother of the child; and that upon his return, very shortly thereafter, he promised the petitioner and his wife that they should

always have the child. It is further stated in the petition that the father of the child possesses no means whatsoever with which to maintain or care for the child, and that he is not an industrious man, and that he is not a fit or proper person to have the charge, custody, or control of the child. It is also alleged in the petition that the father of the child remarried in December, 1917, and that in November, 1918, the father requested the petitioner and the petitioner's wife to allow him to have the child for a short visit, to which they consented, but that thereafter the father refused to return the child to the possession of the petitioner and his wife, and now claims the right to keep the child in his custody and under his control. It is also alleged that it is for the best interests and welfare of the child that the petitioner should be appointed her guardian. The estate of the child is alleged to consist of a savings bank account of the value of about \$20 and four baby bonds of the value of about \$5 each.

Monte Harper, the father of the child, opposed the application of the maternal grandfather for appointment as guardian. After hearing the evidence pro and con on the application, the court found that all the allegations of the petition were true, and thereupon entered an order appointing Devello Tipple guardian of the person and estate of the said minor child, Mary Elizabeth Harper. The father, Monte Harper, brings this appeal, and seeks to review the order of the lower court.

W. L. Barnum, of Phoenix, for appellant.

Alexander & Christy, of Phoenix, for appellee.

BAKER, J. (after stating the facts as above). We have in this case a contest between the father and the maternal grandfather over the custody and care of a minor child and her estate. As to the estate of the child, it is so small and inconsequential that it may be dropped out of sight at once. The case is one of a delicate nature, and it may be impossible to extricate the parties from the contest without disappointment and suffering somewhere; but the voice of nature, which declares that the father is the natural guardian of his minor child, cannot be silenced. "The law does not fly in the face of nature, but rather acts in harmony with it." *Lamar v. Harris*, 117 Ga. 997, 44 S. E. 868.

[1] It is disclosed by the evidence that the mother of the child, shortly before her death, expressed the wish that the grandmother should take the child and care for her during the grandmother's life, and that the father, shortly after the death of his wife, the mother of the child, stated substantially that he would never think of parting the child

from its grandmother as long as the grandmother lived. No one can consider the request of the dying mother without a sincere wish that such a request could be legally enforced. But such is not the case. Under the law, the mother was not vested with the testamentary disposition of the child during the lifetime of the father. Neither could she give the child away without his consent. *Hernandez v. Thomas*, 50 Fla. 522, 39 South. 641, 2 L. R. A. (N. S.) 203, 111 Am. St. Rep. 137, 7 Ann. Cas. 446; *Ingalls v. Campbell*, 18 Or. 461, 24 Pac. 904.

There is a striking resemblance between the facts in the instant case and the case of *Miller v. Wallace*, 76 Ga. 479, 2 Am. St. Rep. 48. That case, like this, was a contest between the father and the maternal grandparents of a minor child. It appeared that the mother of the child, shortly before her death, expressed the wish that her mother and father should take, care for, and raise her child, and that the father of the child stated that, as the wife wanted her mother to have the baby, she should do so. The father, subsequently, by strategy gained possession of the child, and the grandparents brought habeas corpus. The trial court awarded the child to the grandparents, but on writ of error to the Supreme Court of the state the judgment was reversed, and it was held, substantially, that the facts did not authorize the award of the child to the grandparents. To the same effect are the cases of *Looney v. Martin*, 123 Ga. 209, 51 S. E. 304; *Sharpe v. Banks*, 25 Ind. 495; *Parker v. Wiggins* (Tex. Civ. App.) 86 S. W. 788.

[2] It is true that there is positive evidence in the record that the father promised the grandmother that he would not separate the child from her during her lifetime. It appears that this was a mere volunteer promise, made on the part of the father to gratify the love and accommodate the wishes of the grandmother. Apparently, the parties did not consider that they were making a contract about the custody of the child, and even if what was said could be held to be a contract, it would nevertheless be void as against public policy; for the father cannot make a valid and irrevocable contract which relieves him from the legal obligation to maintain, support, and educate his minor child. *Spencer on the Law of Domestic Relations*, § 481; *Brooke v. Logan*, 112 Ind. 183, 13 N. E. 669, 2 Am. St. Rep. 177; *Weir v. Marley*, 99 Mo. 484, 12 S. W. 798, 6 L. R. A. 672; *Lipsey v. Battle*, 80 Ark. 287, 97 S. W. 49.

[3,4] The conclusion of the trial court must have been reached upon the theory that the welfare of the child would be best promoted by placing her in the custody of the grandparents, because of the incompetency of the father. It is manifest that the statute vests in the appointing court or judge

a very large discretion in the selection and appointment of a guardian; the paramount consideration being the welfare of the child, rather than the technical legal right of the parents. While this is true, yet the court should not invade the natural right of the parent to the custody and care of an infant child, except upon a clear showing of delinquency on the part of the parent. In *re Forrester*, 162 Cal. 493, 123 Pac. 283; *Hernandez v. Thomas*, supra. The breaking of the ties that bind father and child to each other can never be justified without the most solemn and substantial reasons, established by plain proof. In any form of proceeding the sundering of such ties should always be approached by the courts "with great caution and with a deep sense of responsibility." *State v. Richardson*, 40 N. H. 274, 275. Ordinarily the father is entitled to the custody of his minor child. This was the rule of the common law (2 Kent, Com. 205; *Schouler's Domestic Relations*, para. 245-248; *Spencer on the Law of Domestic Relations*, § 479), and this rule of the common law is reaffirmed by the statute in this state:

"The father or the mother of a minor child under the age of fourteen years, if found by the court competent to discharge the duties of guardianship, is entitled to be appointed a guardian of such minor child, in preference to any other person. * * * " Civil Code (1913) par. 1110.

The father in this case proved himself to be a moral man, of exemplary habits, and industrious. It is shown that at the time of the trial he was conducting an automobile business, from which he was deriving an income of \$300 or \$400 a month, and he is therefore in a position financially to care for his child. The inference to be fairly drawn from the evidence is that he entertains a deep affection for the child. His love and affection for his former wife and his family as it then existed is proven beyond all question by the pathetic message of love which the wife, when dying, requested the grandmother to convey to her husband. She expressed her love for her husband just as she was passing away.

[5] True, since the death of his former wife, the father has contracted a second marriage; but shall it be said that he thereby forfeited his right to the custody of his child? There is nothing in the record derogatory to the character of the second wife, and it is to be presumed that she is a good woman, and that she will do all that duty demands that she should do to assist her husband in the nurture, care, teaching, and protection of the child. There is no showing that the father is a man of vicious habits or immoral character. We have, then, a case where the father is a man of good habits and morals, with a lucrative and growing business, and his home and family

relations pleasant and happy. He is in possession of the child. We take it that the device or strategy, if it can be so called, by which the father obtained possession of the child from the grandmother (promising to return the child after taking it away for a short visit, and failing to do so), was suggested rather to avoid a painful scene and angry controversy than for any other purpose, and that it would be going too far to infer from what then occurred that the father proved himself to be an unsuitable and unfit person to have the custody of his child. Certainly, under the circumstances, we can find no warrant in law for taking the child away and placing her in the grandparent's care. We do not for a moment question the affection and love of the grandparents for the child, nor their ability and disposition to cherish and care for her; yet it cannot be overlooked that they are already in the decline of life, and can scarcely hope to survive through all the years of the child's minority.

[§. 7] The petitioner in this case recognized the necessity of affirmatively showing the incompetency of the father, as proven by the allegation in his petition that the father was an unfit person to have the custody of the child; but we do not think that the evidence sustains the allegation. We do not think that the evidence affirmatively shows that the father is an unfit or incompetent person to have the custody of his own child. We are not unmindful of the rule that where the evidence is conflicting, or where different conclusions may be drawn from the evidence, we will not interfere with the judgment of the lower court. We have, however, considered the evidence in the light of the rule that it will be assumed that a father is competent to have the care and custody of his child, in the absence of any affirmative showing to the contrary.

[§] We conclude that the cautions, circumstance, and humane judge of the lower court was mistaken in the exercise of his discretionary powers, and that for the lack of sufficient evidence to support the finding that the father was incompetent the decree appealed from must be reversed; and it is so ordered.

CUNNINGHAM, C. J., and ROSS, J., concur.

(43 Cal. App. 479)

PEOPLE v. MACY et al. (Civ. 1962.)

(District Court of Appeal, Third District, California. Oct. 8, 1919.)

1. NUISANCE §84—REPUTATION OF HOUSE AS EVIDENCE UNDER RED LIGHT ABATEMENT ACT.

In view of Red Light Abatement Act, § 5, general reputation of the place involved may

alone be sufficient to prove the character of such place in a proceeding under such act to abate a nuisance.

2. NUISANCE §84—SUFFICIENCY OF EVIDENCE UNDER RED LIGHT ABATEMENT ACT.

In a proceeding by the state under the Red Light Abatement Act for the purpose of abating a nuisance existing in a house, evidence held sufficient to show the character of the house to be immoral.

3. NUISANCE §77—PROCEEDING UNDER RED LIGHT ABATEMENT ACT CIVIL ACTION.

A proceeding by the state under the Red Light Abatement Act for the purpose of abating a nuisance existing in a house is not a criminal proceeding, but is a civil action.

4. NUISANCE §81—LAW OF ENTRAPMENT NOT APPLICABLE TO RED LIGHT ABATEMENT ACT.

Since a proceeding by the state under the Red Light Abatement Act to abate a nuisance existing in a house is a civil action, witnesses who induced immoral women in the presence of employees of the house to go to such house with them for immoral purposes can testify as to such fact, for the purpose of showing that the house was at the time in question used for the purposes alleged, and that the persons in charge of it were allowing such use; the law of entrapments not applying.

5. EVIDENCE §67(1)—HOUSE SHOWN DISORDERLY AT CERTAIN DATE PRESUMED TO CONTINUE A NUISANCE.

Where it is proved, in a proceeding under the Red Light Abatement Act to abate a nuisance, that the house was used for immoral purposes up to a certain date, there is a presumption, in view of Code Civ. Proc. § 1963, subd. 32, that the immoral condition continued to exist so long as is usual for things or conditions of such nature, in the absence of satisfactory evidence to the contrary.

Appeal from Superior Court, Butte County; H. D. Gregory, Judge.

Proceeding by the People of the State of California against L. D. Macy and others under the Red Light Abatement Act. Judgment for plaintiff, and defendants appeal. Affirmed.

Martin I. Welsh and V. L. Hatfield, both of Sacramento, for appellants.

John R. Robinson, Dist. Atty., of Chico, for the People.

BURNETT, J. The action was brought under the Red Light Abatement Act (St. 1913, p. 20) for the purpose of abating a nuisance existing in the Johnson House, a hotel in Chico, and of causing the same to be closed as provided by the provisions of said act. The judgment was in favor of the plaintiff, from which the owner of the premises has appealed. Three points are made by appellant, as follows:

(1) He insists that the evidence is insufficient to sustain the judgment, for the reason

that it consists solely of evidence of the general reputation of said house in the community.

(2) It is claimed that the testimony of the two investigators or detectives, who testified in the case, cannot be considered by reason of the application of the doctrine of the "law of entrapments."

(3) The further claim is made that the evidence is insufficient to show that at the time of the filing of the complaint on the 14th of September, 1918, or at the time of the trial, one month later, the house was being used for said unlawful purposes, assuming that the evidence was sufficient to show such use on August 12, 1918, the date on which the last act of illicit intercourse and the reputation of the house were shown.

[1, 2] From reading and an examination of the record we are satisfied that there is no merit whatever in any of these contentions. As to the first point there was a strong showing of the bad reputation of the house in said community. The witnesses who so testified were persons of long residence there, or persons engaged in business in Chico, or persons whose calling would tend to make them familiar with the general reputation of any hotel in the community. They comprised business men, ministers, peace officers, and also women who were interested in the social conditions and welfare of the community. Their testimony was direct, clear, and unequivocal that the house had a bad reputation in the respects indicated. As an example of the general character of the testimony of these various witnesses, we may quote from the record of the testimony of Galen L. Rose as follows:

"Q. Do you know the general reputation of the Johnson House for lewdness, prostitution, or assignation? A. I do. Q. What it is, good or bad? A. Bad.

"Cross-examination: Q. With whom did you discuss the reputation of the Johnson House, Mr. Rose? A. I have discussed it. It came up in a general way in a conversation with a considerable number of people. I do not know as I recollect the individuals; but is a topic that comes up frequently in a conversation in a general way. And in all of my conversations I never heard a good word for the Johnson House, and I heard a good many speak and they were that it was bad."

It is to be observed that section 5 of said act provides:

"In such action, evidence of the general reputation of the place shall be admissible for the purpose of proving the existence of said nuisance."

This would seem to imply that such evidence may be of itself sufficient to prove the character of the house, and upon this point it may be said that seldom is such a strong showing made as appears in the present instance. But beyond that, there was strong

evidence that the character of several inmates or frequenters of the hotel was morally bad, and this is a circumstance of great importance in the determination of the character of the house. *De Martini v. Anderson*, 127 Cal. 33, 59 Pac. 207. As an example of this line of evidence we may quote from the record of the testimony of William Alexander, formerly chief of police, as follows:

"Q. Do you know of your own personal knowledge, Mr. Alexander, while you were acting chief of police of the city of Chico, of any woman of a lewd or immoral character going to the Johnson House? A. I do. I know of one Myrtle McNeal, who was, at one time an inmate of the house of prostitution known to the house as such, having lived in the Johnson House for some time. A. Do you know of any other such person? A. Of my own knowledge I do not know of any such person, except that I have seen women, whose reputation was known to be bad, go into the Johnson House at all hours of the day."

There was other evidence of similar character and import. In addition to the foregoing, there was the positive testimony of the two investigators or detectives of acts of improper relations with a certain woman known as Hazel Howard in said house on August 10 and August 12, 1918. It appears further that said woman had a notorious reputation for immorality in the community and was in conversation with the clerk of the house in front of the desk in the office of said premises when one of said detectives came up and the agreement was made between him and her in the presence and hearing of said clerk to occupy together a room in said house. In fact, the evidence seems as strong and conclusive of the truth of the charge against the house as has appeared in any case of this class that this court has been called upon to consider.

[3, 4] As to the second point, it is sufficient to say that the record contains no evidence that said detectives or either of them offered any inducement to or enticed or allured or urged or persuaded in any manner the said Hazel Howard to commit any crime or to go to the Johnson House for any immoral purpose whatever. Moreover, this is not a criminal proceeding, but is a civil action for the purpose of abating a nuisance, and if such inducement had been offered the evidence would be admissible for the purpose of showing that said Johnson House was at the time in question used for the purposes alleged in said complaint and that the persons in charge of it were allowing such use. In this connection it may be proper to quote from *Corpus Juris*, vol. 18, p. 88, on the doctrine of entrapments, as follows:

"While it has been said that the practice of entrapping persons into crime for the purpose of instituting criminal prosecutions is to be deplored, and while investigation, as distinguished from mere entrapment, has often been

condemned and has sometimes been held to prevent the act from being criminal or punishable, the general rule is that it is no defense to the perpetrator of a crime that facilities for its commission were purposely placed in his way, or that the criminal act was done at the 'decoy solicitation' of persons seeking to expose the criminal, or that detectives feigning complicity in the act were present and apparently assisting in its commission. Especially is this true in that class of cases where the offense is one of a kind habitually committed, and the solicitation merely furnishes evidence of a course of conduct."

It will be observed that in nearly all of those cases where such evidence has been held inadmissible it has been upon the ground that no crime has been actually committed, as in the case where the owner induces a person to steal his property. In such case there could be no commission of the crime, if the property is taken with the owner's consent, since it is an essential factor of the crime of larceny that it be against the will of the owner. It may be further said that the cases distinguish clearly between measures used to entrap a person into crime and artifice used to detect persons suspected of being engaged in criminal practices, particularly as such criminal practices vitally affect the public welfare rather than individuals. *People v. Liphardt*, 105 Mich. 60, 62 N. W. 1022. This distinction is illustrated in the case of *People v. Haselman*, 76 Cal. 460, 18 Pac. 425, 9 Am. St. Rep. 238, which was a criminal prosecution for larceny. The complaining witness was a constable, who, for the purpose of detecting persons in theft, placed money in his pockets and pretended to be drunk in order to catch some one in the act of taking money from his pocket, and the defendant was caught in this way. It was held that these acts of the complaining witness, by way of inducement, did not amount to a consent to the taking, and were no defense to the criminal charge. The most that could be said in the present instance as to the conduct of said investigators was that they resorted to artifice and strategy and placed themselves in an attitude of willingness to participate in the commission of an immoral and illegal act in order to obtain evidence of the character of said house. Of course, it is to be regretted that it should seem necessary or expedient or proper for reputable citizens to so conduct themselves, but that is not sufficient reason for rejecting their testimony as altogether unworthy of credence. Manifestly in this class of cases it is usually quite difficult to secure evidence of the true character of the house, and therefore there is some excuse and justification in the interests of the public welfare, for the questionable method adopted by said investigators.

[5] As to the third point, it is sufficient to

say that it was proved that the Johnson House was used for said immoral purposes as late as August 12, 1918, and that there was a course of such conduct up to that time. From this proof the presumption would follow that said condition continued to exist as long as is usual for things or conditions of such nature. Code Civ. Proc. § 1963, subd. 32. Of course, if there were satisfactory evidence that the condition had changed, it might be said that the presumption was overcome. There was indeed the testimony of the owner of the premises that no immoral acts of the character charged had been committed in the house since said date of August 12, 1918. He even went further and declared that no such acts had ever been committed therein. The lower court, undoubtedly, was not greatly impressed with the truthfulness of his statements. We cannot say that he was entitled to any more credit than was accorded him by the trial judge. As bearing upon this consideration we may cite *People v. Dillman*, 174 Pac. 951; *White v. White*, 82 Cal. 427, 23 Pac. 276, 7 L. R. A. 790; *Hohenshell v. South Riverside, etc., Co.*, 128 Cal. 627, 61 Pac. 371; *Judge v. Kribs*, 71 Iowa, 183, 32 N. W. 324; *Halfman v. Spreen*, 75 Iowa, 309, 39 N. W. 512.

We think it must be held that the case was fairly tried and justly decided, and that no error whatever appears in the record.

The judgment is therefore affirmed.

We concur: ELLISON, Presiding Judge pro tem.; HART, J.

(43 Cal. App. 449)

EHRHART et al. v. MAHONY et al.
(Civ. 1990.)

(District Court of Appeal, Third District, California. Oct. 4, 1919.)

1. SPECIFIC PERFORMANCE §114(2)—NECESSITY OF PLEADING ESSENTIALS OF CAUSE OF ACTION.

To obtain relief by way of specific performance, it is necessary to plead that defendant has received an adequate consideration for the contract, and that it is as to him just and reasonable, as required by Civ. Code, § 3391.

2. SPECIFIC PERFORMANCE §114(2)—SUFFICIENCY OF ALLEGATIONS AS TO REASONABLENESS AND FAIRNESS.

In a suit for specific performance of a contract for the purchase of mining claims, allegations that the purchase price was fair and reasonable, and that the contract was as to defendants just, reasonable, fair, and equitable, while to some extent involving conclusions, held sufficient as against general demurrer, in view of Civ. Code, § 3391.

3. APPEAL AND ERROR ¶1099(3)—DECISION ON PRIOR APPEAL AS TO TENDER LAW OF CASE.

A decision by the Supreme Court on appeal in a suit for specific performance that a defective tender was immaterial where a conveyance would have been refused in any event constitutes the law of the case on a subsequent appeal, where the facts presented are the same.

Appeal from Superior Court, Calaveras County; N. D. Arnot, Judge.

Action by Thomas J. Ehrhart and another against D. R. Mahony and others. From a judgment for plaintiffs, defendants appeal. Affirmed.

W. A. Dower, of San Andreas, for appellants.

Snyder & Snyder and Nutter & Hancock, all of Stockton, for respondents.

HART, J. On September 27, 1910, the parties to the action entered into a written agreement denominated "Contract for Deed," whereby the plaintiffs agreed to sell and the defendants agreed to purchase three certain quartz mining claims in Calaveras county for the sum of \$3,000, payable in installments, and defendants agreed to do all assessment work on said claims from the date of said contract. Defendants paid the first installment of \$50, but made no further payments, and they notified plaintiffs that they refused to carry out said contract or to pay any further installments. On the 19th of December, 1910, plaintiffs executed a deed of said mining property, conveying the same to defendants, and offered to deliver the same to defendants upon the payment of the balance of the purchase price, which defendants refused to do. This action was brought to recover the balance of the purchase price, \$2,950, and the sum of \$300, which plaintiffs alleged they had expended for assessment work upon the claims. Judgment was in favor of plaintiffs for the amount sued for, and this appeal is prosecuted by defendants from said judgment upon the judgment roll alone.

The action was before the Supreme Court upon an appeal from a former judgment for the same amount. *Ehrhart v. Mahony et al.*, 170 Cal. 148, 148 Pac. 934. That court held, upon the authority of *White v. Sage*, 149 Cal. 613, 87 Pac. 193, and *Sparks v. Hess*, 15 Cal. 186, that the action here is in effect one for the specific performance of a contract, and reversed the judgment for the reason that—

"The complaint does not allege, nor does the court find, facts showing that there was an adequate consideration for the obligation sought to be enforced, or that the contract was just or reasonable as to the defendants."

Upon the case being returned to the superior court of Calaveras county the complaint was amended as follows:

"That said defendants have received an adequate consideration for said contract; that the price for which the defendants so agreed to purchase said property and the plaintiffs so agreed to sell the same is a fair and reasonable price for said property and a fair valuation thereof, and that said contract is, as to the defendants, just, reasonable, fair, and equitable, and was fairly entered into between the plaintiffs and defendants"

—and a finding was made accordingly. To the amended complaint the defendants submitted a general demurrer, which was overruled, whereupon they filed an answer thereto.

Two points are made by appellants for a reversal of the present judgment: First. That the complaint fails to disclose that the contract, as to the defendants is just and reasonable, and that they have received an adequate consideration for the contract. Civ. Code § 3391. Second. That the findings do not support the theory that "defendants served notice that they refused to perform their part of the contract prior to the time that respondents made tender and demand."

Section 3391 of the Civil Code declares that specific performance cannot be enforced as to the party against whom that remedy is invoked, "if he has not received an adequate consideration for the contract," or "if it is not, as to him, just and reasonable."

[1] The above requisites in an action for relief by way of specific performance, as all the authorities say, must be pleaded and proved to justify the awarding of such relief.

[2] The amended complaint in this action, as we have seen, alleges that the price at which the defendants agreed to purchase the property in question "is fair and reasonable and a fair valuation thereof, and that said contract is, as to the defendants, just, reasonable, fair, and equitable," etc. While these allegations in a measure involve conclusions of the pleader and of law, they also involve a statement of the fact. At any rate, they are sufficient to resist the effect of a general demurrer. The amended answer specifically denies these allegations, and thus tendered an issue upon the question of the fairness and reasonableness of the consideration; and, the appeal not being supported by a transcript of the testimony or a bill of exceptions, we may presume, in support of the judgment, that the action was tried upon the theory that the allegations were sufficient, and that testimony was received without objection in support thereof.

The remaining point of those urged for a reversal involves an attack upon the findings that the defendants notified the plaintiffs of their refusal to perform their part of the contract, and that plaintiffs made a tender of a conveyance to defendants, and demanded of them the performance of the contract.

The complaint, the answer, and the find-

ings upon the question of tender and the refusal of the defendants to stand up to the contract are precisely the same here as they were in the record on the former appeal, which, like the appeal here, was from the judgment on the judgment roll alone. The question of tender was presented to the Supreme Court on the former appeal, and in the opinion in that case (*Ehrhart et al. v. Mahony et al.*, 170 Cal. 148, 148 Pac. 934, *supra*) was disposed of as follows:

"The appellants criticize the allegation of tender, but since their answer showed that a conveyance would have been refused in any event, technical defects in the tender, or even a want of any tender, would be of no importance. Civ. Code, § 1440."

[3] The facts presented on both appeals upon the point now under review being the same, the above is the law of the case as to said point, and is decisive thereof against the position of the appellants.

No other points are presented.

The judgment is affirmed.

We concur: ELLISON, Presiding Judge, pro tem.; BURNETT, J.

(43 Cal. App. 411)

TORMEY v. McINTOSH et al. (Civ. 2635.)

(District Court of Appeal, First District, Division 2, California. Oct. 2, 1919. Rehearing Denied by Supreme Court Dec. 1, 1919.)

ESTOPPEL § 22(3)—**RECITALS IN ATTACHMENT BOND.**

Where sureties caused attachment bond to be drawn which purported to be authorized by defendant in attachment suit, and which in form complied with Code Civ. Proc. § 540, and the property was released in reliance upon representations therein, sureties were estopped by recitals in bond from proving that it was not given by defendant but by persons having no right to give such bond.

Appeal from Superior Court, City and County of San Francisco; Geo. A. Sturtevant, Judge.

Action by Ben E. Tormey against Belinda P. McIntosh and others. From judgment denying relief, plaintiff appeals. Reversed.

Milton Newmark and Clarence A. Shuey, both of San Francisco, for appellant.

J. Oscar Goldstein, of Chico, for respondents.

LANGDON, P. J. This is an appeal from a judgment for the defendants in an action brought against them as sureties upon a bond given pursuant to the provisions of section 540, Code of Civil Procedure. In 1912, plaintiff began an action in the superior court for

Butte county against one Frank N. Miller, seeking to recover \$1,200 for merchandise sold and delivered to him. At the time of the commencement of the suit, a writ of attachment was issued and placed in the hands of the sheriff for execution. The sheriff levied upon a stock of merchandise in a store in Chico, which was the property of the defendant in that action. The defendants in the present action executed a bond meeting the requirements of section 540, Code of Civil Procedure, which is the bond sued upon in the present action. Upon receipt of the bond, the sheriff released the property which he had seized. Subsequently, Miller was adjudged a bankrupt, and, in the course of the administration of his property in the bankruptcy court, plaintiff received a dividend of something over \$300, which amount was credited on Miller's account. Thereafter, the defendant in the attachment suit filed a supplemental answer setting up his discharge in bankruptcy. Plaintiff asked for a judgment against the defendant for the balance due, in order that he might be enabled to enforce his rights against the sureties on the bond. He asked that judgment be entered in his favor with a perpetual stay of execution against the property of Miller. The superior court gave judgment for the defendant, from which judgment an appeal was prosecuted, and said judgment reversed. The superior court then rendered its judgment in favor of the plaintiff in the sum of \$875.30 with a perpetual stay of execution against the property of Miller. Demand was made upon the sureties, who refused to pay, and the present action was brought against them, in which action judgment was rendered in their favor.

The appellant argues at some length, and cites numerous cases in support of the proposition, that the subsequent bankruptcy of the attachment defendant did not relieve the bondsmen from their liability. It is unnecessary for us to discuss this point here, because it is conceded by respondents in their brief that the subsequent bankruptcy of Miller would not in itself release the defendants in the present action, if there were no other valid defenses to the bond.

There are several points made in the briefs under different subdivisions, but they are all included in the main question presented. The record presents a conflict in the evidence on certain matters, arising by reason of the fact that the defendant Hazel Miller testified in direct contradiction to some of the recitals of the bond she had executed. The findings of the trial court on such matters are in direct conflict with the recitals of the attachment bond given by the defendants. The inquiry must then be whether, under the facts of this case, the defendants may contradict by their testimony the positive recitals of the bond, which recitals they represented to the plain-

tiff to be true, and upon the strength of which the plaintiff relinquished what was at the time a very valuable right.

At the time the bond was given, the defendant McIntosh was the mother-in-law of Miller, and the defendant Hazel P. Miller was his wife. It appears that Mrs. Miller had loaned her husband about \$2,500, which had been used by him in purchasing the store, and that he had promised to repay this amount to her. She testified that at the time the attachment was threatened she and her husband were having domestic troubles; that her husband had gone to San Francisco, and she did not know where he was; that, when she received notice of the contemplated attachment, she was ill at her mother's home; that she and her mother signed the bond of their own motion, upon the advice of their attorney and without any request from Miller so to do; that said bond was signed for the purpose of protecting the interest that she (Mrs. Miller) had in the store; that the property was attached, and later released by the sheriff after he received the bond; and that she was in the store when the sheriff released it from the attachment. Upon this testimony, as against the positive recitals of the bond, as found by the court, the defendants base their argument that the bond was not given by the defendant in the attachment suit for his benefit, but was given by persons having no right under the statute to give such a bond, and for the benefit of such persons alone. The trial court accepted this view and found in accordance therewith. The bond itself is signed, not only by the sureties, but by Frank N. Miller himself. It recites that whereas the said defendant, Frank N. Miller, is desirous of giving the undertaking mentioned in the writ, now, therefore, the undersigned, etc. There is in the record the testimony of Guy R. Kennedy, identifying the signature of Frank Miller upon the bond, and this witness also stated that he saw Miller in Chico between the time the writ was issued and the bond was given. Mrs. Miller herself admits that the signature upon the bond looks like the signature of her former husband. The decisions of this state are to the effect that the recitals of such a bond are conclusive as between the parties thereto. *Pierce v. Whiting*, 63 Cal. 540; *Smith v. Fargo*, 57 Cal. 159; *Balley v. Aetna Indemnity Co.*, 5 Cal. App. 744, 91 Pac. 416; *McMillan v. Dana*, 18 Cal. 346. The facts of this case are such as to call strongly for the application of the principle announced in the foregoing cases. Taking defendants' view of the evi-

dence, we have a case where Mrs. Miller was seeking an advantage to herself—seeking to protect her interest in the property. She claims now that she had no right to protect this interest by furnishing an attachment bond of her own motion. Let us assume that she had not, and that the only right of this kind was in the defendant in the attachment suit, Frank Miller. If, then, this is assumed to be the law, we must also assume that such facts were known to her and her attorney. But she nevertheless caused a bond to be drawn by her attorney which purported to be authorized by Miller, and in form complied with the statutory bond which he might have furnished. She signed this bond; it was given to the sheriff. The record is silent as to who actually gave the bond to the sheriff, but we will assume that it was regularly given to him by a person authorized to do so. The bond was signed by Frank Miller; the property was released under said bond. The plaintiff in the attachment suit relied upon the representations made in the bond. Mrs. Miller accepted the release of the property; she knew it had been released in reliance upon the bond. Later, when called upon to respond upon the bond, she attempted to contradict the very allegations upon which she secured the release of the attached property. We must conclude that, though the facts be as found by the trial court, these defendants are nevertheless estopped by the recitals of the bond to prove such facts in contradiction of such recitals. The findings of the trial court upon which the judgment is based are findings which have no support except in this testimony on behalf of the defendants. The plaintiff objected to the introduction of such evidence, and his objections were overruled. This ruling was error; the testimony should not have been admitted, and, if it is ignored, there is no evidence in the record to sustain the findings upon which the judgment was based.

The case of *Thayer v. Braden*, 27 Cal. App. 435, 150 Pac. 653, relied upon by respondents, is not inconsistent with the views herein announced. The question involved here does not arise in that case.

As to the contention that the bond was given to prevent an attachment and not to release one, the case of *Preston v. Hood*, 64 Cal. 405, 1 Pac. 487, disposes of that contention.

The judgment is reversed.

We concur: BRITAIN, J.; NOURSE, J.

(76 Okl. 280)

CANAFAX v. BANK OF COMMERCE OF McLOUD. (No. 9438.)

(Supreme Court of Oklahoma. Nov. 18, 1919.)

*(Syllabus by the Court.)***1. EVIDENCE ¶17—JUDICIAL NOTICE OF COINCIDENCE OF DAYS OF WEEK WITH DAYS OF MONTH; SUNDAY.**

Judicial notice will be taken of the coincidence of the days of the week with the days of the month, and of the days of the month on which Sunday falls.

2. APPEAL AND ERROR ¶701(1)—No REVIEW OF TRIAL RULINGS IN ABSENCE OF RECORD EVIDENCE.

Where none of the evidence appears in the record, and there is no statement of what it tended to prove or that it raises the questions on which instructions are based, this court will not, as a general rule, determine whether there was error in the rulings of the court as to the instructions given and refused. Following *Turman v. Burton et ux*, 37 Okl. 5, 130 Pac. 149.

3. APPEAL AND ERROR ¶715(2)—REVIEW OF REFUSAL TO REQUEST STENOGRAPHER TO TAKE DOWN STATEMENTS AT TRIAL.

Where it is desired to review the action of the trial court in refusing to require the stenographer to take down statements made during the trial of any cause, under the terms and provisions of section 1786 or section 1834, Rev. Laws 1910, and such statements or proceedings are attempted to be presented to this court by affidavit, such affidavit must show that such statements or proceedings had reference to the cause on trial and were such as might properly be made a part of the case-made or other proceedings in error.

Error from County Court, Lincoln County; Ira E. Billingslea, Judge.

Action of replevin by the Bank of Commerce of McCloud, Okl., against W. F. Canafax, with counterclaim and cross-petition by defendant. Judgment for plaintiff, motion for a new trial denied, and defendant brings error. Affirmed.

Erwin & Erwin, of Wellston, for plaintiff in error.

Goode & Johnson, of Shawnee, for defendant in error.

BAILEY, J. This is an action of replevin, brought in the county court of Lincoln county. After a general denial, plaintiff in error pleaded by way of counterclaim and cross-petition the payment of various sums of money, and alleging that such sums were paid as usurious interest. To such answer and cross-petition defendant in error filed a reply, consisting of a general denial, and further pleading a written release from all claims, debts, or demands by reason of the transaction as alleged in plaintiff in error's cross-petition. Judgment was

had against plaintiff in error, and a motion for a new trial was duly filed, and said motion for a new trial was overruled on March 26, 1917, and plaintiff in error allowed 90 days in which to prepare and serve a case-made. On June 25, 1917, plaintiff in error did serve a purported case-made. It will be noted that such case-made was served 91 days after the order of the court allowing 90 days in which to serve case-made. This being the fact, it is contended by defendant in error that such case-made is a nullity for the reason that the same was not served within the time allowed.

[1] It is true that the case-made was not served within the 90 days allowed; however, this court will take judicial notice that June 24th, the ninetieth day, fell on Sunday. R. C. L. p. 1100, par. 32. *McIntosh v. Lee*, 57 Iowa, 356, 10 N. W. 895; *Swales v. Grubbs*, 126 Ind. 106, 25 N. E. 877. Section 5341, Rev. Laws 1910, provides:

"The time within which an act is to be done shall be computed by excluding the first day, and including the last; if the last day be Sunday, it shall be excluded."

The last day allowed for serving such case-made being Sunday, such day will be excluded in the computation of time and the following day be included. Board of County Commissioners of Smith County v. Labore et al., 37 Kan. 480, 15 Pac. 577; *Grant v. Creed et al.*, 35 Okl. 190, 128 Pac. 511; *Harn v. Amazon Fire Insurance Co.*, 167 Pac. 473. We therefore hold that the purported case-made was served within the time allowed.

Of the fifteen assignments of error presented by plaintiff in error, fourteen of such assignments charge error of the court in giving certain instructions and in refusing to give certain instructions tendered by plaintiff in error. The case-made does not contain the evidence, nor any part thereof, nor is there any statement of what the evidence was or what facts were sought to be proven, nor is there any claim that the verdict is not supported by the evidence. Section 6005, Rev. Laws 1910, provides:

"No judgment shall be set aside or new trial granted by any appellate court of this state in any case, civil or criminal, on the ground of misdirection of the jury or the improper admission or rejection of evidence, or as to error in any matter of pleading or procedure, unless, in the opinion of the court to which application is made, after an examination of the entire record, it appears that the error complained of has probably resulted in a miscarriage of justice, or constitutes a substantial violation of a constitutional or statutory right."

[2] And under such provision of the statute as well as decisions of this court, in passing upon the errors assigned relative to the giving and refusing of the instructions referred to, the court will be compelled to look into the

evidence and to ascertain if a right and proper verdict has been rendered. The burden is upon the plaintiff in error to show that such error has been committed as has probably resulted in a miscarriage of justice or constitutes a substantial violation of a constitutional or statutory right. If the verdict arrived at by the jury was a proper one, under all the evidence presented to them, the fact that the court may have improperly instructed the jury cannot stand as sufficient grounds for reversal. It is held in *Truman v. Buxton*, 37 Okl. 5, 130 Pac. 149, as follows:

"We are committed to the rule that where a verdict or judgment are authorized by the evidence, and another would be unwarranted, the same will not be reversed on appeal on account of errors alleged to exist in the instructions."

And again:

"Where none of the evidence appears in the record, and there is no statements of what it tended to prove, or that it raised the questions on which instructions are based, this court cannot, as a general rule, determine whether there was error in the rulings of the court as to the instructions or not."

See, also, *Livingston v. Chicago, R. I. & P. Ry. Co.*, 41 Okl. 505, 139 Pac. 280. And as was said in *Town of Leroy v. McConnell*, 8 Kan. 273:

"One of the errors complained of is the giving of certain instructions and the refusal to give others. It would be labor wasted to examine the instructions given, for, even if it were certain that they were not correct as legal principles, there would be the uncertainty as to whether they applied to the evidence in the case; and if they did not, then, though they may have been error, it is not shown to be prejudicial to the plaintiffs. The plaintiffs in error must show that such errors have been committed as have wrought prejudice to them, or may have done so, or there can be no reversal of the judgment. It is not necessary to bring up all the evidence in every case, but enough must be shown, either by the testimony or by statement in the bill of exceptions, for this court to see that the instructions are applicable to the evidence. The same remark applies to instructions refused."

[3] The fifteenth and last assignment of error is that—

"The court erred in refusing defendant's request to have taken, by the court stenographer, certain proceedings, to wit, certain improper remarks by counsel for plaintiff, as found in the affidavit marked 'Exhibit A,' and made a part of the motion for a new trial."

Such affidavit being as follows:

"At the trial of said cause on the 10th day of March, 1917, counsel of record for plaintiff in his argument to the jury made certain remarks outside the record which affiant considers prejudicial to the rights of the defendant. That thereupon affiant objected to such remarks and

averments and asked that the same be taken down by the court stenographer, and that such request was refused by the court, to which affiant excepted on behalf of the defendant."

Counsel relies upon section 1786, Rev. Laws 1910, to support this assignment; aside from the question as to whether, in proceedings in the county court, the court stenographer in recording the statements and proceedings during the trial of a cause is to be governed by section 1786 or section 1834, Rev. Laws 1910. But assuming for the purpose of this assignment that section 1786, supra, controls, we do not think plaintiff in error has brought himself within the provisions of the statutes. In *Dabney v. Hathaway*, 51 Okl. 653, 152 Pac. 77, it is said:

"The defendants lastly complain that 'the court erred in refusing to permit the stenographer to take certain remarks by the court in the presence of the jury, although requested to do so by the attorney for defendants.' They attach affidavits of W. H. Parker and Paul Pinson in support of this assignment. Counsel relies upon section 1786, Rev. Laws 1910, in urging this assignment. But the substance of that statute is: All statements of counsel, the witnesses or the court, made during the trial of any cause with reference to any cause pending for trial, when made by a party or attorney interested therein 'and all other matters that might properly be a part of a case-made for appeal or proceedings in error,' shall be taken down and transcribed by the stenographer if requested, and a refusal of the court to permit this to be done shall be reversible error."

Here, as was observed in the case of *Dabney v. Hathaway*, supra, there is not the slightest indication in the affidavit filed in this case that the remarks of which complaint is made had any reference to the cause of action, or could in any way have been made a part of the case-made. If the remarks complained of by defendant were concerning this case, or could have properly been made a part of the case-made, then it is the duty of counsel to make a showing in the record to that effect.

We recognize the mandatory nature of the section of the statute referred to, and we do not mean to suggest any discretionary power in the trial court to limit or prevent the recording of any statements when made during the trial of any cause, with reference to such cause, or such other matters that might properly be made a part of a case-made or in other proceedings in error; but, before the terms and penalties of such statutes are invoked, counsel should be at least required to make such showing as will enable this court to see that the statements complained of had reference to the trial, and indicate the nature of the remarks of which complaint is made.

For the reasons herein assigned, the judgment of the trial court is affirmed, and the opinion heretofore filed in this cause is withdrawn.

(77 Okl. 1)

WATSON v. SHAFFER et al. (No. 10627.)

(Supreme Court of Oklahoma. Nov. 25, 1919.)

*(Syllabus by the Court.)***1. APPEAL AND ERROR §—566, 567(1)—TIME FOR SUGGESTING AMENDMENTS TO CASE-MADE.**

The time within which to suggest amendments to a case-made begins to run from the expiration of the time allowed within which to serve the same, and not from the actual service thereof, and the case-made, signed and settled before the expiration of the time to suggest amendments, is a nullity.

2. APPEAL AND ERROR §—566—TIME FOR SUGGESTING AMENDMENTS TO CASE-MADE.

Where plaintiff in error is granted 90 days in which to prepare and serve case-made, defendant in error given 10 days thereafter in which to suggest amendments, case-made to be settled on five days' notice; and thereafter, before the expiration of the 90 days, plaintiff in error is granted an extension of 60 days, and the order granting the extension is silent as to the suggestion of amendments or service, the defendant in error is entitled to 10 days from the expiration of the time granted by the order giving the extension.

Error from District Court, Lincoln County; Hal Johnson, Judge.

Action between M. M. Watson and H. G. Shaffer and another. Judgment for the latter, and the former brings error. Dismissed.

Roscoe Cox, of Chandler, for plaintiff in error.

F. A. Rittenhouse, of Chandler, for defendants in error.

PITCHFORD, J. This case comes on to be heard upon motion to dismiss appeal filed herein May 16, 1919. The grounds of the motion are that the purported case-made is a nullity for the reason that the same was not settled and signed as required by law; that judgment on the motion for a new trial was entered on the 2d day of December, 1918, at which time the plaintiff in error was given 90 days in which to make and serve a case-made. Defendants in error were given 10 days thereafter to suggest amendments thereto; said case-made to be settled upon 5 days' written notice. Prior to the expiration of said 90 days, the plaintiff in error procured an extension of time to make and serve his case-made. The order granting extension was silent as to time in which to suggest amendments, and for notice of settlement.

The order originally made, extending the time, would expire on the 2d day of March, 1919; therefore the defendants in error were entitled to 10 days from that time in which to suggest amendments. When the order was granted on the 27th day of February, 1919, allowing the plaintiff in error an extension of 60 days in which to make and serve the

case-made, and being silent as to the time in which amendments should be suggested and for notice of settlement, the defendants in error would be allowed 10 days from the 2d of May, 1919, in which to suggest amendments.

[1] On the 24th day of April, plaintiff in error served the defendants in error with notice that on the 1st day of May, 1919, at 9 o'clock a. m., or as soon thereafter as counsel could be heard, the case-made would be presented to the judge at his chambers in the city of Chandler for settlement. At the time mentioned in the notice, the case-made was presented to the judge, at which time the same was settled, allowed, certified, and signed. The only party present and represented at the hearing at the time the case-made was settled and signed was the attorney for the plaintiff in error. The defendants in error were not present either in person or by attorney, and the case-made was settled and signed in their absence. Defendants in error did not suggest amendments, did not serve the 5 days' notice of the signing, did not appear at the time of the settlement of the case-made, did not waive time, and did not consent that it be signed and settled on May 1, 1919, or at any other date.

In *Chestnut et al. v. Overholser*, 182 Pac. 683, in delivering the opinion of the court, Justice Kane said:

"The time allowed by the trial court for the suggestion of amendments to a case-made commences to run, not from the date of the service of the case-made, but from the expiration of the period of extension. * * * In the absence of a waiver by the defendant in error, a case-made, signed and settled by the trial court before the expiration of the time granted for the suggestion of amendments, is a nullity."

In the case of *M., K. & T. Ry. Co. v. City of Ft. Scott*, 15 Kan. 435, in an opinion by Justice Brewer, the rule is laid down as follows:

"The statute allows three days after the time fixed for making and serving a case for the suggestion of amendments; and an extension of time for making and serving a case does not take away the 3 days for the suggestion of amendments, and such latter time commences to run, not from the date of the actual service of the case-made, but from the expiration of the period of extension."

This case was decided in 1875, and was a construction of the statutes and laws of Kansas at the time we adopted the Kansas Code of Procedure, and became the law of Oklahoma.

In the case of *Reed v. Wolcott*, 40 Okl. 451, 139 Pac. 818, this court, speaking through Justice Turner, lays down the rule as follows:

"It was error for the trial judge to settle a case-made without allowing defendants in error the statutory 3 days from the expiration of the

period limited from the service of the case-made to suggest amendments, though such allowance would have extended settlement beyond the time limited for filing the case in the appellate court."

In *Memphis Steel Const. Co. v. Hutchison*, 47 Okl. 72, 147 Pac. 771, Mr. Justice Hardy, in delivering the unanimous opinion of the court, lays down the rule as follows:

"The time within which to suggest amendments to a case-made begins to run after the expiration of the time allowed within which to make and serve same, and not after the actual service thereof."

To the same effect, see *Frey v. McOune*, 49 Okl. 493, 153 Pac. 109; *Sov. Camp of W. O. W. v. Chumley*, 58 Okl. 681, 161 Pac. 1175; *Wilson v. Branigan* (Okl.) 168 Pac. 819. In the case of *City of Enid v. McCann* (Okl.) 171 Pac. 452, Justice Owen, in delivering the opinion of the court, said:

"The time within which to suggest amendments to a case-made begins to run from the expiration of the time allowed within which to serve same, and not from the actual service thereof; and a case-made, signed and settled before the expiration of the time to suggest amendments, is a nullity."

[2] On first blush, one might be under the impression that the views herein expressed are in conflict with the decision of this court in *Southwestern Surety Ins. Co. v. Dietrich* (Okl.) 172 Pac. 51. However, that is distinguishable from the instant case, and also that of *Chestnut v. Overholser*, supra, in this particular: There the judgment was rendered May 27, 1907, and on the same day motion for a new trial was filed and overruled, and an extension of 90 days was granted in which to prepare and serve case-made, and 10 days thereafter to suggest amendments, same to be settled and signed on 5 days' notice. On August 8, 1917, order was made granting an additional 60 days' time in which to prepare and serve case-made, and 3 days after the service of same in which to suggest amendments. The case-made was served September 22, 1917, and on September 28th notice was served that same would be presented to the trial judge for settlement and signing. On October 2, 1917, the case was settled and signed without an appearance or waiver by defendant in error or her attorney. The justice, in delivering the opinion, said:

"Under some previous holdings of this court a case-made thus settled and signed is a nullity, and presents nothing to the Supreme Court for review, but we think this holding should be modified to the extent of saying that such a case-made is irregular, but not void. It is a well-established rule that a judgment rendered upon service of summons made for a time less than that required or before the day named in the summons by which defendant is required to

answer is not void, but irregular, and, unless attacked in the manner provided by law, will be upheld."

It will be observed, in the case just quoted from, that 3 days were given the defendant in error to suggest amendments after service of the case-made. In the instant case, the time given in which to suggest amendments was 10 days after the expiration of the time in which to make and serve the case. The opinion in the *Southwestern Surety Insurance Co. v. Dietrich*, supra, was by a divided court, Kane and Turner, JJ., dissenting. The court as now constituted express grave doubts as to the correctness of the conclusion reached in that case. As the facts therein are not in all respects the same as in the instant case, we refrain from disturbing the opinion therein.

Motion sustained, and appeal dismissed.

All the Justices concur, except HARRISON, J., absent and not participating.

(55 Utah, 369)

In re SLATER'S ESTATE. (No. 8360.)

(Supreme Court of Utah. Nov. 14, 1919.)

1. EXECUTORS AND ADMINISTRATORS ~~19~~—PREFERENTIAL RIGHT TO APPOINTMENT LOST BY DELAY.

Petitioner lost the preferential right given by Comp. Laws 1917, § 7596, to letters of administration of his father's estate, where he failed to appear within 3 months, as required by section 7598, but delayed nearly 25 years in applying for appointment, and then filed a cross-petition, objecting to the appointment of decedent's married daughter as being disqualified according to section 7600.1

2. EXECUTORS AND ADMINISTRATORS ~~20~~(10)—REVIEW OF DISCRETION IN APPOINTMENT.

A son of deceased, by delay in applying for letters of administration having lost his preferential right of appointment given by Comp. Laws 1917, § 7596, the appointment of another who is competent will not be disturbed, where it does not appear that the court abused its discretion to his prejudice.

3. APPEAL AND ERROR ~~1054~~(1)—HARMLESS ERROR IN ADMISSION OF EVIDENCE

The court on appeal cannot reverse for erroneous admission of testimony, where the admissible testimony is sufficient to sustain the court's judgment.

Appeal from Second District Court, Weber County; A. E. Pratt, Judge.

In the matter of the estate of Richard Slater, deceased. From an order or judgment appointing Howell Slater administrator of the estate of said deceased, James Slater appeals. Affirmed.

~~1~~ For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

¹ In re Owens' Estate, 30 Utah, 351, 85 Pac. 277.

Harris & Jensen, of Ogden, for appellant.
George Halverson, of Ogden, for respondent.

FRICK, J. This is an appeal from an order or judgment made by the district court of Weber county appointing one Howell Slater administrator of the estate of Richard Slater, deceased.

A petition for the appointment of an administrator of the estate aforesaid was filed by one Elizabeth Condon, a daughter of the deceased, on the 24th day of January, 1918. The petitioner, among other things, alleged that Richard Slater died in Weber county, Utah, on or about the 25th day of November, 1893; that he left an estate "consisting of several small tracts of real property * * * of the probable value of \$1,000," etc. The foregoing facts are not in dispute. She further stated in her petition the names, places of residence, etc., of all the heirs, together with all the necessary jurisdictional facts. She prayed that letters of administration be "issued to her or some other suitable and competent person." James Slater, appellant, on June 10, 1918, filed a cross-petition, in which he prayed that letters of administration be issued to him upon the grounds that he was the only surviving son of the deceased, that a majority of the heirs desired and requested that he be appointed administrator of said estate, and that the petitioner, Elizabeth Condon, is a married woman, and for that reason disqualified to act as administratrix of the estate.

A hearing was duly had upon the petition and cross-petition, pursuant to which hearing the court made findings and entered an order or judgment as follows:

"The petition of Elizabeth Condon, praying for letters of administration of the estate of Richard Slater, Sr., deceased, and the contest and cross-petition for letters of administration of James A. Slater, both coming on regularly to be heard this day, and due proof having been made to the satisfaction of the court that due and legal notice of the hearing of said petitions has been given by the clerk of this court, and it being proved by the oath of Elizabeth Condon that said Richard Slater, Sr., died on the 25th day of November, 1893, intestate, in the county of Weber, state of Utah, and that he was a resident of said county and state at the time of his death, and that he left estate in said county of the probable value of \$1,300, and that the rental value thereof is \$25 per annum, and the court having heard the evidence of the respective parties, and it appearing therefrom that neither the petitioner nor cross-petitioner should be appointed, but that Howell Slater is a fit and proper person to be appointed administrator of the estate of the said Richard Slater, Sr.: It is ordered that letters of administration upon the estate of said Richard Slater, Sr., deceased, be issued to the said Howell Slater upon his taking the oath and filing a bond according to law in the penal sum of \$2,000.

"Dated September 14, 1919."

The material errors assigned are: (1) That the court erred in appointing Howell Slater administrator; and (2) that it erred in refusing to appoint the appellant. These two assignments raise the same question. There are two other assignments to which reference will be made hereafter.

[1] Appellant insists that under our statute it was the duty of the court to appoint him, in view that he was the son of the deceased and was competent to act. Comp. Laws Utah 1917, § 7596, fixes the right of priority of appointment as follows: (1) Surviving widow or husband; (2) the children; (3) the father or mother; (4) the brothers and sisters; (5) grandchildren; (6) the next of kin. Section 7597, among other things, provides:

"When there are several persons equally entitled to administration, the court may grant letters to one or more of them. * * * If a dispute arises as to relationship between applicants, or if there is any other good and sufficient reason, the court may appoint any competent person." (Italics ours.)

Section 7598 reads as follows:

"Letters of administration must be granted to any applicant, though it appears that there are other persons having better rights to the administration, when such persons fail to appear within three months after the death of the decedent and claim the issuance of letters to themselves."

Section 7599 is immaterial here, and section 7600, so far as material, provides that in case any person who is interested in an estate objects to the appointment of a married woman, she "must not be appointed administratrix."

Appellant's counsel, in their brief, state the gist of their contention thus:

"James A. Slater is both 'suitable' and 'competent,' and we contend that upon his cross-petition he was entitled to letters, as a matter of right."

That contention, it seems, is based upon the decision in the case of *In re Owens' Estate*, 30 Utah, 351, 85 Pac. 277. The question which necessarily controls the case at bar was, however, not involved in that case, and hence was not, and could not, have been decided. In that case the application was made by one who did not come within any of the classes mentioned in section 7596 and was made before the three-month period provided for in section 7598, supra, had expired. It was accordingly held in the *Owens Case* that the sister of the deceased, who came within the preferred class mentioned in section 7596, had the superior right, and the order of the court appointing another who did not come within the preferred class was reversed. A mere cursory reading of the opinion written by Mr. Chief Justice Bartch, however, clearly shows that the question here presented was not considered, and that the conclusion there reached was entirely based upon the fact that

the appellant in that case came within the preferred class, and that the application of the respondent in that case was made before the period of time had elapsed within which a preferential right existed. In this case, however, the intestate died in November, 1893, and no application for the appointment of an administrator was made until March, 1918, or nearly 25 years after the death of the intestate.

Counsel for respondent contends, stating his contention in his own language:

"The provisions of section 7598 require persons entitled, or having better rights to administration, to make application within a reasonable time for such appointment, and, if they fail to make such application, letters should be granted to any qualified applicant."

That states the law more favorable to the appellant than it is stated in section 7598. That section provides that in case those who have preferential rights to the administration "fail to appear within three months after the death of the decedent and claim the issuance of letters to themselves," then letters "must be granted to any applicant." Of course that implies that such applicant be a competent person to act as administrator.

In view of the conceded facts in this case, therefore, James Slater, the appellant here, had clearly forfeited or lost his preferential right. Upon that question the decisions of the courts under statutes like ours are in perfect harmony. The general rule is well and tersely stated by Church in his *New Probate Law and Practice*, vol. 1, at page 384, in the following words:

"Under statutes giving to certain persons the preference right to letters of administration, and limiting the time within which such preferred persons may apply, it is generally held that such preference is lost by failure to apply within the time fixed by the statute."

In 1 Woerner, *The American Law of Administration*, at section 243, the law is stated thus:

"The preference given by statute may be waived or renounced. * * * The renunciation may be spontaneous, or upon citation of some person interested; and it will be presumed—that is, the exclusive right to administer will be deemed—to have been waived, if letters are not applied for by the party preferred within the period prescribed for such purpose by statute."

The same doctrine is stated in 11 R. C. L. § 22, p. 35.

The following authorities fully sustain the text quoted from Church and Woerner: *Forrester v. Forrester*, Adm'r, 37 Ala. 398; *Wheat v. Fuller*, 82 Ala. 572, 2 South. 628; *Atkinson v. Hasty*, 21 Neb. 663-666, 33 N. W. 206; *Withrow v. De Priest*, 119 N. C. 541, 26 S. E. 110; *In re Sprague's Estate*, 125 Mich. 357, 84 N. W. 293; *Rodes v. Boyers*, 106 Tenn. 434, 61 S. W. 776; *Rice v. Tilton*, 13 Wyo.

420, 80 Pac. 828; *In re Sutton's Estate*, 31 Wash. 340, 71 Pac. 1012; *McLean v. Roller*, 83 Wash. 166, 73 Pac. 1123, 1124; *Ramp v. McDaniel*, 12 Or. 108, 6 Pac. 456; *In re Miller*, 32 Neb. 480, 49 N. W. 427.

In the case of *Withrow v. De Priest*, supra, the court, in the course of the opinion, said:

"The plaintiff's present application was made subsequent to December 5, 1895. The subject of granting letters of administration, etc., is regulated by Code, c. 33. Preference is given to certain persons successively, provided they assert their rights within the time prescribed by law. Public policy and the rights of distributees and creditors require that the estates of deceased persons be settled within a due and reasonable time. If those that have the preference fail to act within six months (section 1394) they must be taken to have renounced or waived their rights. As the question has been fully considered and decided in this court, we need not pursue it any further. *Hill v. Alspaugh*, 72 N. C. 402; *Garrison v. Cox*, 95 N. C. 353."

In 18 Cyc. 84, it is said:

"Where all the persons who under the statute have a right to administer have renounced or otherwise lost their right, the court has a considerable discretion in the appointment of the administrator."

Such must necessarily be the law, and to that effect are the authorities.

In the case at bar all those who are given a preferential right under section 7598 manifestly forfeited or lost the same by delaying nearly 25 years before applying for the appointment of an administrator to administer the estate, and it seems that if Mrs. Condon, who seems to hold the largest interest in the estate, had not then applied, none of the other interested parties would have done so. Indeed, the appellant waited for almost five months after Mrs. Condon had filed her petition before he filed a cross-petition. The right insisted upon by appellant, therefore, is not only contrary to all the authorities, but is in the very teeth of section 7598, which expressly provides that in case those having the preferential right fail to come into court within three months after the death of the decedent, and ask that letters be issued to them, letters of administration must be granted to any applicant.

[2] In any view that can be taken, therefore, appellant had lost his preferential right to be appointed administrator, and even though he was still qualified to act, yet his right to do so was no greater than the right of any other competent person. The district court was thus vested, as stated in Cyc., supra, with "considerable discretion in the appointment of the administrator." There is not a word of complaint that Howell Slater is not a competent person, or that there was any irregularity in making his appointment such as would constitute prejudicial error affecting any substantial right of the appel-

lant. The district court having discretion in the matter, we cannot reverse its rulings, unless it is made to appear that it has abused that discretion to the prejudice of a substantial right of the appellant. This record discloses nothing of that character.

[3] It is, however, insisted that the court erred "in permitting the petitioner to testify as to an oral agreement with James Slater." Even though the court had erred in admitting the evidence, yet, in view that the evidence is otherwise sufficient to sustain the court's judgment, we may not, as this court has repeatedly held, for that reason reverse the judgment. The testimony of the petitioner in that regard was therefore not prejudicial to the rights of the appellant. As we have seen, appellant lost his preferential right, and hence the court, under our statute, had the power to appoint any other suitable and competent person. If such person is suitable and competent to administer the estate, appellant clearly is not prejudiced in any substantial right.

The judgment is affirmed, with costs to respondent.

(55 Utah, 213)

CHANDLER v. INDUSTRIAL COMMISSION OF UTAH et al. (No. 3395.)

(Supreme Court of Utah. Nov. 7, 1919.)

1. MASTER AND SERVANT §373—WORKMEN'S COMPENSATION; ARISING OUT OF EMPLOYMENT INCLUDES DOG BITE.

Where an employé on his way from his residence to a garage to get his employer's automobile, used in making deliveries, was bitten by a dog while making delivery of meat for his employer, which was undelivered the evening before the injury arose "out of the employment" within Comp. Laws 1917, § 3122, allowing compensation for injuries by accident arising out of and in course of the employment.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Course of Employment.]

2. MASTER AND SERVANT §371—WORKMEN'S COMPENSATION ACT MUST BE LIBERALLY CONSTRUED.

The rule that Employers' Liability Act, providing for compensation for injuries, should be liberally construed, which is also the rule prescribed by Comp. Laws 1917, § 5839, applies especially to the phrase "out of and in the course of the employment."

3. MASTER AND SERVANT §348—WORKMEN'S COMPENSATION; DOUBT RESOLVED IN FAVOR OF CLAIMANT.

Any doubt respecting right to compensation should be resolved in favor of the claimant.

Appeal from District Court, Weber County; A. W. Agee, Judge.

Proceedings for compensation under the Employers' Liability Act by Emma Chandler opposed by A. M. Miller and the Aetna Life Insurance Company. Claimant's application was denied, and she commenced proceedings in the district court against the Industrial Commission, Miller, and the Insurance Company. Judgment dismissing action, and claimant appeals. Reversed and remanded, with directions.

Chez & Barker, of Ogden, for appellant.
De Vine, Stine & Gwilliams and J. D. Murphy, all of Ogden, for respondents.

FRICK, J. The plaintiff made application to the Industrial Commission of this state under the Employers' Liability Act of this state to recover compensation for the death of her husband, which occurred as herein-after stated. The Industrial Commission denied her application for the reasons herein-after appearing, and, pursuant to the provisions of the act aforesaid, she commenced this proceeding in the district court of Weber county.

In her complaint, after stating the necessary jurisdictional facts and matters of inducement, she alleged:

"That on the 26th day of January, 1918, at Ogden, Utah, one George C. Chandler was engaged in the employ of A. M. Miller. That the said A. M. Miller was on said date conducting and operating a meat and grocery store in said city, doing business under the name and style of 'Washington Market.' That on said date, and at the said time and place, the said A. M. Miller, in the conduct and operation of said business, employed more than four persons, to wit, about 40 persons, and had elected to become and was subject to the provisions of chapter 100 of the Laws of Utah of 1917, an act passed by the Legislature of the state of Utah on March 8, 1917, creating the Industrial Commission of Utah, and among other things establishing rates of compensation for personal injuries or death sustained by employes in the course of employment, and providing methods of insuring the payment of such compensation.

"That the duties of the said George C. Chandler required him to deliver meat and groceries in the city of Ogden, Utah, with and without an automobile, and that he was on the date and at the time and place herein mentioned furnished an automobile by his employer, the said A. M. Miller, for use in making such deliveries, which were made with an automobile, and that the hours of his said employment were from 7 o'clock a. m. until 6 o'clock p. m.; that is to say, he was required to commence his said employment at 7 o'clock a. m. and continue until 6 o'clock p. m. That the certain automobile which was furnished to him by his said employer for use in making such deliveries which were made with an automobile was kept in a garage at the rear of the residence of his said employer, A. M. Miller, at 764 Twenty-Fifth street, Ogden, Utah. That the place of business of the said A. M. Miller was situated at

2472 Washington avenue, Ogden, Utah. That the place of residence of said George C. Chandler was in the rear of Twenty-Seventh street, between Jefferson and Adams avenues, Ogden, Utah. That in the course of his said employment the duties of the said George C. Chandler required him to go from his family residence each morning to said garage, and get said automobile, and drive it down to the said place of business of the said A. M. Miller, and to use it throughout the day in making such deliveries and to return it to the said garage at night after his day's work was finished. That when he was unable to make all the deliveries of the day he would bring with him to his home such undelivered packages, and make deliveries of them the following morning on his way to his work.

"That on the morning of January 26, 1918, at about 7:20 o'clock, while the said George C. Chandler was on his way from his place of residence to the said garage to get said automobile and drive it down to his employer's said place of business to begin making the daily deliveries which he was required to make as hereinbefore alleged, and while making delivery of meat for his employer which was undelivered the evening before, and without fault on his part, he was attacked and bitten in his hand by a dog known as the Jefferson Avenue dog. That after having his wound dressed he proceeded to his daily work, and worked steadily on each and every work day thereafter until on or about the 22d day of March, 1918, when he became violently sick, and was removed to a hospital, where he died on or about the 25th day of March, 1918, a violent death from hydrophobia, caused by the dog bite received on January 26, 1918, as hereinbefore alleged."

She also made the necessary allegations respecting the age, condition of health, etc., of the deceased and the dependency of herself and her three minor children, ranging in age from 12 to 3 years, etc., and prayed for judgment according to the provisions of the act.

The defendants demurred to the complaint upon several grounds. The only ground that is material here, however, is that the complaint does not state facts sufficient to constitute a cause of action. The district court sustained the demurrer upon that ground, and judgment dismissing the action was duly entered, from which the plaintiff appeals.

[1] Plaintiff's counsel insist that the court erred in sustaining the demurrer. Our statute (Comp. Laws Utah 1917, § 3122) allows compensation to every employé coming within the provisions of the act who is "injured by accident arising out of and in the course of his employment." In view of the facts alleged in the complaint, all of which are admitted by the demurrer, the district court held that, while the deceased was injured by an accident occurring in the course of, yet he was not injured by an accident arising out of, his employment. Whether a particular injury is occasioned by an accident arising out of the employment may present a more or less perplexing question, and with respect to

which reasonable men may well differ. Indeed, that is the difficult question in this case; and we fully appreciate the fact that the decisions of the courts are not unanimous upon that question. As is well said by Mr. Van Doren in referring to the Workmen's Compensation Act in his Workmen's Compensation, p. 43:

"The extremely liberal construction of the courts [of the act] has, as we have seen, made possible a recovery of compensation by the injured employé in a large proportion of the cases."

We are also reminded that our statute (Comp. Laws Utah 1917, § 5839) requires that the statutes of this state are to be "liberally construed with a view to effect the objects of the statutes and to promote justice."

[2] Upon the question that the Employers' Liability Act should be liberally construed and so as to effectuate its purposes, all courts agree. In re Ayers (Ind. App.) 118 N. E. 886. That doctrine applies especially to the phrase "out of and in the course of the employment."

[3] Notwithstanding the fact that the act must be given a liberal construction, the writer, nevertheless, entertains serious doubt whether, in view of the conceded facts in this case, the injury arose "out of the employment." In view, however, that my Associates are of the opinion that a liberal construction requires us to hold that the injury in this case arose out of, as well as in the course of, the employment, I cheerfully yield to their judgment. I do so with less reluctance or hesitation for the reason that such a holding is manifestly in furtherance of justice, and tends to effectuate the beneficent purposes of the Compensation Act. In this connection it must be remembered that the compensation provided for in the act is in no sense to be considered as damages for the injured employé or to his dependents in case death supervenes. The right to compensation arises out of the relation existing between employer and employé, and that the injury arises out of and in the course of the employment. Under such an act the costs and expenses of conducting the business or enterprise, including compensation for injuries to employés or other casualties, must be taxed to the business. The theory of the Compensation Act is that the whole cost and expense of conducting the business as aforesaid is added to the cost of the articles that are produced and sold, and hence, in the long run, such costs and expenses are borne by the public; that is, by the consumers of the articles produced. The purpose of such an act, therefore, is to protect the employé and those dependent upon him, and in case of his serious injury or death to provide adequate means for the support of those dependent upon him. In view, therefore, that in case of total disability or death of the employé his dependents might become

the objects of public charity, such a calamity is avoided by requiring the business or enterprise to provide for such dependents, with the right of the employer to add the amount that is paid out to the cost of producing and selling the product of such business or enterprise. The beneficent purposes of such acts are therefore apparent to all, and for that reason, if for no other, should receive a very liberal construction in favor of the injured employé. We are all united upon the proposition that in view of the purposes of such acts, in case there is any doubt respecting the right to compensation, such doubt should be resolved in favor of the employé or of his dependents as the case may be.

Counsel for the defendants Miller and the life insurance company have cited cases, however, wherein it is held that, where an employé has been injured from a cause or accident to which the public generally are exposed the same as the injured employé, the injury does not arise out of the employment. To that effect are the following among other cases cited by counsel: *In re Employers' Liability Assur. Corporation*, 215 Mass. 497, 102 N. E. 697; *Mann v. Glastonbury Knitting Co.*, 90 Conn. 116, 96 Atl. 368, L. R. A. 1916D, 86; *De Voe v. New York State Rys.*, 218 N. Y. 318, 113 N. E. 256, L. R. A. 1917A, 250; *Newman v. Newman*, 169 App. Div. 745, 155 N. Y. Supp. 665.

In the case first cited, in referring to the test as to when it may be said that an accident or injury arises out of the employment, the court, in the course of the opinion, said:

"It [the injury] arises 'out of' the employment, when there is apparent to the rational mind upon consideration of all of the circumstances a causal connection between the conditions under which the work is required to be performed and the resulting injury. Under this test, *if the injury can be seen to have followed as a natural incident of the work and to have been contemplated by a reasonable person familiar with the whole situation as a result of the exposure occasioned by the nature of the employment*, then it arises 'out of' the employment." (Italics mine.)

This, it seems to the writer, is too rigid a construction of the statute. Such a construction brings us right back to the old proposition that the employer would be liable upon the ground of negligence in a common-law action. If the injury or accident should "have been contemplated by a reasonable person," as is stated in the excerpt quoted from the opinion, then the employer should have foreseen it and protected the employé. If the employer contemplates or foresees an injury and does nothing to prevent it, he is necessarily guilty of negligence, and is thus liable to the injured employé unless the latter is guilty of contributory negligence which is the proximate cause of the injury. Such a construc-

tion, I think, is not sustained by the weight of authority.

Nor is the doctrine, that if the public, or a portion of it, is exposed to the same hazard as the employé, then he, for that reason, may not recover, followed by the more recent decisions. In the case of *Globe Indemnity Co. v. Industrial Accident Commission*, 36 Cal. App. 280, 171 Pac. 1068, cited by counsel for plaintiff, the court, in discussing that question in the course of the opinion, said:

"The petitioner contends that, because Roberts was exposed only to the ordinary perils of the street to which any other person on the street is exposed, he does not fall within the rule which awards compensation for an injury arising out of the employment of the injured man. When the logical result of the application of the rule for which petitioner is contending is considered, the justice of treating this case as one arising out of Roberts' employment is apparent. Consider the case of a messenger boy. He is in no greater peril on the street than any other person there. He carries perhaps his message in his pocket, leaving his arms disengaged and perfectly free to move about. But he is on the street constantly in the course of his employment. To hold that Roberts is not entitled to compensation would be to hold that this messenger boy would likewise not be entitled to compensation for an injury caused to him by the perils of the street. The illustration might be extended further to truck drivers, teamsters, and numerous other classes of employment whose followers use the streets in the regular course of their duty, and whose peril on the streets is no greater than that of any other person, but who would not be injured but for the fact that their duty takes and keeps them on the street. It does not seem to us that the Legislature ever intended that these persons should be excluded from the benefit of industrial accident compensation."

To the same effect are *Industrial Com. v. Aetna Life Ins. Co.* (Colo.) 174 Pac. 589; *City of Milwaukee v. Althoff*, 156 Wis. 68, 145 N. W. 238, L. R. A. 1916A, 327; *Baum v. Industrial Com.*, 288 Ill. 516, 123 N. E. 626.

Counsel for both sides have cited many other cases in support of their respective contentions, but the foregoing are sufficient to illustrate the principle upon which the courts proceed.

In view of the foregoing, it follows that the district court erred in holding that under the facts stated in plaintiff's complaint, which are conceded by the demurrer, she was not entitled to recover compensation under the Compensation Act. The judgment is therefore reversed, and the cause is remanded to the district court of Weber county, with directions to overrule the demurrer and to proceed to determine the cause in accordance with the views herein expressed. Plaintiff to recover costs on appeal.

CORFMAN, C. J., and WEBER, GIDEON, and THURMAN, JJ., concur.

(43 Nev. 320)

(184 P.)

STATE ex rel. SCRUGHAM, State Engineer,
v. DISTRICT COURT OF SIXTH JUDICIAL DIST. HUMBOLDT COUNTY et al.
(No. 2407.)

(Supreme Court of Nevada. Dec. 11, 1919.)

PROHIBITION §=13—MOOT CASE DISMISSED.

Where proceedings in prohibition were brought to restrain district judge from hearing a motion to dissolve a preliminary injunction, the proceeding will be dismissed where, upon hearing, it appears that the motion had been decided and the injunction dissolved by such judge prior to the service upon him of the alternative writ.

Proceeding in prohibition by the State of Nevada, on the relation of J. G. Scrugham, as State Engineer, against the District Court of the Sixth Judicial District of the State of Nevada in and for Humboldt County and Honorable J. A. Callahan, district judge thereof, and Honorable C. J. McFadden, acting district judge thereof. Proceeding dismissed.

Leonard B. Fowler, Atty. Gen., Robert Richards, Deputy Atty. Gen., and Carey Van Fleet, of Elko, for petitioner.

Cheney, Downer, Price & Hawkins, of Reno, for respondents.

DUCKER, J. On the petition of the above relator and petitioner, this court issued an

alternative writ of prohibition restraining the respondents from hearing, trying, or entering a decree in that certain action entitled, "In the Sixth Judicial District Court of the State of Nevada, in and for the County of Humboldt, W. C. Pitt et al., Plaintiff, v. J. G. Scrugham, as State Engineer, Defendant," and required said respondents to show cause before this court why they should not be absolutely restrained and prohibited from taking any further proceedings in said action except to dismiss the same. Due return having been made thereto, the matter came on for hearing in this court and was argued and submitted.

It appeared upon said hearing that the motion to dissolve a preliminary injunction theretofore issued in said action and submitted to the respondent Hon. C. J. McFadden for consideration and decision, and which decision was sought to be restrained by said writ, had been decided and the injunction dissolved by him prior to the service upon him of said alternative writ. We are therefore of the opinion that the proceedings in this court are to all intents and purposes resolved into a moot case and should be dismissed.

It will be so ordered.

COLEMAN, C. J., and SANDERS, J., concur.

§=For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

END OF CASES IN VOL. 184

